No. 22-108-ORG Title: State of Nebraska, Plaintiff
Status: GRANTED v.
State of Wyoming and State of Colorado

Docketed:
January 20, 1987

Entry	Date	Note	Proceedings and Orders
1	Oct 7 1986		Motion of plaintiff for leave to file petition for an order enforcing decree for injunctive relief filed.
2	Oct 8 1986		DISTRIBUTED. Oct. 31, 1986. (Above Motion)
3	Nov 6 1986		Time to respond extended to and including Dec. 19, 1986, for all defendants.
4	Dec 13 1986		Waiver of the State of Colorado to the State of Nebraska's motion for leave to file petition for enforcement order and injunctive relief filed.
5	Dec 18 1986		Wyoming's brief in opposition to motion for leave to file petition filed.
6	Dec 19 1986		Memorandum for the United States filed.
7	Dec 24 1986		DISTRIBUTED. Jan. 16, 1987. (Motion for leave to file petition for order enforcing decree and for injunctive relief).
8	Jan 15 1987		Nebraska's reply to Wyoming's brief in opposition to motion for leave to file a petition filed.
9	Jan 20 1987		The motion for leave to file a petition for an order enforcing decree and for injunctive relief is GRANTED. The defendants are allowed 60 days within which to file answers. This proceeding shall be docketed as case No. 108 Original.
10	Mar 18 1987		Motion of Wyoming for appointment of Special Master filed.
11	Mar 19 1987		Answer of the United States filed.
12	Mar 19 1987		Answer of the State of Wyoming and motion for leave to file counterclaim filed.
13	Mar 20 1987		Motion of Platte River Trust for leave to intervene filed.
14	Mar 23 1987		Motion of National Audubon Society for leave to intervene filed.
15	Mar 25 1987		DISTRIBUTED. April 17, 1987.
16	Mar 26 1987		Waiver of Colorado to file.
17	Apr 3 1987		Nebraska's memorandum in opposition to the motion of the National Audubon Society for leave to intervene or to participate as litigating amicus curiae filed.
18	Apr 3 1987		Nebraska's memorandum in opposition to the motion of the Platte River Trust for leave to intervene filed.
19	Apr 3 1987		Wyoming's memorandum in opposition to Platte River Trust and National Audubon Society motions for leave to intervene filed.
20	Apr 3 1987		Colorado's reponse to Platte River Trust and National Audubon Society motions for leave to intervene filed by Platte River Trust.
21	Apr 10 1987		Reply/Memorandum in support of motion by the Platte River Trust for Leave to intervene as palintiff.

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
22	Apr 13 1987		Motion of Basin Electric Power Cooperative for leave to intervene memorandum in support of motion and answer filed.
23	Apr 14 1987		Wyoming memorandum in opposition to Basin Electric Power Cooperative motion for leave to intervene filed.
24	Apr 15 1987		Motion of Nebraska Public Power District, et al., for leave to intervene filed.
25	Apr 20 1987		The motion of Wyoming for leave to file a counterclaim is GRANTED. Answers to the counterclaim may be filed within 60 days.
26	Apr 22 1987		Reply brief of Basin Electric Power Cooperative to Wyoming's memorandum in opposition to Basin's motion for leave to intervene filed.
27	Apr 28 1987		Wyoming memorandum in opposition to joint motion of Nebraska Public Power District and The Central Nebraska Public Power District and Irrigation District for leave to file a joint complaint in intervention and for leave to intervene as plaintiffs.
28	May 14 1987		Reply of Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District to Wyoming memorandum in opposition to Motion for leave to file a joint complaint in intervention and for leave to intervene as plaintiffs.
29	Jun 15 1987		Waiver of U.S. to answer counterclaim filed.
31	Jun 19 1987		Nebraska's answer to Wyoming counterclaim filed.
30	Jun 22 1987		It is ordered that Owen Olpin, Esquire, of Los Angeles, California be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, and clerical assistants, the cost of printing his report, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct. The motion of Basin Electric Power Cooperative for leave to intervene is referred to the Special Master. The motion of Platte River Trust for leave to intervene is referred to the Special Master. The motion of the National Audobon Society for leave to intervene is referred to the Special Master. The motion of Nebraska Public Power District, et al. for leave to intervene is referred to the Special Master.
32	Jul 6 1987		Oath of the Special Master counterclaim filed.
33	Jan 13 1988		Motion of plaintiff to amend petition for an order enforcing decree and for injunction relief filed.
34	Jan 19 1988		DISTRIBUTED. Jan. 22, 1988. (Above Motion).

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
35	Jan 25 1988		Defendants are invited to file responses within 21 days to the motion of plaintiff to amend petition for an order enforcing decree and for injunction relief filed.
36	Feb 12 1988		Memorandum for the United States filed.
38	Feb 12 1988		Brief in opposition by Colorado filed.
39	Feb 13 1988		Brief in opposition by Wyoming and appendix filed.
37	Feb 16 1988		Motion of Basin Electric for leave to file a response to Nebraska's motion to amend petition filed.
40	Feb 17 1988		DISTRIBUTED. March 4, 1988. (Motion of plaintiff to amend petition and also motion of Basin Electric for leave to file a response).
41	Mar 3 1988		Reply by Nebraska filed. (D)
42	Mar 7 1988		The motion of Basin Electric to file a response to plaintiff's motion to amend petiton is GRANTED. The motion of plaintiff to amend petition for an order enforcing decree and for injunctive relief is DENIED.
43	Jun 16 1988		Request of Special Master for compensation and reimbursement of expenses filed.
44	Jun 30 1988		The motion of the Special Master for award of interim compensation and for reimbursement of expenses is GRANTED and the Special Master is awarded $101,129.97 to be paid one-half by Nebraska and one-half by Wyoming.
45	Apr 17 1989		Motion of the Special Master for compensation filed.
46	Apr 19 1989		DISTRIBUTED. May 11, 1989 (Above motion)
47	Apr 20 1989		Consent to motion of Special Master for compensation filed by Wyoming. (D)
48	Apr 26 1989		Consent to motion of Special Master for compensation filed by Nebraska. (D)
49	May 15 1989		The second interim motion of the Special Master for compensation and reimbursement of expenses is GRANTED and the Special Master is awarded $94,801.10 to be paid 40% by Nebraska, 40% by Wyoming and 20% by the United States.
50	Jun 14 1989		First interim report of the Special Master received.
51	Jun 16 1989		DISTRIBUTED. June 22, 1989. (First interim Report of the Special Master).
52	Jun 26 1989		The First Interim Report of the Special Master is received and ordered filed.
53	Nov 7 1989		Motion of the Special Master for compensation and reimb ursement of expenses filed.
54	Nov 8 1989		DISTRIBUTED. Nov. 22, 1989. (Above motion).
55	Nov 16 1989		Consent by Wyoming filed. (D)
56	Nov 17 1989		Consent by Nebraska filed. (D).
57	Nov 20 1989		Consent by United States filed. (D).
58	Nov 27 1989		The third motion of the Special Master for compensation and reimbursement of expenses is GRANTED and the Special Master is awarded $97,843.24 to be paid to him 20% by the United States and 40% each by the states of Nebraska and Wyoming.
59	Oct 5 1990		Fourth Interim Motion of Special Master for compensation and reimbursement of expenses filed.

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
60	Oct 10 1990		DISTRIBUTED. Oct. 26, 1990. (Fourth Interim Motion)
61	Oct 12 1990		Response by Wyoming filed to the Fourth Interim Motion of Special Master for compensation and reimbursement of expenses.
62	Oct 14 1990		Response by Nebraska filed.
63	Oct 29 1990		The Fourth Interim motion of the Special Master for compensation and reimbursement of expenses is GRANTED and the Special Master is awarded $72,970.75 for the period Oct. 1, 1989 - September 30, 1990, to be paid by the parties as follows 40% each by the states of Nebraska and Wyoming and 20% by the United States.
64	May 22 1991		Motion of the Special Master for award of compensation and expenses filed.
65	May 24 1991		DISTRIBUTED. May 30, 1991.
66	Jun 3 1991		ORDER: Motion of the Special Master for Award of Compensation and Expenses GRANTED the Special Master is awarded a total of $70,718.52 for the period of Oct. 1, 1990 through May 15, 1991 to be paid as follows: 20% by the United States and 40% each by the states of Nebraska and Wyoming.
67	Oct 10 1991		Motion of Nebraska for leave to file Amended Petition filed.
68	Nov 12 1991		Motion of Wyoming in opposition to Motion for leave to file Amended Petition filed.
69	Nov 12 1991		Brief of United States in opposition to Motion for leave to file Amended Petition filed.
70	Nov 12 1991		Brief of Colorado in opposition to Motion for leave to file Amended Petition filed.
71	Nov 12 1991		Motion of Basin Electric Power Cooperative Amicus Curiae for leave to file brief in opposition to Nebraska's Motion to Amend filed.
72	Nov 12 1991		Motion of Central Nebraska Public Power and Irrigation District Amicus Curiae for leave for leave to file brief in opposition to Nebraska's Motion to Amend filed.
73	Nov 12 1991		Brief of Platte River Trust Amicus Curiae in support of of Nebraska's Motion to Amend filed.
74	Nov 12 1991		Brief of Natioanl Audobon Society Amicus Curiae in support of Nebraska's Motion to Amend filed.
75	Nov 26 1991		Memorandum of Nebraska in opposition to Basin Electric's Motion for leave to file filed.
76	Nov 26 1991		Reply Brief of Nebraska to responses of Wyoming, United States and Colorado filed.
77	Dec 31 1991		DISTRIBUTED. Jan. 17, 1992 (Above motions)
78	Jan 21 1992		ORDER: Motion of Basin Electric Power Cooperative Amicus Curiae for leave to file a Brief is GRANTED. Motion of Central Nebraska Public Power and Irrigation District Amicus Curiae for leave to file a Brief is GRANTED.
79	Feb 6 1992		Motion of National Audobon Society Amicus Curiae for leave to file a brief in support of Motion to Amend filed. (see brief Nov. 12, 1991)
80	Feb 10 1992		Motion of Platte River Trust Amicus Curiae for leave to

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
			file a brief in support of Motion to Amend filed. (see brief Nov. 12, 91)
81	Feb 19 1992		DISTRIBUTED. March 6, 1992 (Above two Amicus Motions).
82	Mar 9 1992		ORDER: Motion of National Audobon Society Amicus Curiae for leave to file brief GRANTED. Motion of Platte River Trust Amicus Curiae for leave to file brief GRANTED.
83	Mar 25 1992		Motion of Special Master for Compensation and Reimbursement of Expenses filed. (NP)
84	Mar 25 1992		DISTRIBUTED. April 17, 1992 (Above motion).
85	Apr 1 1992		Consent to United States to Special Master's Motion for Compensation filed. (NP) (D)
86	Apr 2 1992		Consent of National Audobon Society Amicus Curiae to Special Master's Motion for Compensation filed.
87	Apr 6 1992		Opposition of Basin Electric Power Cooperative to Special Master's Motion for Compensation filed. (NP) (D).
88	Apr 9 1992		Second Interim Report of the Special Master received. (Also letter from Special Master re: Motion of Nebraska to Amend Petition).
89	Apr 15 1992		Consent of Central Nebraska Public Power and Irrigation District Amicus Curiae to Special Master's Motion for Compensation filed. (NP) (D).
90	Apr 15 1992		Reply of Special Master to the responses to his motion for Compensation filed. (NP) (D).
91	Apr 15 1992		Response of Colorado to the Second Interim Report of the Special Master filed.
92	Apr 15 1992		Report of the Special Master filed. (NP).
93	Apr 15 1992		Response of Wyoming to the Second Interim Report of the Special Master filed. (NP).
94	Apr 15 1992		DISTRIBUTED. May 15, 1992. (Second Interim Report of the Special Master. Motion of Nebraska to Amend, relist from Jan. 17, 1992.)
95	Apr 20 1992		ORDER: The sixth motion of Special Master for Compensation and Reimbursement is GRANTED and the Special Master is awarded a total $233,144.11. Assessment of this award is deferred pending receipt of further responses by Colorado and Amici Curiae to the special assessment proposed by the Special Master, to be filed on or before Monday, May 4, 1992 and further order of the Court.
96	Apr 21 1992		Further response of Central Nebraska Public Power and Irrigation District Amicus Curiae per request of the Court filed. (NP).
97	Apr 24 1992		Response of Nebraska to letter of Special Master filed Apr. 9, 1992 re: Motion of Nebraska to Amend. (NP)
98	Apr 30 1992		Further response of Basin Electric Cooperative Amicus Curiae per request of the Court filed. (NP)
99	May 4 1992		Further response of Colorado per request of the Court filed.
100	May 4 1992		Further response of the Platte River Trust Amicus Curiae per request of the Court. (NP)

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
101	May 18 1992		ORDER: The Second Interim Report of the Special Master is received and ordered FILED. Exceptions to this Report and the First Interim Report, with supporting briefs, may be filed by the parties within 45 days, Replies thereto, if any, may be filed within 30 days. Amici Curiae may file replies within the time allowed the parties. FURTHER consideration of the Motion to Amend is deferred to consideration of the Motion to Amend is deferred to consideration of the Exceptions and Replies.
102	Jun 8 1992		DISTRIBUTED. June 12, 1992 (Motion of Special Master for Compensation and Reimbursement) (relist)
103	Jun 15 1992		ORDER: The Court, by order dated Apr. 20, 1992, awarded the Special Master interim compensation and reimbursement of expenses. It is ORDERED that the award is to be paid as follows: Colorado $25,000; the four proposed Intervenors/ Amici Curiae $5000 each; The remaining award to be paid 40% by Nebraska ; 40% by Wyoming, and 20% by the United States. (See Order) Statement by Justice White. Dissenting statement by Justice Stevens.
104	Jun 29 1992		Copy of the Special Master's docket filed.
105	Jun 30 1992		Exceptions of Wyoming to the First and Second Interim Reports of the Special Master filed.
106	Jul 1 1992		Exceptions of Colorado to the First and Second Interim Reports of the Special Master filed.
107	Jul 1 1992		Exceptions of Nebraska to the First and Second Interim Reports to the Special Master filed.
108	Jul 1 1992		Exceptions of Basin Electric Power Cooperative Amicus Curiae to the Second Interim Report of the Special Master filed.
109	Jul 24 1992		ORDER: Extending time for all parties and amici curiae to file Reply Briefs to and including August 17, 1992.
110	Aug 14 1992		Reply Brief of Wyoming to Nebraska's Exceptions to the Reports of the Special Master filed.
111	Aug 14 1992		Reply brief of Basin Electric Power Cooperative Amicus Curiae to Nebraska's Exceptions to the Reports of the Special Master filed.
112	Aug 17 1992		Brief of the United States opposing exceptions filed.
113	Aug 17 1992		Reply Brief of Nebraska to the Exceptions of Wyoming, Colorado and Basin Electric filed.
114	Aug 17 1992		Reply Brief of National Audobon Society and Platte River Trust Amici Curiae filed.
115	Aug 19 1992		DISTRIBUTED: Sept. 28, 1992 (Exceptions and Reply's to Reports of the Special Master).
121	Sep 16 1992		Motion of Wyoming for leave to file a Reply Brief to the of the U.S. opposing exceptions filed.
122	Oct 5 1992		ORDER: Motion of Wyoming for leave to file a Reply Brief is GRANTED. The Exceptions to the Reports of the Special Master are set for argument in due course.
123	Oct 9 1992		Motion of Nebraska to file sur-reply brief to Wyoming's Reply Brief to the U.S. Brief in Opposition filed.

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
124	Oct 13 1992		DISTRIBUTED October 16, 1992 (Above Motion).
158	Oct 19 1992		ORDER: Motion of Nebraska to file sur-reply brief denied.
126	Nov 12 1992		Motion of Special Master for Compensation and Reimbursement filed. (NP)
159	Nov 18 1992		Joint motion of Colorado and Wyoming for divided argument filed.
128	Nov 19 1992		Motion of Nebraska for Divided Argument filed. (NP)
129	Nov 19 1992		DISTRIBUTED November 25, 1992 (Motion for Compensation and Reimbursement).
130	Nov 20 1992		Motion of the U.S. for Divided Argument filed. (NP)
131	Nov 20 1992		Consent of Nebraska to the Motion for Compensation and Reimbursement filed. (NP)
132	Nov 20 1992		SET FOR ARGUMENT WEDNESDAY, JANUARY 23, 1993. (3rd case)
133	Nov 23 1992		CIRCULATED
134	Nov 23 1992		Joint Response of Wyoming and Colorado to Motions for Divided Argument filed. (NP)
135	Nov 30 1992		ORDER: Motion of the Special Master for Compensation and Reimbursement GRANTED and it is ORDERED that the Special Master is awarded $124,171.27 for the period March 1, 1992 through October 15, 1992 to be paid as follows: 20 % by the U.S. and 40% each by Nebraska and Wyoming.
136	Dec 7 1992		ORDER: Motions for Divided Argument are GRANTED in part and DENIED in part: 20 minutes to Wyoming, 10 minutes to Colorado, 15 minutes to Nebraska, and 15 minutes to the U.S.
137	Jan 13 1993		ARGUED.
138	Jan 19 1993		Docket and Record filed.
139	Apr 19 1993		REDISTRIBUTED April 23, 1993 (motion for leave to file amended petition)
140	Apr 20 1993		OPINION: On the Exceptions to Reports of the Special Master. Intervention motions of certain amici curiae Denied. All Exceptions filed to the Special Master's Reports are overruled. Summary judgment motions of Nebraska and the United States regarding Inland Lakes' priority date are GRANTED as in Nebraska's partial summary judgment motion with respect to issue of canal diversion limitati ons. All other summary judgment motions are denied. Opinion by Justice O'Connor.
141	Apr 26 1993		ORDER: The State of Nebraska's motion for leave to file Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims is DENIED without prejudice with respect to Count I. The Special Master is directed to provide a recommendation to the Court as to whether the motion for leave to file an amended petition should be granted with respect to Counts II and III.
116	Oct 1 1993		Motion of Special Master for Compensation and reimbursement of expenses. (NP)
117	Oct 5 1993		Consent of Solicitor General filed.
118	Oct 6 1993		DISTRIBUTED. October 29. 1993.

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
119	Oct 6 1993		Consent of the State of Nebraska filed.
120	Oct 8 1993		Consent of Wyoming filed.
127	Oct 18 1993		Joint Motion of Colorado and Wyoming for Divided Argument filed. (NP)
125	Oct 19 1993		ORDER: Motion of Nebraska to file sur-reply brief DENIED.
142	Oct 22 1993		Consent by Colorado filed.
143	Nov 1 1993		ORDER: The motion of the Special Master for award of compensation and reimbursement of expenses is granted and the Special Master is awarded a total of $59,566.79 for the period October 16, 1992 throught August 31, 1993 to be paid as follows: 30% to be paid by each Nebraska and Wyoming, 15% to be paid by Colorado and 25% to be paid bythe United States.
144	Feb 18 1994		Joint motion to refer motions for leave to file amended pleadings to the Special Master filed.
146	Feb 18 1994		Motion of Wyoming for leave to file amended counterclaims and cross-claims filed.
147	Feb 18 1994		Motion of Nebraska for leave to file amended petition filed.
149	Mar 16 1994		Brief of United States on Joint Motion by Nebraska and Wyoming to refer to Special Master their motions for leave to file amended pleadings filed.
148	Mar 21 1994		ORDER: The joint motion to refer the motions for leave to file amended pleadings to the Special Master is granted. The motion of Nebraska for leave to file an amended petition is referred to the Special Master for his recommendation. The motion of Wyoming for leave to file amended counterclaims and cross-claims is referred to the Special Master for his recommendation. The Special Master is requested to file his report and recommendation on the motions to amend within 120 days.
150	Apr 12 1994		Motion of Special Master for compensation and reimbursement of expenses filed.
152	Apr 13 1994		DISTRIBUTED. April 29, 1994.
153	Apr 18 1994		Consent of Colorado to Special Master's motion for compensation and reimbursement of expenses filed.
151	Apr 20 1994		Consent of Solicitor General to Special Master's motion for compensation and reimbursement of expenses filed.
154	Apr 20 1994		Consent of Wyoming to Special Master's motion for compensation and reimbursement of expenses filed.
155	May 2 1994		ORDER: The motion of the Special Master for compensation and reimbursement of expenses is granted and the Special Master is awarded a total of $60,059.18 to be paid as follows: 30% by Nebraska, 30% by Wyoming, 15% by Colorado and 25% by the United States.
156	May 27 1994		Time to file Special Master's report and recommendation on the motions to amend is extended to and including August 26, 1994.
157	Aug 17 1994		Time to file Special Master's report and recommendation on the motions to amend is extended further to and

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
			including September 9, 1994.
160	Sep 9 1994		Third interim report of Special Master on motions to amend the pleadings received.
161	Oct 11 1994		ORDER: The Third Interim Report of the Special Master on Motions to Amend Pleadings is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Reply briefs, if any, may be filed by the partie within 30 days.
162	Oct 20 1994		Motion of Special Master for compensation and reimbursement of expenses filed.
163	Oct 24 1994		Consent thereto by Wyoming filed. (NP)
165	Nov 10 1994		Consent of United States to Special Master's motion for compensation and reimbursement of expenses filed. (NP)
164	Nov 14 1994		ORDER: The motion of the Special Master for award of compensation and reimbursement of expenses is granted and the Special Master is awarded a total of $180,833.83 for the period of April 1 through September 30, 1994, to be paid as follows: 30% to be paid by each Nebraska and Wyoming, 15% to be paid by Colorado, and 25% to be paid by the United States.
166	Nov 22 1994		Nebraska's Exceptions to the Third Interim Report of the Special Master filed.
167	Nov 25 1994		Exceptions of Wyoming to Third Interim Report of Special Master filed.
168	Nov 25 1994		Exception of the United States filed.
169	Dec 14 1994		Time for all parties to file replies to exceptions to Report of Special Master extended to and including December 30, 1994.
170	Dec 23 1994		Reply brief of Colorado filed.
171	Dec 29 1994		Brief of United States opposing Exceptions of Wyoming filed.
173	Dec 29 1994		Reply of Wyoming to Exceptions of Nebraska and United States filed.
172	Dec 30 1994		Motion of Platte River Trust for leave to file a response to Wyoming's Second Exception to the Report of the Special Master filed.
174	Dec 30 1994		Motion of Basin Electric Power Cooperative for leave to file reply to certain Exceptions to Report of Special Master filed.
175	Dec 30 1994		Nebraska's reply to Wyoming's Exceptions filed.
176	Jan 4 1995		DISTRIBUTED. (Jan. 20, 1995 Conf)
177	Jan 23 1995		ORDER: The motion of Basin Electric Power Cooperative for leave to file a reply to certain Exceptions to the Report of the Special Master is granted. The motion of Platte River Trust for leave to file a response to Wyoming's Second Exception to the Report of the Special Master is granted. The Exceptions to the Report of the Special Master are set for oral argument in due course.
178	Jan 27 1995		Motion of United States for divided argument filed. (NP)
179	Jan 30 1995		SET FOR ARGUMENT TUESDAY, MARCH 21, 1995. (2ND CASE).

No. 22-108-ORG

Entry	Date	Note	Proceedings and Orders
180	Jan 30 1995		Motion of Wyoming for leave to file reply brief filed.
181	Feb 1 1995		CIRCULATED.
182	Feb 9 1995		Nebraska's response to Wyoming's motion filed.
183	Feb 21 1995		ORDER: The motion of Wyoming for leave to file a reply brief is granted. The motion of the Solicitor General for divided argument is granted.
184	Mar 21 1995		ARGUED.

MOTION FILED
OCT 7 1986

No. 6, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF, PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

October 6, 1986

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

1911

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

CERTIFICATE OF SERVICE

No. 6, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

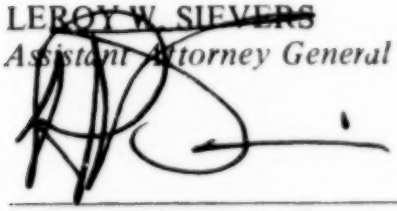
MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

The State of Nebraska hereby moves for leave to file its petition for an order enforcing the Court's Decree of October 8, 1945, as modified on June 15, 1953, and for injunctive relief against the State of Wyoming.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 6, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

The State of Nebraska hereby petitions the Court for an order enforcing the provisions of its Decree of October 8, 1945, as amended on June 15, 1953, and for injunctive relief against the State of Wyoming, and in support hereof states:

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska.

2. The Decree is premised on the recognition that Pathfinder and Guernsey Reservoirs in Wyoming are operated primarily for the benefit of lands in Nebraska. Consequently, the Decree establishes restraints on storage of water in those reservoirs to protect water users in Nebraska.

3. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by:

a. Depleting the flows of the North Platte River by the operation of Greyrocks Reservoir on the Laramie River, a tributary of the North Platte River;

b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

4. The current and imminent actions of the State of Wyoming contravene the Court's opinion and invalidate the equitable balance of the North Platte River established in the Decree.

5. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and it continues to violate the provisions of the Decree.

6. The State of Wyoming's present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

7. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the State of Wyoming.

8. The Court expressly retained jurisdiction to resolve the present controversy in Article XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . .;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

WHEREFORE, the State of Nebraska prays that the Court enter its order requiring the State of Wyoming to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953, and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North

Platte River in violation of the State of Nebraska's apportionment under the Decree.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 6, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

October 6, 1986

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

INDEX OF AUTHORITIES

CASES: Page

Arizona v. California,
460 U.S. 605 (1983) 4, 5

Nebraska v. Wyoming,
325 U.S. 589 (1945) 2, 3

Nebraska v. Wyoming,
325 U.S. 665 (1945) 1, 3, 4

New Jersey v. New York,
283 U.S. 336 (1931) 4

Railway Employees v. Wright,
364 U.S. 642 (1961) 5

Wisconsin v. Illinois,
278 U.S. 367 (1929) 4

Wyoming v. Colorado,
259 U.S. 419 (1922) 4

Wyoming v. Colorado,
286 U.S. 494 (1932) 4

Wyoming v. Colorado,
298 U.S. 573 (1936) 4

Wyoming v. Colorado,
309 U.S. 572 (1940) 4

CONSTITUTIONAL PROVISIONS:

U.S. Const. Art. III, Section 2 2

STATUTES:

28 U.S.C. Section 1251(a) 2

No. 6, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

STATEMENT OF THE CASE

This is an action to enforce the apportionment made to the State of Nebraska pursuant to the Court's Decree of October 8, 1945, in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), and to enjoin the State of Wyoming's continued and threatened violations of the Decree.* The retained jurisdiction of the

* Because of a different procedure for assigning docket numbers, this case has been numbered 5, 6, and 16. The decree we seek to enforce follows the reported opinion at 325 U.S. 589 (1945), which is docketed as Original No. 6. Given the age of the case and the abundance of docket numbers, the Court may wish to assign a new docket number to the case for the purpose of these proceedings.

Court is invoked under Article XIII of the Decree, Article III, Section 2, Clause 2 of the United States Constitution, and the Judiciary Act, 28 U.S.C. Section 1251(a).

STATEMENT OF FACTS

The Court's Decree apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska. The State of Wyoming is violating and threatens to violate the Decree by depletion of the flows of the North Platte River resulting from existing and proposed reservoirs, river pumping, and diversion facilities on tributaries of the North Platte and the Laramie rivers. These violations of the Decree disrupt the equitable balance of the river and deprive the State of Nebraska of its lawfully established entitlement under the Decree.

The State of Wyoming's unlawful actions will cause the State of Nebraska to suffer substantial economic, ecological, and environmental injuries. Initial analyses of the economic impact of the present and imminent depletion of the natural flows of the North Platte River apportioned to the State of Nebraska show annual losses of $363,580.00 in increased power costs, $620,046.00 in lost farm income, $1,329,533.00 in the value of agricultural production, and $3,656,217.00 in statewide economic output.

POINTS OF LAW

In this case the Court initially determined that a genuine controversy existed between the states, premised on proposed diversions in Wyoming which would have adversely affected downstream senior appropriators in Nebraska. In response to the evidence of detriment, the Court fashioned a decree which equitably apportioned the waters of the North Platte River and recognized the need for flexibility in the administration and enforcement of its provisions. *See, e.g., Nebraska v. Wyoming,*

325 U.S. 589, 622-23 ("If conditions of supply substantially change, any party can apply for modification of the decree. The decree will not necessarily be for all time. Provision will be made for its adjustment to meet substantially changed conditions."); *id.* at 625 ("If such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction."); *id.* at 654 ("We cannot conclude that the segregation of natural flow and storage water lacks feasibility. If a comprehensive formula can be agreed upon, it may later be incorporated in the decree.").

Finally, the Court discussed with approval and adopted the proposal of the Special Master that the Court retain jurisdiction. *Id.* at 655. In Article XIII of the Decree the Court expressly retained jurisdiction to address changes in condition as well as certain anticipated matters:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . ..
>
> * * *

> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

On the face of the Court's opinion and the Decree, it is clear that the Court's continuing jurisdiction may be invoked to seek redress for the current and threatened harm to Nebraska's apportionment pursuant to the terms of the Decree.

The Court's retention of jurisdiction is consistent with precedent. Beginning with *Wyoming v. Colorado*, 259 U.S. 419 (1922), the Court recognized the need for continuing jurisdiction to enforce its equitable apportionment decrees. *See Wyoming v. Colorado*, 286 U.S. 494 (1932) (action brought to enforce the decree and obtain injunction restraining Colorado from taking diversions in excess of that permitted by the decree); *Wyoming v. Colorado*, 298 U.S. 573 (1936) (bill in equity brought by Wyoming regarding violations of the decree in which partial injunctive relief was granted and the Court expressly retained jurisdiction); *Wyoming v. Colorado*, 309 U.S. 572 (1940) (petition for a show cause order requiring Colorado to demonstrate why it should not be adjudged in contempt for violations of the decree). Similarly, the Court retained and continued to exercise its jurisdiction in *Wisconsin v. Illinois*, 278 U.S. 367 (1929), 281 U.S. 179, decree entered, 281 U.S. 696 (1930), temporarily modified, 352 U.S. 945 (1956), 352 U.S. 983 (1957), superseded, 388 U.S. 426 (1967), and in *New Jersey v. New York*, 283 U.S. 336, decree entered, 283 U.S. 805 (1931), modified, 347 U.S. 995 (1954). Both *Wisconsin v. Illinois* and *New Jersey v. New York* involved decrees which contained retention of jurisdiction clauses substantially the same as that involved in the present case.

In *Arizona v. California*, 460 U.S. 605 (1983), the Court analyzed the need for retention of jurisdiction. The Court stated that its "purpose in retaining jurisdiction . . . can be gleaned from the respective reports of the Special Masters,

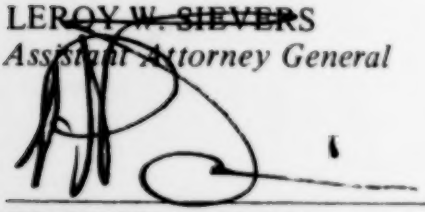
which note the need for flexibility in light of changed conditions and questions which could not be disposed of at the time of an initial decree." *Id.* at 624. The Court also stressed that this flexibility is consonant with the authority of a court of equity "to modify an injunction in adaptation to changed conditions." *Id.* at 624-25, quoting *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961). It is apparent that the retention of jurisdiction is a necessary attribute of equitable apportionment cases. *See Arizona v. California*, 460 U.S. at 625.

The Court's retention of jurisdiction was predicated on the possibility of harm to downstream users as a result of potential development. Wyoming's present and threatened interference with the equitable balance of the river and its interference with Nebraska's apportionment necessitates the exercise of the Court's retained jurisdiction. Accordingly, the Court should grant Nebraska's motion for leave to file its petition to enforce the provisions of the Decree and for appropriate injunctive relief.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 6, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of the foregoing Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 6th day of October to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

The Honorable Ed Herschler
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Archie G. McClintock
Wyoming Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

The Honorable Richard D. Lamm
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Duane Woodard
Colorado Attorney General
Department of Law
1525 Sherman Street, Third Floor
Denver, Colorado 80203



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

Supreme Court, U.S.
FILED
DEC 18 1986
PANIOL, JR.
CLERK

No. 6, Original (2)

In the Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION

A.G. McCLINTOCK
Attorney General
of Wyoming
Counsel of Record
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

DENNIS C. COOK
Senior Assistant
Attorney General

JENNIFER HAGER
Assistant Attorney General

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street,
Suite 300
Boulder, Colorado 80302
(303) 443-8782

December 17, 1986

94 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

JURISDICTION 1

QUESTION PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. 1945 North Platte Decree, as Modified 2

B. Additional Pertinent Facts 5

Grayrocks Reservoir 6
Corn Creek Project 7
Deer Creek Project 9
Inland Lakes 10

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. WYOMING HAS NOT VIOLATED, AND DOES NOT THREATEN TO VIOLATE, THE NORTH PLATTE DECREE IN ANY RESPECT 14

A. The Existing Grayrocks Reservoir and the Proposed Corn Creek Project on the Laramie River Do Not Violate or Threaten to Violate the North Platte Decree 14

Page

1. Nebraska has no right to water from the Laramie River 14

2. Even if Nebraska had some right to the Laramie River, it is estopped to assert that Grayrocks Reservoir or the Corn Creek Project infringe on its rights 17

B. Construction and Operation of Deer Creek Reservoir Will Not Violate the North Platte Decree, and Its Proposed Construction Is Not within the Scope of the Court's Retained Jurisdiction 19

1. Wyoming has a right under the Decree to construct the Deer Creek Project 19

2. Municipal uses such as the Deer Creek Project are not subject to the Court's retained jurisdiction 20

C. Wyoming's Suit to Require the United States Bureau of Reclamation to Obtain Wyoming Permits for Storage in the Inland Lakes Does Not Violate the North Platte Decree and Is Not a Controversy Appropriate for this Court's Original Jurisdiction 23

1. Wyoming's suit against the Bureau of Reclamation is not a violation of the North Platte Decree 23

2. Nebraska's attempt to preempt the litigation between Wyoming and the Bureau of Reclamation does not present a controversy

Page

appropriate for this Court's original jurisdiction 24

II. NEBRASKA'S ALLEGATIONS DO NOT PRESENT A CASE OR CONTROVERSY APPROPRIATE FOR THIS COURT'S ORIGINAL JURISDICTION 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES — Pages

Arizona v. California.
460 U.S. 605 (1983) 17.22

Arizona v. New Mexico.
425 U.S. 794 (1976) 25

Arkansas v. Texas.
346 U.S. 368 (1953) 24.25

California v. United States.
438 U.S. 645 (1978) 23

Connecticut v. Massachusetts.
282 U.S. 660 (1931) 22

Dickerson v. Colgrove.
100 U.S. 578 (1879) 17

Glus v. Brooklyn Eastern District Terminal.
359 U.S. 231 (1959) 17

Idaho v. Oregon.
462 U.S. 1017 (1983) 26

Illinois v. Michigan.
409 U.S. 36 (1972) 18

Lewis v. State Board of Control.
699 P.2d 822 (Wyo. 1985) 11.24

Missouri v. Andrews.
586 F. Supp. 1268 (D. Neb. 1984) 25

Pages

Montana v. United States.
440 U.S. 147 (1979) 18

Nebraska v. Rural Electrification Administration
12 E.R.C. 1156 (D. Neb. 1978) 6

Nebraska v. Wyoming.
295 U.S. 40 (1935) 23,24

Nebraska v. Wyoming.
325 U.S. 589 (1945) ..... passim

Nebraska v. Wyoming.
345 U.S. 981 (1953) 1,3

Nevada v. United States.
463 U.S. 110 (1983) 17,24

Parklane Hosiery Co. v. Shore.
439 U.S. 322 (1979) 18

Pennsylvania v. New Jersey.
426 U.S. 660 (1976) 26

South Dakota v. Nebraska.
106 S.Ct. 1487 (1986) 25,26

United States v. Nevada.
412 U.S. 534 (1973) 25

Wyoming v. Colorado.
259 U.S. 419, *modified*, 260 U.S. 1 (1922) 14,15

Wyoming v. Colorado.
298 U.S. 573 (1936) 9,14

Pages

Wyoming v. Colorado,
353 U.S. 953 (1957) 9,14,16

Wyoming Hereford Ranch v. Hammond Packing Co.,
33 Wyo. 14, 236 P. 764 (1925) 11,24

CONSTITUTIONS

Colo. CONST. art. XVI, § 6 22

U.S. CONST. art. III, § 2, cl. 2 1,2

STATUTES

Federal Water Pollution Control Act,
33 U.S.C. §§ 1344, *et. seq.* (1980) 10

Endangered Species Act,
16 U.S.C. §§ 1531, *et.seq.* (1980) 6

Judiciary Act,
28 U.S.C. § 1251(a) (1980) 1,2

National Environmental Policy Act,
42 U.S.C. §§ 4321, *et. seq.* (1980) 6

Reclamation Act of 1902,
32 Stat. 390, 43 U.S.C. § 383 (1980) 23

Neb. Rev. Stat. § 46-204 (Reissued 1984) 21
Neb. Rev. Stat. § 46-613 (Reissued 1984) 21

Wyo. Sess. Laws, ch. 60 (1982), ch. 52 (1984),
ch. 89 (1985) 10

Pages

Wyo. Stat. § 41-3-102 (1977) 22
Wyo. Stat. § 41-3-301 (1986 Supp.) 11
Wyo. Stat. § 41-3-302 (1977) 11
Wyo. Stat. § 41-3-305 (1977) 11
Wyo. Stat. § 41-4-501 (1977) 11
Wyo. Stat. § 41-4-503 (1977) 11
Wyo. Stat. § 41-4-504 (1977) 11
Wyo. Stat. § 41-4-603 (1977) 11
Wyo. Stat. § 41-4-604 (1977) 11
Wyo. Stat. §§ 41-7-201, *et. seq.* (1977) 7

MISCELLANEOUS

Black's Law Dictionary,
(5th Ed. 1979) 21

No. 6, Original

In the Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION

JURISDICTION

Nebraska invokes the Court's retained jurisdiction under Paragraph XIII of the Court's October 8, 1945, Decree in *Nebraska v. Wyoming*, 325 U.S. 665, 671-72 (1945), as modified by the Court's June 15, 1953, Order, *Nebraska v. Wyoming*, 345 U.S. 981 (1953). That Decree apportioning the waters of the North Platte River among Nebraska, Wyoming and Colorado for irrigation purposes was entered under Article III, Section 2, Clause 2 of the United States Constitution, and the Judiciary Act, 28 U.S.C. § 1251(a) (1980). The Petition that Nebraska seeks leave to file is for enforcement of the Decree. Wyoming contends that the allegations of the Petition, even if assumed to be true, do not establish any violation of the terms of the Decree and do not otherwise present a case or controversy appropriate for the Court's original jurisdiction.

QUESTION PRESENTED

Whether Nebraska's Petition alleges facts which, if true, would establish any violation of the North Platte Decree, and whether the Petition otherwise presents a case or controversy that is appropriate for the exercise of this Court's original jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

Judiciary Act,
28 U.S.C. § 1251(a) (1980):

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

STATEMENT OF THE CASE

A. *1945 North Platte Decree, as Modified*

The litigation resulting in the Court's Decree apportioning the waters of the North Platte River among Nebraska, Wyoming and Colorado for irrigation purposes was initiated in 1934. The United States was a party intervenor. The Court's opinion addressing the Special Master's recom-

mended decree and the exceptions of the parties to it is reported at *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The Decree, entered on October 8, 1945, is reported at 325 U.S. 665. A copy of the 1945 Decree is reproduced in the Appendix at pp. A-1 to A-9. Pursuant to stipulation among the parties, the Decree was modified by the Court's June 15, 1953, Order Modifying and Supplementing Decree, reported at 345 U.S. 981. A copy of the 1953 Order is reproduced in the Appendix at pp. A-10 to A-16. (References hereafter to the "Decree" or the "North Platte Decree" refer to the Decree as modified unless indicated otherwise.) The modifications principally provided for the Bureau of Reclamation's construction and operation of Glendo Reservoir on the North Platte River mainstem in Wyoming and allocation of its yield between Wyoming and Nebraska users under contracts with the Bureau of Reclamation.[1] *Decree*, Par. XVII.

The Decree places certain restrictions on diversions and storage of water from the North Platte River and its tributaries in each of the three states. *Decree*, Par. I, II, V. The Decree confirms the relative Wyoming priorities *inter sese* of the storage rights of the federal storage projects on the North Platte mainstem in Wyoming.[2] *Decree*, Par. III. It also fixes the priorities of those storage rights and the direct flow rights of the Kendrick Project in relation to the priorities of the five Nebraska canals diverting at or above Tri-State Dam for irrigation of Nebraska lands. *Decree*,

[1] Nebraska is allocated up to 25,000 acre-feet annually from Glendo Reservoir; Wyoming is allocated up to 15,000 acre-feet. *Decree*, Par. XVII.

[2] Pathfinder and Guernsey Reservoirs were constructed by the Bureau of Reclamation as part ofthe North Platte Project; Seminoe and Alcova Reservoirs were constructed by the Bureau of Reclamation as part of the Kendrick Project. *Nebraska v. Wyoming*, 325 U.S. at 594-95, 597. Glendo Reservoir was constructed by the Bureau of Reclamation as a unit of the Missouri Basin Project authorized by the Flood Control Act of 1944, 58 Stat. 778. The Bureau of Reclamation operates all five reservoirs.

Par. IV. The Decree limits irrigated acreage and storage for irrigation purposes in parts of the North Platte basin in Wyoming. *Decree*, Par. II, III. The Decree does not otherwise restrict diversions or storage in Wyoming for non-irrigation purposes and does not restrict diversions or storage for any purpose from tributaries of the North Platte below Pathfinder Dam. The Decree apportions only natural flow, not storage water. *Decree*, Par. VI.

The apportionment to Nebraska under the Decree is limited to irrigation water for Nebraska lands supplied by specified irrigation canals diverting from the North Platte mainstem at or above Tri-State Dam. *Decree*, Par. V; *Nebraska v. Wyoming*, 325 U.S. at 625, 654-55. During the May 1 through September 30 irrigation season specified in the Decree, natural flows in the North Platte mainstem between Guernsey Dam and the Tri-State Diversion Dam, including the contribution of Spring Creek, are apportioned 75% to such Nebraska canals and 25% to Wyoming canals. *Decree*, Par. V.

Paragraph X of the Decree provides that the Decree "shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption." Paragraph XII(d) provides that the Decree shall not affect "[t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River."

Paragraph XIII of the Decree provides for the retained jurisdiction of the Court to consider requests by the parties for modification of the Decree, for a supplementary decree, or for further relief.

Nebraska's Petition here asserts that Wyoming has

violated and threatens to violate the Decree, and requests injunctive relief enforcing the Decree. Petition, par. 5, 7, and prayer for relief. Nebraska's Petition does not request modification of the Decree or a supplementary decree.

B. *Additional Pertinent Facts*

The Petition that Nebraska seeks leave to file asserts that the following alleged actions by Wyoming "violate the provisions of the decree":

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers;
>
> c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and
>
> d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

Petition, par. 3, 5. The following is a summary of relevant facts relating to each of these allegations in the order in

which they appear in the Petition:

Grayrocks Reservoir

Grayrocks Reservoir was completed on the Laramie River mainstem northeast of Wheatland, Wyoming in 1980. It is used to supply the Laramie River Station, a large coal-fired steam electric power generating plant that was constructed at the same time. The reservoir and power plant were constructed by the Missouri Basin Power Project, a consortium of consumer-owned electric systems supplying power in eight states, including Nebraska and Wyoming. Basin Electric Power Cooperative ("Basin Electric") is the operator of the power plant and reservoir. The Rural Electrification Administration granted loan guarantees for part of the cost of the project in 1976. The U.S. Army Corps of Engineers issued a Section 404 dredge and fill permit for Grayrock Reservoir in 1978. Nebraska and several environmental groups filed lawsuits in the United States District Court in Nebraska challenging both federal actions. They requested an injunction against construction of the reservoir and power plant on grounds of noncompliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.* (1980), and the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* (1980). The cases were consolidated and decided as *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978). Nebraska had previously formally objected to issuance of a dredge and fill permit for the reservoir on the ground that the depletions to the Laramie River by the project would violate the North Platte Decree. *See* letter of May 12, 1976, from Nebraska Attorney General, Paul L. Douglas, to Colonel Russell Glenn, District Engineer, U.S. Army Corps of Engineers. App. A-17. The U.S. District Court enterered the requested injunction. *Nebraska v. Rural Electrification Administration, supra.*

While the case was pending on appeal to the Eighth Circuit Court of Appeals, all parties to the litigation entered an Agreement of Settlement and Compromise dated December 4, 1978, in which Nebraska withdrew "all objections" to issuance of the permit. The agreement also provided for certain limitations on the operation of Grayrocks Reservoir and for limitations on total water depletions by the Laramie River Station. App. A-24 to A-28. Pursuant to the settlement agreement, the parties executed and filed with the Court of Appeals a stipulation dated February 20, 1979, which resulted in an order vacating the District Court's judgment and dismissing the case with prejudice, subject to the right of any party to "petition the District Court for intrepretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978." App. A-33, A-34. Wyoming was not a party to the litigation or to the settlement agreement or stipulation.

Corn Creek Project

Nebraska's allegation regarding "the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and North Platte Rivers" (Petiton, par. 3b.) apparently refers to the Corn Creek Project, because it is the only project currently proposed for construction in that area. The Corn Creek Project is a proposed project for irrigation of lands currently used for dryland farming and grazing in Goshen County, Wyoming. It was originally studied by the Bureau of Reclamation in 1964. The current sponsor of the project is the Corn Creek Irrigation District, which was formed in 1978 under Wyoming law [Wyo. Stat. §§ 41-7-201, *et seq.* (1977)]. The primary water supply for the project would be storage water supplied from Glendo Reservoir on the North Platte and from Grayrocks Reservoir on the Laramie to the District's pumping facilities at the mouth of the Laramie.

The Grayrock's Reservoir storage water would be delivered pursuant to an existing agreement between the District's predecessor, Corn Creek Reservoir Association, and Basin Electric. That agreement is expressly recognized in the Agreement of Settlement and Compromise between Basin Electric, *et al.*, and Nebraska, *et al.* App. A-27, A-28. The Glendo Reservoir water would be supplied under a pending contract between the District and Bureau of Reclamation. Such water would be part of Wyoming's annual allocation from Glendo Reservoir pursuant to the 1953 modification of the North Platte Decree. *Decree*, Par. XVII(b).

The Corn Creek Irrigation District was formed by order of the District Court, Eighth Judicial District, Goshen County, Wyoming, entered January 20, 1978. *In Re the Corn Creek Irrig. Dist.*, Civil Action No. 19-460 (Wyo. Dist. Ct. 1978), App. A-42. The State of Nebraska filed an Objection to Petition for Formation of Irrigation District, asserting that:

> [Nebraska] may be affected by the formation of the Corn Creek Irrigation District since the waters proposed to be appropriated and used by the district are waters which normally flow from the Laramie River into the North Platte River and are eventually used by Nebraska citizens for agricultural, industrial and domestic purposes. These Laramie River flows, by contributing to the total flow of the North Platte River in Nebraska, are also necessary to maintain the quality of the environment in the North Platte and Platte River Basins in Nebraska.

App. A-37. After a two-day hearing on the petition, in which Nebraska participated by counsel, the district court entered its judgment and decree on January 20, 1978, establishing the District and determining:

> 3. That the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or under any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the Corn Creek Irrigation District, and therefore, the objection of the State of Nebraska to the formation of said District, be, and the same is hereby, denied.

App. A-44. No appeal was taken from the district court's judgment.

Deer Creek Project

Nebraska's allegation regarding the "proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir" fails to identify any particular storage project. Petition, par. 3c. Wyoming assumes that Nebraska means to refer to Deer Creek Reservoir, which is the only project currently proposed and funded for construction on such tributaries. Deer Creek Reservoir is a municipal storage project proposed to be constructed on Deer Creek, a tributary entering the North Platte River east of Casper, Wyoming, between Pathfinder and Guernsey Reservoirs. The sponsor of the project is the Wyoming Water Development Commission, an agency of the State of Wyoming.

Deer Creek Reservoir would, by exchange, provide a needed supplemental source of water for the City of Casper, whose current service area population is about 57,000, and

for smaller communities along the North Platte below Alcova Reservoir. Wyoming has appropriated a total of $48.25 million for the Deer Creek Project. Wyo. Sess. Laws, ch. 60 (1982), ch. 52 (1984), ch. 89 (1985). Approximately $2.1 million has been expended for studies, plans and specifications, final design, and right-of-way acquisition.

The design capacity of Deer Creek Reservoir is approximately 66,000 acre-feet. Its estimated annual yield is approximately 6,400 to 9,600 acre-feet.[3] The annual yield is highly dependent on carryover storage because of the variability of runoff in Deer Creek from year to year.

On January 25, 1985, the Wyoming Water Development Commission applied to the U.S. Army Corps of Engineers for a dredge and fill permit for Deer Creek Reservoir under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1980). A Draft Environmental Impact Statement (published September, 1986) for the Deer Creek Project has been prepared by the Corps of Engineers, Omaha District, and is currently in the public interest review process. Public hearings have been held in both Wyoming and Nebraska. Officials of the State of Nebraska have participated in the hearings.

Inland Lakes

Nebraska alleges that there have been "[a]ctions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska." Petition, par. 3(d), at 2. The only "action" Wyoming has taken with respect to the Inland

[3] The difference in yield estimates is due in part to the uncertainty regarding the priority and extent of the natural flow water rights used to supply the Inland Lakes.

Lakes matter is the lawsuit it filed on October 3, 1986, against the United States in the District Court for the Eighth Judicial District, Goshen County, Wyoming. *Wyoming ex rel. Christopulos v. United States*, Civil Action No. 23-13 (complaint filed October 3, 1986), App. A-46. That lawsuit, brought at the request of the Wyoming State Engineer, asks the court to declare that the Bureau of Reclamation may not divert natural flow water from the North Platte River in Wyoming to storage in four reservoirs in Nebraska known as the Inland Lakes without the requisite Wyoming permits, nor store water out of priority in the Bureau's other reservoirs in Wyoming for the benefit of the Inland Lakes "until the defendants have complied with the laws of the State of Wyoming." App. A-51, A-52. An order dated October 24, 1986, removed the case to the U.S. District Court for the District of Wyoming (Docket No. C 860370). The federal defendants have obtained an extension of time until January 31, 1987, to respond.

Under Wyoming law, an appropriation of water may not be made except pursuant to a valid permit. Wyo. Stat. §§ 41-3-301 (1986 Supp.); 41-3-305 (1977); 41-4-501 (1977); *Lewis v. State Board of Control*, 699 P.2d 822 (Wyo. 1985); *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 236 P. 764, 768-70 (1925). State water officials responsible for administering water rights according to state law, therefore, may not recognize or administer any right to divert waters in Wyoming except pursuant to a valid permit. Wyo. Stat. §§ 41-3-301 (1986 Supp.), 41-3-302 (1977); 41-4-503, 504, 603, 604 (1977). The Bureau of Reclamation has refused Wyoming's requests that it apply for the requisite permits.[4]

[4] The dispute is primarily about whether the Bureau may divert natural flow water through the Interstate Canal for storage in the Inland Lakes without the permits required by Wyoming law. There is no dispute about the Bureau's ability to restore North Platte Project storage water in the Inland Lakes, assuming such restorage is properly accounted for under Wyoming law.

SUMMARY OF ARGUMENT

The matters raised in the Petition which Nebraska seeks leave to file do not involve considerations of high equity sufficient to justify exercise of this Court's sparingly used original jurisdiction. Nebraska invokes the Court's retained jurisdiction to enforce rights it claims under the North Platte Decree. Nebraska's vague allegations do not assert any hard facts concerning violation of the Decree or threat of injury to Nebraska water rights protected by the Decree. Even assuming each of Nebraska's allegations to be true for the purposes of this Brief, they clearly would not establish any violation or threatened violation of the Decree by Wyoming.

Nebraska has no right to the Laramie River. The Laramie River was completely apportioned between Colorado and Wyoming in 1922. The North Platte Decree expressly did not affect that apportionment. This Court's original jurisdiction should not be exercised to allow Nebraska to attempt to upset the long-settled rights and expectations of Wyoming and Colorado under the Laramie River apportionment. Moreover, Nebraska is estopped to invoke this Court's equity jurisdiction for the purpose of asserting that either the Corn Creek Project or Grayrocks Reservoir on the Laramie violates Nebraska's rights under the North Platte Decree. Nebraska litigated in a Wyoming court that very issue regarding the Corn Creek Project and is a party to the very agreement allowing construction and operation of Grayrocks Reservoir.

The North Platte Decree does not restrict water uses on tributaries of the North Platte between Pathfinder and Guernsey Reservoirs. Paragraph X of the Decree affirmatively exempts ordinary and usual municipal uses from the Decree's restrictions. Therefore, construction of Deer Creek Reservoir clearly would not violate the Decree. Such

municipal uses were not intended to be subject to the Court's retained jurisdiction under Paragraph XIII of the Decree. To construe the Decree otherwise would disregard the compelling need for certainty and finality regarding Wyoming's right under the Decree to use water for municipal purposes.

Wyoming's suit to require the Bureau of Reclamation to comply with Wyoming law regarding storage of water in the Inland Lakes is not a violation of the North Platte Decree. The policy of federal deference to state water laws surely encompasses Wyoming's right to have its dispute with the Bureau adjudicated to eliminate the uncertainty caused by the Bureau's refusal to comply with Wyoming law. Wyoming's dispute is with the Bureau regarding questions of Wyoming law, not with Nebraska. The pending litigation initiated by Wyoming provides an adequate forum for determination of such issues. Even if the outcome of that litigation might affect rights asserted by Nebraska under the North Platte Decree, in the interests of comity and judicial economy, this Court should not exercise its original jurisdiction pending the outcome.

Finally, it may be that despite the characterization of its Petition as one for enforcement of the Decree, Nebraska really seeks to modify the Decree to secure greater rights. If so, its allegations do not even suggest sufficient threat of serious injury to justify exercise of this Court's original jurisdiction. Nebraska does not describe any changed conditions that would justify exercise of the Court's original jurisdiction to consider further restrictions on Wyoming, and does not even identify the rights it asserts may be injured. To the extent that Nebraska asserts injury to rights supplied from the North Platte River below Tri-State Diversion Dam, this Court previously determined in *Nebraska v. Wyoming* that local water supplies for such uses were adequate without demand for water in Wyoming, even

during the 1931-1940 extreme drought. Nebraska's allegations are not sufficient to justify exercise of this Court's extradorinary original jursidiction either for the purpose of "enforcing" the existing Decree or modifying it to impose further restrictions.

ARGUMENT

I. WYOMING HAS NOT VIOLATED, AND DOES NOT THREATEN TO VIOLATE, THE NORTH PLATTE DECREE IN ANY RESPECT.

Nebraska has not alleged facts which, if true, would establish any violation or threatened violation of the existing provisions of the North Platte Decree.

A. *The Existing Grayrocks Reservoir and the Proposed Corn Creek Project on the Laramie River Do Not Violate or Threaten to Violate the North Platte Decree.*

1. *Nebraska has no right to water from the Laramie River.*

Implicit in Nebraska's allegations regarding Grayrocks Reservoir and the proposed Corn Creek Project is the assertion that the North Platte Decree entitles Nebraska to demand water from the Laramie River, despite this Court's prior apportionment of the Laramie River between Wyoming and Colorado. *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922); 353 U.S. 953 (1957). The 1922 Laramie River Decree was subsequently construed by the Court as confirming "the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries . . ." *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936).

In the North Platte litigation Nebraska argued that, not having been a party to the Laramie River proceedings, Nebraska was not bound by the Laramie River Decree, and was entitled to share in any waters in the Laramie River drainage in excess of the requirements of Wyoming and Colorado as determined by the Court in the Laramie River proceedings. (*E.g.*, Nebraska Replication to Colorado Answer and Cross Bill at 8, *Nebraska v. Wyoming*, 325 U.S. 589 (1945); Nebraska Opening Brief before Special Master at 43, *id.*)

Colorado and Wyoming took the position throughout the North Platte proceedings that all of the waters of the Laramie River had been "fully and completely divided and apportioned" between the two states by the Laramie River Decree, that the Decree was *res judicata*, and that the apportionment should not be disturbed in the North Platte apportionment proceedings. (*E.g.*, Colorado Answer and Cross Bill at 32, 48, *id.*; Wyoming Answer to Colorado Cross Bill at 9, *id.*) The Special Master agreed:

> The water of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, 259 U.S. 419, and that of the South Platte River was equitably distributed by compact between Nebraska and Colorado ratified by the Congress in 1926. This conclusion takes into the account the interests of all parties and no redistribution of the waters of those rivers should be undertaken in this suit.

Special Master's Report at 8, *id.*

None of the parties excepted to that conclusion of the Special Master. Nor did they ask the Court to impose any restrictions on future depletions of the Laramie River by Wyoming appropriators. Noting that Colorado's Answer

and Cross Bill requested an equitable apportionment among the three states, "excepting only the tributary waters of the South Platte and Laramie rivers", the Court confirmed the Special Master's conclusion:

> The waters of the South Platte and the Laramie were previously apportioned — the former between Colorado and Nebraska by compact, the latter between Colorado and Wyoming by decree. Those apportionments are in no way affected by the decree in this case.

Nebraska v. Wyoming, 325 U.S. at 592, n.1 (citations omitted). The Court's description of the drainage area of the North Platte expressly excludes the Laramie River. *Id.*, n.2. The North Platte Decree entered by the Court in 1945 provides that the Decree shall not affect "the apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." *Decree*, Par. XII(d).

In 1957, the Laramie River Decree was amended, *inter alia*, to permit increased diversions in Colorado, and to provide: "The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado." *Wyoming v. Colorado*, 353 U.S. at 953 (1957).

Nebraska therefore has no equitable claim to the Laramie River and cannot in good faith argue that existing or future depletions to the Laramie River violate its rights under the North Platte Decree. This Court's original jurisdiction should not be used to allow Nebraska to attempt to upset Wyoming and Colorado's long-settled rights and expectations with respect to the Laramie River through vague allegations about the "equitable balance" of

the North Platte. Principles of equity and finality respecting water rights recognized by this Court in original jurisdiction proceedings preclude Nebraska from attempting to relitigate the Laramie River issue here. *Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. United States*, 463 U.S. 110 (1983).

2. *Even if Nebraska had some right to the Laramie River, it is estopped to assert that Grayrocks Reservoir or the Corn Creek Project infringe on its rights.*

To the extent that Nebraska's claims here are based on equitable principles, it simply is not in a position to complain about either Grayrocks Reservoir or the proposed Corn Creek Project. Nebraska is a party to the very settlement agreement and stipulation that allowed construction of Grayrocks Reservoir and the Laramie River Station. They were completed and have been in operation for six years. Nebraska is estopped to now claim that construction or operation of Grayrocks Reservoir consistent with the settlement agreement violates its rights. *See generally Dickerson v. Colgrove*, 100 U.S. 578 (1879), and *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959).

Under the settlement agreement and stipulation, the owner of the reservoir is obligated to operate it within the specific limitations agreed to by Nebraska. If the owner of the reservoir fails to operate it in compliance with the agreement, Nebraska's remedy is against the owner of the reservoir, not Wyoming. The stipulation specifically provided for enforcement of the terms of the settlement agreement by the U.S. District Court in Nebraska. Wyoming is not a party to the stipulation or agreement. Any dispute about compliance with the agreement does not involve Wyoming and does not belong in this Court.

Nebraska is in no better position to complain about the proposed Corn Creek Project. The operational limitations established in the Grayrocks settlement agreement specifically took into account the depletions to the Laramie River that would result from the Corn Creek Project. App. A-26 to A-28.

In addition, Nebraska was a party to the proceedings in the Wyoming court for the formation of the Corn Creek Irrigation District for the purpose of constructing and operating the Corn Creek Project. Nebraska placed in issue there the very claim it raises here — that the depletions by the Project would violate Nebraska's rights under the North Platte Decree. App. A-39. Nebraska agrued that because it had a prior right to Laramie River waters, there would be insufficient water available for the Corn Creek Project. Nebraska had a full and fair opportunity to litigate that issue. The court squarely held that Nebraska had no legitimate claim to Laramie River water under the North Platte Decree. App. A-44. Nebraska did not appeal from the court's judgment and therefore is bound by it. *Illinois v. Michigan*, 409 U.S. 36, 37 (1972).

Nebraska freely chose to present that issue to the state court in Wyoming and freely chose not to appeal the ruling against it. As this Court said of the United States' attempt to relitigate a matter previously determined in a state court, "[c]onsiderations of comity as well as respose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court." *Montana v. United States*, 440 U.S. 147, 163 (1979). *See generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Under these circumstances, even assuming Nebraska had an equitable claim to the Laramie River, Nebraska cannot invoke this Court's equitable original jurisdiction to attempt to relitigate issues relating to Grayrocks Reservoir and the Corn Creek Project.

B. *Construction and Operation of Deer Creek Reservoir Will Not Violate the North Platte Decree, and Its Proposed Construction Is Not within the Scope of the Court's Retained Jurisdiction.*

1. *Wyoming has a right under the Decree to construct the Deer Creek Project.*

The Decree does not restrict diversions or storage for any purpose on tributaries between Pathfinder and Guernsey Reservoirs, including Deer Creek. In addition, Paragraph X of the Decree affirmatively exempts ordinary and usual domestic and municipal uses from any restrictions under the Decree. Therefore, under the Decree, Wyoming has an absolute right to construct Deer Creek Reservoir.

By characterizing the Deer Creek Project as a threatened violation of the existing Decree and invoking the Court's retained jurisdiction to reconsider the question of new storage on tributaries between Pathfinder and Guernsey Reservoirs, Nebraska evidently hopes that a less stringent standard for exercise of the Court's original jurisdiction will apply. Wyoming believes that except for legitimate claims of violation of the existing Decree, the standard should be no less stringent than where a new apportionment is requested.

The projected depletions by the Deer Creek Project are relatively small by any standards, but particularly in comparison to the massive existing storage projects on the North Platte in both Wyoming and Nebraska.[5] The yield and projected depletions by the Deer Creek Project are

[5] The combined total storage capacity of the Bureau of Reclamation's North Platte and Kendrick Project reservoirs and Glendo Reservoir in Wyoming is about 3.1 million acre-feet. The combined storage capacity of Sutherland Reservoir and Lake McConaughy (Kingsley Dam) in Nebraska is about 2.1 million acre-feet.

small for the same reasons that the Special Master concluded regulation of the tributaries to be unjustified, even during the 1931-1940 extreme drought period upon which the Decree was based:

> On the tributary streams the runoffs are of shorter duration even than those above Pathfinder. The flows reach their peak in May, fall off rapidly during June, and usually run dry by the first of July, before there is serious shortage of water in the river. There are hundreds of small diversions on these tributaries, regulation of which could be of little, if any, benefit to the river below. [Footnotes ommitted].

Special Master's Report at 52, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Nebraska has not alleged any change in conditions that would justify the imposition of restrictions on the tributaries now.

2. *Municipal uses such as the Deer Creek Project are not subject to the Court's retained jurisdiction.*

The Court's retained jurisdiction under Paragraph XIII was not intended to apply to municipal uses such as the Deer Creek Project. The restrictions in the Decree apply only to irrigation uses. The Decree recommended by the Special Master and approved by the Court permitted expansion of irrigation uses in some areas and restricted them to then-existing levels in other areas:

> [Equity] does require, during present or comparable conditions of water supply, restraint of any further expansion of irrigation from the river or its tributaries between the Colorado-Wyoming state line and Pathfinder Reservoir or from the

> main river in the section between Pathfinder Reservoir and Guernsey.

Special Master's Report at 9-10, *id.*

The Decree imposes no restrictions on future expansions of municipal uses. The parties agreed that "there should be no restriction upon the diversion from the North Platte River in Colorado or Wyoming of water for ordinary and usual domestic and municipal purposes and consumption and that nothing in the recommended decree is intended to or will interfere with such diversions and uses." *Nebraska v. Wyoming*, 325 U.S. at 656. The Court adopted that provision and extended it to the tributaries at Wyoming's suggestion. *Id.*

Paragraph X affirmatively provides that the Decree "shall not affect or restrict" ordinary and usual domestic and municipal uses. The word "restrict" means "to restrain within bounds; to limit; to confine." Black's Law Dictionary (5th Ed. 1979). The express affirmative exemption of municipal uses by a separate article of the Decree reflects intent that future expansion of such uses not be limited and that such uses be treated differently than irrigation uses for purposes of the Court's retained jurisdiction. Otherwise, Paragraph X would be superfluous.

The Decree, in effect, apportioned to each of the three states the right to use water from the North Platte and its tributaries for future ordinary and usual domestic and municipal uses without restriction. This treatment of municipal uses is consistent with both common sense and principles of certainty and finality. Although subject to administration in the priority system like other water rights, domestic and municipal uses are generally recognized to be preferred uses, as they are by Nebraska, Wyoming and Colorado. Neb. Rev. Stat. §§ 46-204, 46-613

(Reissued 1984); Wyo. Stat. § 41-3-102 (1977); Colo. Const. art. XVI, § 6. *See also Connecticut v. Massachusetts*, 282 U.S. 600, 673 (1981).[6] Cities grow, and must be able to provide water for such growth. Presumably cities in Nebraska using water from the North Platte too have experienced growth since 1945. Because of the brief and highly variable runoff on the tributaries recognized by the Special Master, and because existing senior rights have appropriated the dependable supply on the mainstem, reliable municipal water supplies cannot be provided in this area of Wyoming without storage.

In order to plan and develop water supplies for future needs, cities must have certainty regarding their legal right to use water. The compelling need for certainty requires finality regarding determinations of such rights. Here, that means that the apportionment to each of the states of water for municipal use effected by Paragraph X of the Decree should not be subject to the Court's retained jurisdiction under Paragraph XIII. *See Arizona v. California*, 460 U.S. 605, 619-20 (1983), construing a similar retained jurisdiction provision narrowly in the interests of certainty and finality respecting water rights.

Even assuming that Paragraph X was not intended to have any separate effect, Deer Creek Reservoir will not violate the existing Decree. Nor has Nebraska alleged facts or changed conditions which would justify the Court's

[6] There, Connecticut asserted that any further reduction in the flow of the Connecticut River would injure its vested rights. The Boston area faced a serious water shortage. Denying the injunction sought by Connecticut, the Court said:

> [T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. . . Drinking and domestic purposes are the highest uses of water. An ample supply of wholesome water is essential.

282 U.S. at 669, 673.

exercise of its retained jurisdiction to consider the imposition of new restrictions on the tributaries.

C. *Wyoming's Suit to Require the United States Bureau of Reclamation to Obtain Wyoming Permits for Storage in the Inland Lakes Does Not Violate the North Platte Decree and Is Not a Controversy Appropriate for this Court's Original Jurisdiction.*

1. *Wyoming's suit against the Bureau of Reclamation is not a violation of the North Platte Decree.*

Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383 (1980), requires the Bureau of Reclamation to proceed in conformity with state water laws in constructing and operating its projects. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935); *Nebraska v. Wyoming*, 325 U.S. 589, 612-15, 629 (1945); *California v. United States*, 438 U.S. 645 (1978). Nevertheless, the Bureau has refused to apply for the permits required by Wyoming law for diversion of natural flow water from the North Platte River through the Interstate Canal for storage in the Inland Lakes. Without such permits, Wyoming water officials are unable to properly carry out their statutory duties to administer water rights in the North Platte River. Without such permits and the information to be provided in the applications for them, there is great uncertainty regarding the Bureau's operation of its North Platte Project to supply the Inland Lakes and the effect of such operation on other Wyoming water rights. Unresolved questions exist concerning the quantity and timing of natural flow water and storage water delivered to the Inland Lakes, the priority under which natural flow is diverted and stored, and the manner and place of use of the water.

The uncertainty resulting from the Bureau of Reclamation's refusal to comply with Wyoming law is detrimental to

Wyoming and its water users. *Lewis v. State Board of Control*, 699 P.2d 822 (Wyo. 1985); *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 236 P.764 (1925). Wyoming's attempt to have this uncertainty resolved by its suit now pending in the United States District Court is not a violation of the North Platte Decree. The Decree does not purport to exempt the United States from compliance with Wyoming law in the construction and operation of its reclamation projects; on the contrary, the Court mandated such compliance. *Nebraska v. Wyoming*, 295 U.S. at 43, 325 U.S. at 612-15, 629.

2. *Nebraska's attempt to preempt the litigation between Wyoming and the Bureau of Reclamation does not present a controversy appropriate for this Court's original jurisdiction.*

Wyoming's dispute is with the Bureau of Reclamation, not Nebraska. To the extent that the outcome of the dispute might affect the irrigators in Nebraska who use Inland Lakes water, their interests are represented by the Bureau. The Bureau has an obligation to operate the North Platte Project and to secure its water rights for the benefit of those irrigators. *Nevada v. United States*, 463 U.S. 110, 127-28 (1983).

The Wyoming suit involves primarily issues of state law. Those issues are not appropriate for this Court's original jurisdiction when there is another adequate forum for their determination. *Arkansas v. Texas*, 346 U.S. 368 (1953). If questions of federal law are litigated in the pending proceeding, the parties will have recourse to this Court through the normal appellate process.

In similar circumstances, this Court denied a motion for leave to file a compliant because there was "an appropriate forum in which the *issues* tendered here may be

litigated." *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (emphasis in original). The Court found that the pending state court lawsuit provided a more appropriate forum where the real parties in interest could have their dispute fully and fairly determined. The same is true here. The Court's original jurisdiction is exercised sparingly, and need not be exercised where the real parties in interest have an adequate, and perhaps more appropriate, forum for resolution of the issues. *United States v. Nevada*, 412 U.S. 534, 538 (1973).

This principle of restraint in the exercise of the Court's original jurisdiction was recognized recently when the Court denied South Dakota's motion for leave to file a complaint against Nebraska, Iowa and Missouri. *South Dakota v. Nebraska*, 106 S.Ct. 1487 (1986). Nebraska argued there that this Court should not exercise its original jurisdiction because the action which gave rise to South Dakota's complaint was a pending federal district court suit[7] brought by Nebraska, Iowa, Missouri and other private parties against the U.S. Army Corps of Engineers, the U.S. Bureau of Reclamation and various officials within those agencies. Nebraska argued: "If the case [in the lower federal court] simply involves an effort by Nebraska, Iowa and Missouri to force a federal agency to comply with federal law, however, no basis exists for exercise of this Court's original jurisdiction." Brief of Defendants in Opposition to Motion for Leave to File Complaint, *id.*

The same principle applies here. It would be prudent for this Court to await the outcome of the pending litigation before deciding whether exercise of its original jurisdiction is appropriate.[8] *Arkansas v. Texas*, 346 U.S. at 368. The litigation may ultimately resolve Nebraska's concern or more sharply focus the issues.

[7] *Missouri v. Andrews*, 586 F. Supp. 1268 (D. Neb. 1984).

[8] The United States, as *amicus curiae*, agreed that the Court should

II. NEBRASKA'S ALLEGATIONS DO NOT PRESENT A CASE OR CONTROVERSY APPROPRIATE FOR THIS COURT'S ORIGINAL JURISDICTION.

If the real relief that Nebraska seeks is modification of the decree to impose further restrictions on uses in Wyoming in order to secure greater rights than the existing Decree provides, Nebraska has failed to allege facts which would demonstrate sufficient threat of injury to justify exercise of this Court's original jurisdiction. A request for such relief would be the equivalent of a request for a new apportionment.[9] Accordingly, a showing of an imminent threat of serious injury to Nebraska's rights would be required. *Idaho v. Oregon*, 462 U.S. 1017 (1983); *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976). Nebraska's allegations fall far short of meeting this standard.

Nebraska has no right to the Laramie River. Nor does Nebraska have any rights assertable against municipal uses in Wyoming such as the proposed Deer Creek Project. Even if it did, the facts it has alleged do not show a threat of injury to any Nebraska rights protected by the North Platte Decree. Nebraska's rights under the apportionment provided by the Decree are limited to the water supplies for lands irrigated by canals diverting at and upstream of Tri-State Dam. *Nebraska v. Wyoming*, 325 U.S. 589, 607, 654 (1945). Nebraska has not alleged that the water supply for such canals is threatened, and has not identified other rights that might be injured. The Court found that local water supplies for uses supplied from sources below Tri-State Dam were adequate, even during the 1931-1940

withhold exercise of its original jurisdiction pending the outcome of the *Missouri v. Andrews* litigation in the lower federal court. Brief for the United States as *Amicus Curiae* at 8. *South Dakota v. Nebraska*, 106 S.Ct. 1487 (1986).

[9] Both Wyoming and Colorado would be required to be parties to such a proceeding, as a matter of equity.

extreme drought period upon which the Decree was based. *Id.* Any assertion of injury to rights below Tri-State Dam cannot properly be made in a proceeding characterized as one to "enforce" the North Platte Decree.

Nebraska invokes the Court's retained jurisdiction under Paragraph XIII of the Decree by vague references to "changed conditions". Such "changed conditions" are not described. The Decree was based on the 1931-1940 extreme drought period during which Nebraska's suit was litigated. Both the Special Master and the Court acknowledged that if water supply conditions subsequently improved, the restrictions on Wyoming and Colorado might not be justified. That was the principle reason for the Court's retained jurisdiction in Paragraph XIII of the Decree. *Nebraska v. Wyoming*, 325 U.S. at 610, 620; Special Master's Report at 10-11, 39, 119-22, *id.* Regarding the provision in his recommended decree for retention of jurisdiction to consider changed conditions, which was subsequently adopted by the Court, the Special Master explained:

> This recommendation contemplates particularly the possibility of the passing of the present drouth cycle and the future availability of far greater water supplies, comparable with those of former years which might justify a release of some or all of the restrictions now proposed.

Special Master's Report at 10-11, *id.*

Based on water supply conditions in the North Platte River drainage since 1940, it is doubtful that the Court would have found the restrictions on Wyoming and Colorado uses to have been justified. When the Decree was entered, it was questioned whether Seminoe Reservoir ever would fill. *Nebraska v. Wyoming*, 325 U.S. at 609; *Decree*, Par. VIII(a). Seminoe has filled regularly since. In addition,

Glendo Reservoir has been constructed and filled. Nebraska has not alleged any facts to the contrary. Indeed, the only "facts" alleged by Nebraska relate to purported "violations" of the existing Decree. Even assuming those facts to be true, they do not establish a violation of the Decree.

In short, Nebraska's allegations are insufficient to justify the exercise of the Court's original jurisdiction either for the purpose of "enforcing" the existing Decree or modifying it to impose further restrictions.

CONCLUSION

For the foregoing reasons, the Motion for Leave to File Petition should be denied.

Respectfully submitted,

A.G. McCLINTOCK
Attorney General of Wyoming
Counsel of Record
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

DENNIS C. COOK
Senior Assistant Attorney General

JENNIFER HAGER
Assistant Attorney General

RAPHAEL J. MOSES
Special Assistant Attorney General

CHARLES N. WOODRUFF
Special Assistant Attorney General

JAMES R. MONTGOMERY
Special Assistant Attorney General

MOSES, WITTEMYER, HARRISION
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

No. 6, Original

In the Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

APPENDIX

INDEX TO APPENDIX

Page

Decree, *Nebraska v. Wyoming*, 325 U.S. 665 (1945) A-1

Order Modifying Decree, *Nebraska v. Wyoming*, 345 U.S. 981 (1953) A-10

Letter to Colonel Russell Glenn from Paul L. Douglas (May 12, 1976) A-17

Stipulation, *Nebraska v. Basin Electric Power Cooperative*, Case No. 78-1775; *Nebraska v. Rural Electrification Administration*, Case No. 78-1778, U.S. Court of Appeals for the Eighth Circuit (February 20, 1979).....A-20

Agreement of Settlement and Compromise, *Nebraska v. Basin Electric Power Cooperative*, Case No. 78-1775; *Nebraska v. Rural Electrification Administration*, Case No. 78-1778, U.S. Court of Appeals for the Eighth Circuit (December 4, 1978).. A-24

Order, *Nebraska v. Basin Electric Power Cooperative*, Case No. 78-1775; *Nebraska v. Rural Electrification Administration*, Case No. 78-1778, U.S. Court of Appeals for the Eighth Circuit (February 27, 1979) . A-33

Order of Dismissal, *Nebraska v. Rural Electrification Administration*, Case No. CV76-L-242, U.S. District Court for the District of Nebraska (March 23, 1979). A-35

Order of Dismissal, *Nebraska v. Ray*, Case No. CV78-L-90, U.S. District Court for the District of Nebraska (March 23, 1979).....A-36

Page

Objection to Petition for Formation of Irrigation District, *In the Matter of the Corn Creek Irrigation District*, No. 19-460, District Court, First Judicial District, Goshen County, Wyoming (December 30, 1977) A-37

Excerpts from Order, *In the Matter of the Corn Creek Irrigation District*, No. 19-460, District Court, First Judicial District, Goshen County, Wyoming (January 20, 1978) A-42

Complaint, *Wyoming ex rel. Christopulos v. United States*, Docket No. 23-13, District Court, Eighth Judicial District, Goshen County, Wyoming (October 3, 1986) A-45

NEBRASKA v. WYOMING
(325 U.S. 589)
Decree

DECREE.
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;

Second, Guernsey Reservoir;

Third, Seminoe Reservoir; and

Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the

Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that

unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transporation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	*Area Acres*	*Daily Loses-Second Feet May*	*June*	*July*	*Aug.*	*Sept.*
Alcova to Wendover	*8,360*	*53*	*76*	*87*	*76*	*56*
Guernsey Res. to Whalen	*560*	*4*	*5*	*6*	*5*	*4*
Whalen to State Line	*2,430*	*16*	*22*	*25*	*22*	*16*

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of

70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, it officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases

from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court

retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the state of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief

magistrates of the States of Colorado, Wyoming and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, ORIGINAL. NEBRASKA v. WYOMING (COLORADO, IMPLEADED DEFENDANT, AND THE UNITED STATES, INTERVENOR.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment

of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado and Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never

exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(c) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of

70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation iosses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	*Area Acres*	*Daily Loss-Second Feet May*	*June*	*July*	*Aug.*	*Sept.*
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than

submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash*, Assistant Attorney General, for the State of Nebraska, *Howard B. Black*, Attorney General, for the State of Wyoming, *Duke W. Dunbar*, Attorney General, *H. Lawrence Hinkley*, Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.

State of Nebraska
DEPARTMENT OF JUSTICE

May 12, 1976

Colonel Russell Glenn
District Engineer
U.S. Army Corps of Engineers
Omaha District
6014 United States Post Office
and Court House
Omaha, Nebraska 68102

Attention: Operations Division

Dear Colonel Glenn:

It is my understanding that the Corps of Engineers is presently considering the application of Basin Electric Power Cooperative to construct the Grayrocks Dam and Reservoir on the Laramie River in Wyoming for the purpose of providing water for electric generating plants. I am informed that the proposed dam could take up to 100 percent of the flow of the Laramie River, which is the most significant single contributor to the flow of the North Platte River. The flow of the North Platte River has been apportioned between the States of Nebraska and Wyoming by the United States Supreme Court in the case of *Nebraska v. Wyoming*, 325 U.S. 589 (1945), as modified June 15, 1953.

The Supreme Court decree provides that:

> "That natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek be and the same hereby is apportioned between Wyoming and Nebraska on the basis of

twenty-five per cent to Wyoming and seventy-five per cent to Nebraska. . . ."

It is obvious that the construction of this project would significantly invade and interfere with the water rights of Nebraska citizens.

Basin Electric has not addressed this highly important issue in their application and presentation before your agency. The effects of this project do not stop at the Wyoming-Nebraska state line and, therefore, the detrimental impact on the flows of the Platte River in Nebraska must be given serious consideration.

The Governor of Nebraska and I have discussed this matter and he joins me on behalf of the State of Nebraska in requesting that the Corps of Engineers issue no permit for construction of the proposed dam and reservoir except under conditions which will preserve the natural flows of the North Platte River including the contribution of the Laramie River, during each annual period of May 1 through September 30, or until such time as adequate arrangements are affected which will protect the rights of the State of Nebraska and its citizens under the above decree. We believe that such conditions must ensure the State of Nebraska that the Grayrocks Reservoir will be operated pursuant to the terms of the decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), as modified June 15, 1953, and that no part of the natural flow of the Laramie River will be used by Basin Electric Power Cooperative or stored in Grayrocks Reservoir during the period May 1 through September 30.

Sincerely yours,

(signed)
Paul L. Douglas
Attorney General

PLD:smh

[Exhibit No. 75 in the Case Nos. CV76-L-242 and CV78-L-90, according to conversation with the Clerk of the Federal District Court for Nebraska on December 3, 1986]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF NEBRASKA, et al.,	)	
Appellees,	)	
v.	)	No. 78-1775
BASIN ELECTRIC POWER	)	
COOPERATIVE, et al.,	)	
Appellants.	)	
	)	
STATE OF NEBRASKA, et al.,	)	
Appellees,	)	
v.	)	
RURAL ELECTRIFICATION	)	No. 78-1778
ADMINISTRATION, et al.,	)	
Appellants.	)	

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that:

1. The Agreement of Settlement and Compromise ("Agreement") which was fully and finally executed on December 4, 1978, and which is attached to the Memorandum of Law being filed herewith as Appendix A and which is incorporated herein by reference, constitutes a full and final resolution of the disputes which gave rise to the above-captioned consolidated appeals.

2. Paragraph 14 of the Agreement provides that the Agreement shall be null and void unless each of the following occurs:

(a) the Secretary of the Interior gives his concurrence to section 12 of this Agreement;

(b) the Grayrocks Dam and Reservoir receives an exemption as provided in section 5 of the Endangered Species Act Amendments of 1978 or the Committee referred to therein determines that by virtue of this Agreement no exemption is required for the Project to proceed as in this Agreement provided; and

(c) the district court's judgment is vacated and the pending litigation is dismissed with prejudice.

3. The conditions subsequent contained in Paragraphs 14(a) and (b) of the Agreement have been satisfied. Attached as Exhibit B to the Memorandum of Law being filed herewith, is a letter of the Secretary of the Interior to Edward Weinberg dated January 5, 1979[1] which reflects the Secretary's concurrence to Section 12 of the Agreement. Attached as Exhibit C to the Memorandum of Law being filed herewith is a copy of the official transcript of the Endangered Species Committee. As pages 12-14 of that transcript reflect, the Endangered Species Committee voted unanimously in favor of the proposition which:

> "...[G]rants an exemption for Grayrocks project with the explicit condition of those mitigation and enhancement provisions set forth in the agreement of settlement and compromise dated December 4, 1978, by and among the litigants in the case of Nebraska et al. versus REA, et al."
>
> (Tr. at 12).

4. To satisfy the condition subsequent of Paragraph 14(c) of the Agreement, this Court is requested to enter an order which:

(1) provides that the amended judgment of the District Court below which was entered on October 23, 1978 and docketed on October 24, 1978 is vacated;

[1] The letter bears an erroneous date of January 5, 1978. The letter was actually issued on January 5, 1979.

(2) provides that these consolidated appeals are dismissed;

(3) remands the cases to the District Court with instructions to dismiss the cases with prejudice, provided that any party to the limitation may petition the District Court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978 which is attached as Exhibit A to the parties' Joint Memorandum of Law and which is incorporated herein by reference; and

(4) provides that, except as specifically provided in the Agreement, each party is to bear its own costs incurred in this litigation.

A proposed order which all parties agree will carry the Agreement into effect is being filed herewith.

5. The Rural Electrification Administration of the Department of Agriculture is currently preparing a supplemental environmental impact statement on the Missouri Basin Power Project, as required by Paragraph 13 of the Agreement.

6. All plaintiffs and intervening plaintiffs below agree, with respect to the Project which is the subject to the litigation herein, that they will neither bring nor support any new litigation by whomever brought asserting that any new environmental impact statements under the National Environmental Policy Act or actions under the Endangered Species Act of 1973, as amended by the Endangered Species Act Amendments of 1978, or under the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, or under the Fish and Wildlife Coordination Act, are required in connection with the carrying out by the Missouri Basin Power Project of its obligations under the Agreement.

Dated: February 20, 1979.,

(Signed)
Attorney for Defendant Basin
Electric Power Cooperative and
all Intervening Defendants

(Signed)
Attorney for Federal Defendants

(Signed)
Attorney for National Wildlife Federation,
Nebraska Wildlife Federation, and
National Audubon Society

(Signed)
Attorney for State of Nebraska

(Signed)
Attorney for Powder River Basin
Resource Council and Laramie River
Conservation Council

AGREEMENT OF SETTLEMENT AND COMPROMISE

THIS AGREEMENT OF SETTLEMENT AND COMPROMISE ("Agreement"), made and entered into this 4th day of December, 1978, by and among Basin Electric Power Cooperative ("Basin"), on its own behalf and as project manager and operating agent for the Missouri Basin Power Project ("Project"); Tri-State Generation and Transmission Association, Inc. ("Tri-State"), on its behalf and as agent for Chimney Rock Public Power District, the Midwest Electric Membership Corporation, Panhandle Rural Electric Membership Association, Northwest Rural Public Power District and Wheat Belt Power District; City of Lincoln, Nebraska; Wyoming Municipal Power Agency ("WMPA"); the State of Nebraska; the National Wildlife Federation, Inc.; Nebraska Wildlife Federation; National Audubon Society; Powder River Basin Resource Council; Laramie River Conservation Council; Anthony C. Liotta, in his official capacity as Deputy Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice; Robert W. Feragen, in his official capacity as Administrator of the Rural Electrification Administration, United States; and James W. Ray, in his official capacity as District Engineer, Omaha District, United States Army Corps of Engineers.

WHEREAS, the parties desire to settle and compromise the dispute that has arisen among them concerning whether the REA Administrator, in issuing loan guarantees for the Project, and the District Engineer, Omaha District, U.S. Army Corps of Engineers, in issuing a dredge and fill permit for the Grayrocks Dam and Reservoir, a feature of the Project, under Section 404 of the Federal Water Pollution Control Act, as amended, acted in compliance with applicable laws and regulations;

NOW THEREFORE, in consideration of the promises

and convenants herein contained, the parties hereto agree as follows:

1. The maximum annual consumptive water use by the power plant at the Laramie River Station will be limited to 23,250 acre-feet per year.

2. To satisfy the requirements cited in Section 1 above, the Project will first utilize the quantity of water which is available to the Project as a result of the Boughton Ditch acquisition. The Project will, secondly, utilize the quantity of water which is available to the Project from the inundated water rights at the reservoir site. The Project will, thirdly, utilize the quantity of water which has been made available to the Project from the Johnson well fields in accordance with the Order of the Wyoming State Engineer dated November 1, 1978 (The Project shall withdraw the "enlargement application" set forth in Paragraph 4 of that Order at page 12). The Project will, fourthly, utilize the water which is stored in the Grayrocks Reservoir. The water rights representing the foregoing are enumerated in Exhibit A appended hereto and incorporated herein by reference. The Project shall not obtain any water or water rights within the Laramie River drainage other than those set out above and enumerated in Exhibit A, or store any water in the Grayrocks Reservoir except pursuant to water rights set out above and enumerated in Exhibit A, or cause the other obligations of this Agreement to be satisfied by water or water rights from within the Laramie River drainage other than by those set out above and enumerated in Exhibit A, except that:

(a) The project may for purposes of start up, initial plant operation and for subsequent intermittent periods of plant operation, utilize groundwater from irrigation wells existing as of the date of this Agreement, or from new wells used in lieu of existing irrigation wells, but only so that such

groundwater use by the Project shall not exceed on an annual basis the amount of water historically consumed by the irrigation appropriation and use from the above mentioned existing wells as determined by the appropriate Wyoming state agency. (This groundwater use shall not increase the limit stated in Section 1); and

(b) This provision shall not preclude acquisition of water or water rights of Corn Creek Irrigation District by the Project to satisfy the other provisions of this Agreement out of water rights or applications for water rights of Corn Creek Irrigation District existing as of the date of this Agreement.

3. All water intake structures will be designed and implemented for the sole purpose of supplying water to the Project for Project purposes. No other intake structures will be allowed and the Project will not authorize other entities to construct intake structures at the reservoir site. All intake structures will be metered. A stream-gauging station will be provided above the reservoir and at a distance sufficiently remote from the reservoir so that reservoir storage will not affect the accuracy of the stream-guaging [sic] apparatus. There will be stream-gauging station located below the dam and reservoir site but above any additional drainage or draw from the river and another stream-guaging [sic] station at the mouth of the Laramie River. There will be metering apparatus in each pumping structure supplying water to the Project, including all underground water wells.

4. (a) The Project agrees to release adequate flows from Grayrocks Reservoir to insure that flows at a minimum, as measured at the first gauging station below the dam, are 40 cfs during April, and 40 cfs or 75% of the natural flow at the same gauging station during the remaining five months of the year (May through September, inclusive),

whichever is greater. The Project agrees to operate the Grayrocks Reservoir so as to provide for the delivery of 40 cfs at the mouth of the Laramie River during six months of the year (October through March, inclusive), 50 cfs during April, and 40 cfs or 75% of the natural flow of the Laramie River at its mouth during the remaining five months of the year (May thorugh [sic] September, inclusive), whichever is greater: provided, that the Project will not be required to release more than 200 cfs at any one time nor more than 12,000 acre-feet during any month.

(b) During the initial reservoir filling period, flows will be maintained at the mouth of the Laramie River of at least 20 cfs from October through March, and at 40 cfs during the six months until 70,000 acre-feet have been placed in storage.

(c) Whenever total reservoir storage drops below 50,000 acre-feet, the flow levels to be maintained by the Project shall be 20 cfs from October through March, and 40 cfs from April through September, as measured at the mouth of the Laramie River.

5. When and if the Corn Creek Irrigation District constructs its diversion and delivery system and the District begins using water from the Laramie River Basin, the Project will deliver into the mouth of the Laramie River on an annual basis an amount of water equal to the minimum flows specified in Section 4 minus 22,500 acre-feet and, in addition, will deliver into the North Platte River on an annual basis 11,250 acre-feet, subject to adjustment as provided below. The Project may meet this obligation (subject to the limitations in Section 2) with any flows from the Laramie River which exceed the number of acre-feet derived by subtracting 22,500 from the minimum flow figures in Section 4. Alternatively, at its option, the Project may acquire a portion of this amount or an equivalent

amount of water from sources in Wyoming and/or the North Platte Basin in Nebraska and deliver it to the North Platte. This obligation shall continue for as long as the Laramie River Station remains in commercial operation.

6. If the water delivered to the North Platte River by the Project is obtained from any source below the confluence of the Laramie River and the North Platte River, the Project shall be credited with the amount deemed to be conveyance loss. Conveyance loss shall be determined by the North Platte Natural Flow Committee referred to in Section 8.

7. The Project will deliver water annually as provided in sections 5 and 6 above, in the same irrigation season that it is withdrawn by the Corn Creek Irrigation District. For purposes of this Agreement, the irrigation season shall be April through September, inclusive. As used in sections 5 and 6, "deliver" includes, without limitation, abandonment to the North Platte, or failure to use, either temporarily or permanently, Laramie River or North Platte River water or water rights, the right to the use of which has been acquired by the Project, either by purchase, contract or otherwise, so that either the flow of the North Platte is augmented or an existing depletion is avoided as the result of such abandonment or failure to use.

8. The Project will annually submit to the Governor of the State of Nebraska, the Attorney General of the State of Nebraska, and the Director of the Department of Water Resources of the State of Nebraska (with copies to the Laramie River Conservation Council, the Powder River Basin Resource Council, and the National Wildlife Federation) a written report containing all the data and information necessary to show that all conditions agreed to in this Agreement have been fully complied with. The annual report will also incude all pertinent data and information

gathered from the metering and gauging apparatus required in section 3 above. The Project will submit this written report, as well as an oral report, if asked to do so, to the North Platte Natural Flow Committee meeting of officials of the State of Nebraska and the State of Wyoming each year. For the purpose of assuring interested parties that the gauging apparatus is accurately recording data and in proper working condition, officials of the Nebraska Department of Water Resources will be allowed to verify the information supplied from the gauging apparatus and to conduct appropriate tests, subject to prior agreement by the project Operating Agent, upon such apparatus to determine that they are in proper working condition. The Project will allow officials of the State of Nebraska to have access to all records kept and the right to request and receive reasonable supplemental data regarding compliance by the Project with the water release and delivery requirements of this Agreement.

9. Each October, Basin will request a meeting with a representative to be designated by the State of Nebraska, at which Basin will review its proposed operating plan for Grayrocks Reservoir for the next calendar year. Basin will give serious consideration to comments and recommendations by the Nebraska representative and modify its operating plan to the extent compatible in its judgment with full and efficient operation of Laramie River Station, its commitments to other parties in respect to reservoir management, and with any recommendations by other interested parties such as the U.S. Fish and Wildlife Service and the State of Wyoming. Similar information and consultation will be provided during the year if, in the judgment of the Operating Agent, significant changes in the operating plans are required.

10. Upon the occurrence of all of the events specified in Section 14, the Project, through Basin, shall establish the

Platte River Whooping Crane Habitat Maintenance Trust by executing a trust declaration in the form appended hereto as Exhibit B, which is incorporated herein by reference.

11. (a) Basin, Tri-State and WMPA agree that the proposed amendment to Wyoming Statute §41-3-104, attached hereto as Exhibit C is consistent with the policies of their respective organizations and for a period of ten (10) years hereafter agree to actively support the proposed amendment before the Wyoming Legislature. They further agree to actively support the specific concept of this proposed amendment if it is contained in or included with other proposed amendments to Wyoming Statute §41-3-104, which they otherwise may not choose to support.

(b) Basin (except as otherwise set forth in this Agreement as to the Project), Tri-State, and WMPA agree that they shall not, without prior written consent of the Laramie River Conservation Council and the Powder River Basin Resource Council, transfer, nor seek to transfer from irrigation use or appropriation to industrial use or appropriation, water or water rights within the Laramie River drainage before the 1st day of December, 1988.

12. The parties agree that compliance by the Project with this Agreement satisfies the requirements of the Endangered Species Act of 1973 as amended by the Endangered Species Act Amendments of 1978.

13. All objections to the adequacy of the existing EIS and to the 404 Permit as amended and to the REA loan guarantees are withdrawn. A supplemental EIS is under preparation. The non-Federal parties agree not to challenge its adequacy.

14. This Agreement shall be null and void unless each

of the following occurs:

(a) the Secretary of the Interior gives his concurrence to section 12 of this Agreement;

(b) the Grayrocks Dam and Reservoir receives an exemption as provided in section 5 of the Endangered Species Act Amendments of 1978 or the Committee referred to therein determines that by virtue of this Agreement no exemption is required for the Project to proceed as in this Agreement provided; and

(c) the district court's judgment is vacated and the pending litigation is dismissed with prejudice.

15. Upon execution of this Agreement, the parties, through their respective counsel, will promptly file in the Eighth Circuit Court of Appeals a stipulation incorporating this Agreement and requesting that the Eighth Circuit Court of Appeals take appropriate action to vacate the judgment of the District Court and to dismiss the pending litigation with prejudice. The stipulation shall also incorporate the agreement of plaintiffs that they will neither bring nor support any new litigation by whomever brought asserting any further environmental impact statements or actions under the Endangered Species Act of 1973 as amended by the Endangered Species Act Amendments of 1978 are required in connection with carrying out by the Project of its obligations under this Agreement.

16. Upon the occurrence of all of the events specified in Section 14, the Project shall pay attorneys' fees and costs as follows:

State of Nebraska	$60,000
Powder River Basin Resource Council and Laramie River Conservation Council	25,000

National Wildlife Federation,
Nebraska Wildlife Federation,
and National Audubon Society 50,000

17. This Agreement shall be executed in fourteen counterparts, numbered consecutively 1 through 14, each of which shall be deemed to be an original.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

(Signed)

Basin Electric Power Cooperative
Tri-State Generation and Transmission Association, Inc.
City of Lincoln
Wyoming Municipal Power Agency
The State of Nebraska (Governor and Attorney General)
The National Wildlife Federation, Inc.
The Nebraska Wildlife Federation
National Audubon Society, Inc.
Powder River Basin Resource Council
Laramie River Conservation Council
Deputy Assistant Attorney General*
Land and Natural Resources Division
Department of Justice
Administrator, Rural Electrification Administration*
District Engineer, Omaha District*
U.S. Army Corps of Engineers

*The Justice Department, the Rural Electrification Administration and the Corps of Engineers have no involvement in Sections 11 and 16 of this Agreement.

[EXHIBITS OMITTED]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 78-1775

State of Nebraska, et al.,
Appellees,
v.
Basin Electric Power
Cooperative, Inc., et al.,
Appellants.

No. 78-1778

State of Nebraska, et al.,
Appellees,
v.
Rural Electrification
Administration et al.,
Appellants.

Appeals from the United States District Court for the District of Nebraska

Filed: February 27, 1979

Before GIBSON, Chief Judge, HEANEY and STEPHENSON, Circuit Judges.

ORDER

This cause having come before the court on a "Joint Motion Filed on Behalf of All Parties for an Order Dismissing Appeals, Vacating the Judgment Below, and Remanding the Cases to the District Court with Instructions to Dismiss With Prejudice," and the court having fully considered that motion, the accompanying Stipulation and Joint Memorandum of Law, and the entire record herein, it is

ORDERED that the amended judgment of the district

court below which was entered on October 23, 1978, and docketed on October 24, 1978, is hereby vacated;

FURTHER ORDERED that these consolidated appeals are hereby dismissed;

FURTHER ORDERED that these cases are hereby remanded to the district court with instruction to dismiss the cases with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978, which is attached as Exhibit A to the parties' Joint Memorandum of Law and which is incorporated herein by reference; and

FURTHER ORDERED that, except as specifically provided in the Agreement of Settlement and Compromise, each party is to bear its own costs incurred in this litigation. Mandate will issue forthwith.

A true copy.

Attest: (Signed)
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, et al., Plaintiffs,	)	
vs.	)	ORDER OF
RURAL ELECTRIFICATION ADMINISTRATION, et al., Defendants.	)	DISMISSAL
	)	CV76-L-242

Pursuant to the mandate from the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that this case is dismissed with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978.

Dated March 23, 1979.

BY THE COURT
(Signed)
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, et al.	)	
Plaintiffs,	)	ORDER OF
vs.	)	DISMISSAL
JAMES W. RAY, et al.	)	CV78-L-90
Defendants.	)	

Pursuant to the mandate from the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that this case is dismissed with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978.

Dated March 23, 1979.

BY THE COURT
(Signed)
Chief Judge

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE	)	19-460
	)	OBJECTION TO
CORN CREEK	)	PETITION FOR
	)	FORMATION OF
IRRIGATION DISTRICT.	)	IRRIGATION DISTRICT

COMES NOW the State of Nebraska, by and through Paul L. Douglas, Attorney General of the State of Nebraska, by the authority vested in his office under Neb.Rev.Stat. §84-207 (Reissue 1976), and objects to the petition filed herein for reason that said petition and accompanying preliminary engineering report fail to fairly and reasonably establish the feasibility of the district and the sufficiency of the proposed water supply. In support of this objection the objector respectfully represents to the court as follows:

I.

That the State of Nebraska files this objection under the provisions of section 41-279 *Wyo. Stats.* (1957), as a person who may be affected by the formation of the Corn Creek Irrigation District since the waters proposed to be appropriated and used by the district are waters which normally flow from the Laramie River into the North Platte River and are eventually used by Nebraska citizens for agricultural, industrial and domestic purposes. These Laramie River flows, by contributing to the total flow of the North Platte River in Nebraska, are also necessary to maintain the quality of the environment in the North Platte and Platte River Basins in Nebraska.

II.

That the petitioner states that it has a contract for

storage of 22,500 acre-feet of water with Basin Electric Power Cooperative, which water is to be stored in the proposed Greyrocks Reservoir which is to be located on the Laramie River in Wyoming.

III.

That before Greyrocks Reservoir can be constructed, Section 404 of the Federal Water Pollution Control Act (33 U.S.C. §1344, as amended) requires the issuance of a permit by the United States Army Corps of Engineers. Thus far, Basin Electric Power Cooperative, as project manager, has failed to obtain this permit from the Corps. Without said permit the reservoir cannot be constructed and without the reservoir Basin Electric Power Cooperative cannot deliver 22,5000 acre-feet of storage water to the district.

IV.

That the State of Nebraska has filed a complaint in the United States District Court for the District of Nebraska (State of *Nebraska v. Rural Electrification Administration, et al.*, CV-76-L-242), a copy of which is attached hereto and incorporated herein. Basin Electric Power Cooperative, as project manager, has been permitted to intervene as a party defendant in that proceeding which is scheduled for trial in October, 1978. Also attached hereto and incorporated herein is an affidavit of James L. Grahl, which was filed in support of the motion of Basin Electric Power Cooperative to intervene in those proceedings. The objectors respectfully request the court to consider the statement in paragraph 8 of that affidavit. The statement in paragraph 8 shows that construction of Greyrocks Reservoir and Power Plant depends upon Rural Electrification Administration guaranteed financing. Pendency and final resolution of that action could jeopardize project financing and construction, and accordingly, the ability of Basin Electric Power Coopera-

tive to deliver 22,500 acre-feet of water to the petitioners herein.

V.

That the State of Nebraska has been and is currently negotiating with Basin Electric Power Cooperative concerning the construction and operation of the proposed Greyrocks Reservoir. The State of Nebraska has offered to withdraw its litigation and objections to the issuance of the 404 Permit if Basin Electric Power Cooperative guarantees to release certain amount of water from the reservoir which will flow into the North Platte River and into Nebraska for uses within Nebraska. The State of Nebraska believes that guaranteed releases from the reservoir will protect rights and established uses of Nebraska citizens to those flows in addition to those rights to the contributions of water the Laramie River makes to the North Platte River which accrue to the State of Nebraska under the United States Supreme Court decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), as modified June 15, 1953. Furthermore we also seek, through an agreement on guaranteed releases, to alleviate our concern that the water consumed in generating electricity by the project may have detrimental effects upon the environment and economy of the State of Nebraska. The objector believes that there is not enough water available in the Laramie River, including all water proposed to be impounded in Greyrocks Reservoir, to meet the total requirements of the State of Nebraska, the project and the proposed irrigation district.

VI.

That because of the foregoing the State of Nebraska submits that there are serious doubts about the reliability, sufficiency and future status of the district's proposed water supply.

WHEREFORE, the objector prays that the court dismiss said petition at the cost of the petitioner. In the alternative the objector prays this court enter an order continuing this matter until Basin Electric Power Cooperative has received its Section 404 Permit from the Corps of Engineers and until the issues in *Nebraska v. Rural Electrification Association, et al.*, have been resolved, or until such other time or contingency as the court may deem proper.

(Signed)
Paul L. Douglas
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Gerald Connolly, Local Counsel
110 West 22nd Avenue
Torryington, [sic] Wyoming 82240

STATE OF NEBRASKA)
) ss. VERIFICATION
COUNTY OF LANCASTER)

Paul L. Douglas, being first duly sworn deposes and says that he is the duly elected and acting Attorney General of the State of Nebraska, that he is one of the attorneys for the objector in the above entitled cause, that he has read the above and foregoing Objection and knows the contents thereof and that the allegations of fact in said Objection are true as he verily believes.

(Signed)
Paul L. Douglas, Attorney General
Subscribed and sworn to before me this 29th day of December, 1977.
(Signed)
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Objection to Petition for Formation of Irrigation District upon Mr. Bob C. Sigler, 2020 East "D" Street, Torrington, Wyoming 28840, on this 29th day of December, 1977, by mailing said copy through the United States Mail, with first class postage prepaid.

(Signed)
Paul L. Douglas
Attorney General
State of Nebraska

(Signed)
Gerald Connolly, Local Counsel
110 West 22nd Avenue
Torrington, Wyoming

(Excerpts from Order)

STATE OF WYOMING	)	IN THE DISTRICT COURT
	)SS	EIGHTH JUDICIAL
COUNTY OF GOSHEN	)	DISTRICT
		Docket No. 19-460
In The Matter Of The	)	
	)	
CORN CREEK	)	
IRRIGATION DISTRICT	)	

ORDER

The Petition for the formation of the Corn Creek Irrigation District having come on for hearing on the 5th and 6th days of January, 1978, the petitioners appearing by and through their attorneys Stanley K. Hathaway, Bob C. Sigler and Dan J. Pauli; the contestants Wallace and Dorothy Newton and A.J. Bar Ranch Inc., appearing by and through their attorney Frank J. Jones; the State of Nebraska appearing by and through Steven C. Smith, Assistant Attorney General, State of Nebraska and Gerald Connolly; and the contestants, Robert T. Nelson, O.L. Barkman, Herbert W. Walker, Kenneth M. Walker, Ellen L. Walker, Al Barkman, Patricia C. Barkman, Leo Clark, Norma Clark, Alfred H. Barkman, Erma L. Barkman, Virgil Jagger, Edith A. Jagger, Merle J. Lisle and Shirley A. Lisle, (being the purported purchasers of land from Gurny and Edna Bernice Gregg), Lillie Motsick, William J. Motsick, Wallace Newton (as to his separate petition to exclude lands not presently included in the boundaries of the proposed district), Kenneth R. Pursley, Dale Bremer, Miriam Bremer, Ralph Bremer, Lenore Bremer, Tony Pontarola, Pete Pontarola, James M. Pontarola, Jeanette M. Pontarola, J.E. Tittle, Louise Tittle, Bruce A. Jagger, Trustee, R.E. Thompson, Evelyn P. Thompson, William A. Duncan, Keith O. Duncan and Charles Ross appearing through Bruce A. Jagger and Gerald Connolly; and Bruce A. Jagger also

representing himself as trustee and personally as a contestant; and the Court having examined the files herein and having heard all the testimony and the arguments of counsel and being fully advised in the premises:

THE COURT DOTH FIND that the Petition filed herein for the formation of the Corn Creek Irrigation District is sufficient and that it is signed by a sufficient number of parties and that due and timely notice of this hearing has been given as required by law and by Order of this Court, and that the Court has jurisdiction in this matter.

THE COURT DOTH FURTHER FIND that the Corn Creek Irrigation District as proposed is feasible and that the report of the engineer accompanying said Petition is sufficient and the approval of the State Engineer is adequate and that an Order should be entered for the formation of said District.

THE COURT DOTH FURTHER FIND, as to the protest filed by the State of Nebraska, that the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the proposed District, and therefore, the State of Nebraska has no grounds for objection to the creation of said District and that its protest should therefore be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Petition for the formation of the Corn Creek Irrigation District filed herein be, and the same is hereby, in all things ratified, approved and confirmed.

2. That the Corn Creek Irrigation District, with the boundaries hereinafter fixed and determined, be, and the same is hereby organized and established as a corporation by the name of the "CORN CREEK IRRIGATION DISTRICT" with all powers and rights granted to such corporations pursuant to Wyoming law.

3. That the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or under any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the Corn Creek Irrigation District, and therefore, the objection of the State of Nebraska to the formation of said District, be, and the same is hereby, denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that this finding, Order and Decree shall be final and conclusive upon all parties in interest unless appealed from to the Wyoming Supreme Court within thirty days after the same is filed in the office of the Clerk of this Court.

DONE IN OPEN COURT.

(Signed)
Judge

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT IN AND FOR GOSHEN COUNTY, WYOMING

STATE OF WYOMING, ex rel., GEORGE L. CHRISTOPULOS, WYOMING STATE ENGINEER, Plaintiff, vs. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION, and DONALD PAUL HODEL, SECRETARY OF THE INTERIOR; C. DALE DUVALL, COMMISSIONER OF RECLAMATION; BILL E. MARTIN, REGIONAL DIRECTOR, MISSOURI BASIN REGION, U.S. BUREAU OF RECLAMATION; DAVID G. WILDE, PROJECT MANAGER, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; KENNETH C. RANDOLPH, CHIEF, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; WILLIAM McCRACKEN, HYDROLOGIC TECHNICIAN, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION, in their official capacities, Defendants.	Docket No. 23-13 Filed October 3, 1986 (Signed) Clerk of District Court, Goshen Co.

COMPLAINT

COMES NOW the State of Wyoming by and through its attorney, A.G. McClintock, Attorney General, and in support of this complaint against Defendants alleges:

1. This action is brought pursuant to W.S. 41-2-111 upon request of the State Engineer to bring a suit to enjoin the unlawful diversion, storage and use of the waters of the State.

2. This court has jurisdiction over this matter pursuant to W.S. 41-2-111, Article 5, Section 10 of the Wyoming Constitution and W.S. 1-37-101 et seq. (1977). In particular, W.S. 41-2-111 empowers the district court to enjoin the unlawful appropriation, diversion or use of waters of the State. A showing of injury in a suit brought pursuant to W.S. 41-2-111 is not required as a condition to the issuance of any temporary restraining order, preliminary or permanent injunction.

3. This District Court has jurisdiction over the Defendants pursuant to the McCarren Amendment, 43 U.S.C. § 666. That Act provides in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by

reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided That no judgment for costs shall be entered against the United States in any such suit.

4. Venue in the District Court of Goshen County, Wyoming is proper since the illegal diversion complained of herein occurs at Whalen Diversion Dam, on the North Platte River in Goshen County, Wyoming.

5. Defendant Donald Paul Hodel is Secretary of the Interior and, pursuant to 43 U.S.C. § 373, is charged by Congress with the duty of carrying out the provisions of the Reclamation Act of 1902, as amended, 43 U.S.C. § 371 et seq.

6. Defendant C. Dale Duvall is Commissioner of Reclamation and, pursuant to 43 U.S.C. § 373a, is charged by Congress with administration of the Reclamation Act of 1902, as amended, 43 U.S.C. §§ 371 et seq.

7. Defendant Bill E. Martin is the Regional Director for the Missouri Basin Region, U.S. Bureau of Reclamation (Bureau) which region includes the part of the North Platte River drainage that is relevant to this suit.

8. Defendants David G. Wilde, Project Manager, Kenneth C. Randolph, Chief of Land and Water Operations, and William McCracken, Hydrologic Technician, are employees of the U.S. Bureau of Reclamation in the North Platte River Projects Office in Mills, Wyoming and are responsible for the Bureau operations and facilities relevant to this action.

9. The Defendant United States owns and, through the

remaining Defendants, controls the diversion structures, conveyance systems and storage facilities in the "North Platte Project" along with the other storage facilities on the North Platte River in Wyoming where the unlawful acts occur and are therefore necessary parties to this suit.

10. The "North Platte Project" consists of reservoirs, structures and a system of canals and ditches that convey and distribute waters of the North Platte River to lands in Wyoming and Nebraska as part of a federal reclamation project. Defendants' Pathfinder Reservoir, Guernsey Reservoir, Whalen Diversion Dam, the Interstate Canal and four off-channel reservoirs (hereinafter referred to as the Inland Lakes) located in Nebraska and supplied by the Interstate Canal are the relevant component parts of the "North Platte Project."

11. The "North Platte Project" was planned, constructed and is to be operated in accordance with the provisions of an Act of Congress known as the Reclamation Act of 1902 as amended. 32 Stat. 388. Section 8 of that Act provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and

beneficial use shall be the basis, the measure, and the limit of the right.

Id. at 390 (See 43 U.S.C. §§372, 383).

12. The North Platte River in Wyoming from which the unlawful diversions complained of herein are made is subject to administration according to Wyoming law and the terms and conditions of the Supreme Court's Order and Decree entered in *Nebraska v. Wyoming*, 325 U.S. 665, 66 S.Ct. 1, 89 L.Ed.2d 1857 (1945). Neither the Supreme Court's decree or its opinion in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815, (1945) relieved the Defendants from the duty of complying with the provisions of Wyoming law in order to appropriate, divert or use the waters of the North Platte River in Wyoming.

13. Article 8 Section 1 of the Wyoming Constitution provides that the water of all natural streams, springs, lakes or other collections of still water within the boundaries of the State are property of the Plaintiff, State of Wyoming.

14. Article 8 Section 3 of the Wyoming Constitution provides that priority of appropriation for beneficial uses shall give the better right.

15. Article 8 Section 5 of the Wyoming Constitution empowers the State Engineer to supervise the distribution of the waters of the State.

16. Pursuant to W.S. 41-4-501, any person, association or corporation intending to beneficially use the public water of the State must apply for and obtain a permit before doing so.

17. Pursuant to W.S. 41-3-301 et seq. (1977), any person, corporation, association or organization, of any nature

whatsoever, intending to divert water for beneficial use through storage must first apply for and obtain a permit before doing so.

18. Any person, association or corporation intending to store water in an off-stream reservoir is required to apply for and obtain a permit for the diversion of water through the reservoir supply canals to the reservoir and for the reservoir itself. W.S. 41-3-301 et seq. and W.S. 41-4-501 et seq. (1977).

19. Defendants are "persons" as defined by W.S. 8-1-102(a)(vi) and used in W.S. 41-4-301 et seq. and 41-3-501 et seq. and are subject to the provisions of Wyoming law.

20. Before Wyoming's waters can be appropriated, stored or diverted within this State for use outside of the State, compliance with the provisions of W.S. 41-3-115 (1977) is required.

21. Pursuant to Wyoming law, Defendants have secured adjudicated water rights for the "North Platte Project" for storage of water in Pathfinder Reservoir and Guernsey Reservoir. This water is allocated for irrigation of lands in Wyoming and Nebraska served through the Interstate Canal.

22. Defendants have not applied for or secured a permit to divert the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes pursuant to Wyoming law. There is no other means of acquiring the right to divert Wyoming water for that purpose than through those provisions of Wyoming law set forth above. *Lewis v. Board of Control*, 699 P.2d 822 (Wyo. 1986).

23. Defendants have been diverting, are now diverting, and intend to [illegible] the natural flow of the

North Platte River at Whalen Diversion Dam, Goshen County, Wyoming through the Interstate Canal for storage in the Inland Lakes.

24. Defendant's diversion of the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes is unlawful and therefore must cease.

25. Additionally, Defendants have in the past, are now and intend to continue diverting, accumulating and storing the natural flow of the North Platte River in their reservoirs in Wyoming for the benefit of the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs contrary to Wyoming law.

26. Defendants have neither applied for nor secured the necessary permits pursuant to Wyoming law to divert, accumulate and store water for the benefit of Inland Lakes in the manner described above in allegation 25. W.S. 41-3-301 et seq. and 41-4-501 et seq.

27. Defendants' accumulation and storage of natural flow waters in their Wyoming reservoirs, in the manner described above in allegation 25 for the benefit of Inland Lakes is unlawful and therefore must cease.

WHEREFORE, Plaintiff prays:

1. That this Court declare that Defendants have no rights to divert the natural flows of the North Platte River in Wyoming in any manner for storage in the Inland Lakes until they acquire such a right in the manner prescribed by Wyoming law.

2. That this Court permanently enjoin Defendants,

their agents, employees, and representatives from diverting natural flows of the North Platte River in Wyoming through the Interstate Canal for storage in the Inland Lakes or in any manner diverting, accumulating and storing water within their Wyoming reservoirs on the North Platte River for the benefit of storage in the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs until the Defendants have complied with the laws of the State of Wyoming.

3. That this Court grant such other relief as it may deem necessary, just and proper.

Respectfully submitted this 3rd day of October, 1986.

(Signed)
A.G. McClintock
Attorney General
Jennifer Hager
Assistant Attorney General
Dennis C. Cook
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

PLAINTIFF'S ATTORNEYS

State of Wyoming)
) ss
County of Laramie)

George L. Christopulos, being duly sworn, deposes and says: he is the State Engineer for the State of Wyoming, the above named Plaintiff; he has read the foregoing complaint and the same is true to the best of his knowledge and belief.

(Signed)
George L. Christopulos

Subscribed and sworn to before me this 3rd day of October, 1986.

(Signed)
Notary Public

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 6, Original

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING AND STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
F. HENRY HABICHT II
Assistant Attorney General
ANDREW F. WALCH
JOHN LINDSKOLD
PATRICIA L. WEISS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217



In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 6, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING AND STATE OF COLORADO

ON MOTION FOR LEAVE TO FILE PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

MEMORANDUM FOR THE UNITED STATES

The State of Nebraska seeks leave to file a petition for an order enforcing this Court's decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), which establishes an interstate apportionment of the flow of the North Platte River.[1] The United States, a party to the original action, suggests that this Court grant leave to file the petition and refer the matter to a Court-appointed Special Master for further consideration.

1. In 1934, the State of Nebraska sought leave to file an original action in this Court to resolve a dispute with the State of Wyoming over the use of the water of the North Platte River. *Nebraska* v. *Wyoming*, No. 6, Orig. (filed Oct. 8, 1934). This Court granted Nebraska leave to file the complaint (293 U.S. 523 (1934)), denied Wyoming's motion to dismiss (295 U.S. 40 (1935)), and appointed a Special Master (296 U.S. 542 (1935)). The State of Colorado was impleaded as a defendant (296 U.S. 553 (1935)) and the United States was granted leave to intervene (304 U.S. 545 (1938)).

[1] The decree is set forth at 325 U.S. at 665-672.

Six years later, after lengthy hearings, the Special Master submitted his report. This Court heard argument on exceptions to the report and, on June 11, 1945, issued an opinion providing for equitable apportionment of the natural flow of the North Platte River among the three States (325 U.S. 589). The Court entered a decree on October 8, 1945, that specified each State's obligations (*id.* at 665-672). The decree expressly provided that the Court would retain jurisdiction of the suit and that "[a]ny of the parties may apply at the foot of this decree for its amendment [and] further relief" (*id.* at 671). This Court later modified and supplemented the decree upon joint request of the parties (345 U.S. 981 (1953)).

2. Nebraska contends that "[t]he State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Decree" (Neb. Pet. 2). Nebraska cites four bases for this allegation. It claims that Wyoming threatens the flow of the North Platte River by (a) the operation of the Greyrocks Reservoir on the Laramie River; (b) the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and North Platte rivers; and (c) the proposed construction of storage capacity on certain tributaries entering the North Platte River (*ibid.*). Nebraska also claims that Wyoming officials have attempted "to prevent the United States' Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes of Nebraska for the benefit of water users in the State of Nebraska" (*ibid.*).[2]

---

[2] The United States, at present, has only limited familiarity with Nebraska's first three bases for relief. However, the fourth basis apparently relates to a suit by the State of Wyoming, filed on October 3, 1986, in Wyoming state court, against the United States, the Secretary of the Interior, and numerous officials of the Bureau of Reclamation. *State of Wyoming, ex. rel. George L. Christopulos, Wyoming State*

3. This Court stated in *Nebraska* v. *Wyoming, supra*, that the longstanding dispute over the use of the North Platte River presents a "clash of interests * * * of that character and dignity which makes the controversy a justiciable one under our original jurisdiction" (325 U.S. at 610). The Court recognized that "[t]he matter is a delicate one and extremely complex" (*id.* at 617). It drafted the decree to resolve the immediate controversy and to provide sufficient flexibility to address future circumstances, stating (*id.* at 620):

> But a controversy exists; and the decree which is entered must deal with conditions as they obtain today. If they substantially change, the decree can be adjusted to meet the new conditions.

See also *id.* at 622-623 ("If conditions of supply substantially change, any party can apply for modification of the decree."). The Court expressly retained jurisdiction to provide appropriate relief, fully anticipating that future disputes might arise (*id.* at 655, 671-672; 345 U.S. at 981).

Nebraska's petition—objecting to Wyoming's operation of present works, construction of future works, and challenges to Bureau of Reclamation activities (Pet. 2)—appears to identify a substantial interstate dispute that threatens to "disturb the delicate balance of the river" (325 U.S. at 625). Furthermore, the dispute appears to fall

---

State Engineer v. *United States of America, et al.*, No. 23-13 (8th Judicial District, Goshen Co., Wyo.). The complaint (reproduced as an addendum to this memorandum), asserts that the United States, in operating the Bureau of Reclamation's North Platte Project, has failed to comply with Wyoming law in diverting water from the North Platte River through the Interstate Canal for storage in Nebraska's Inland Lakes. See Addendum, *infra*, 6a-7a. The United States has removed this action to federal court and its answer is presently due on January 31, 1987. Nebraska may be an indispensable party to the dispute.

within this Court's retained jurisdiction under the decree.[3] We therefore suggest that the Court grant Nebraska's motion for leave to file its petition and that it appoint a Special Master to examine the matters raised by Nebraska, as well as any other related issues properly raised by Wyoming, Colorado, or the United States.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ANDREW F. WALCH
JOHN LINDSKOLD
PATRICIA L. WEISS
Attorneys

DECEMBER 1986

---

[3] This Court observed in fashioning the decree that the creation of future additional tributary storage between the Pathfinder and Guernsey reservoirs could require "an appropriate restriction" (325 U.S. at 625; see also *id.* at 671-672). And the Court repeatedly observed that the North Platte Project, including the preexisting Inland Lake reservoirs (Lake Alice and Lake Minatare), are entitled to water under the decree (see *id.* at 624-625, 633, 639-640, 646-647, 649 & n.2).

ADDENDUM

IN THE DISTRICT COURT OF
THE EIGHTH JUDICIAL DISTRICT
IN AND FOR GOSHEN COUNTY, WYOMING

Docket No. 23-13

STATE OF WYOMING, EX REL., GEORGE L. CHRISTOPOLUS, WYOMING STATE ENGINEER, PLAINTIFF,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION, AND DONALD PAUL HODEL, SECRETARY OF THE INTERIOR; C. DALE DUVALL, COMMISSIONER OF RECLAMATION; BILL E. MARTIN, REGIONAL DIRECTOR, MISSOURI BASIN REGION, U.S. BUREAU OF RECLAMATION; DAVID G. WILDE, PROJECT MANAGER, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; KENNETH C. RANDOLPH, CHIEF, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; WILLIAM MCCRACKEN, HYDROLOGIC TECHNICIAN, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS.

[Filed Oct. 3 1986]

COMPLAINT

COMES NOW the State of Wyoming by and through its attorney, A. G. McClintock, Attorney General, and in support of this complaint against Defendants alleges:

1. This action is brought pursuant to W.S. 41-2-111 upon request of the State Engineer to bring a suit to enjoin the unlawful diversion, storage and use of the waters of the State.

2. This court has jurisdiction over this matter pursuant to W.S. 41-2-111, Article 5, Section 10 of the Wyoming Constitution and W.S. 1-37-101 et seq. (1977). In particular, W.S. 41-2-111 empowers the district court to enjoin the unlawful appropriation, diversion or use of waters of the State. A showing of injury in a suit brought pursuant to W.S. 41-2-111 is not required as a condition to the issuance of any temporary restraining order, preliminary or permanent injunction.

3. This District Court has jurisdiction over the Defendants pursuant to the McCarren Amendment, 43 U.S.C. § 666. That Act provides in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided That no judgment for costs shall be entered against the United States in any such suit.

4. Venue in the District Court of Goshen County, Wyoming is proper since the illegal diversion complained of herein occurs at Whalen Diversion Dam, on the North Platte River in Goshen County, Wyoming.

5. Defendant Donald Paul Hodel is Secretary of the Interior and, pursuant to 43 U.S.C. § 373, is charged by Congress with the duty of carrying out the provisions of the Reclamation Act of 1902, as amended. 43 U.S.C. § 371 et seq.

6. Defendant C. Dale Duvall is Commissioner of Reclamation and, pursuant to 43 U.S.C. § 373a, is charged by Congress with administration of the Reclamation Act of 1902, as amended. 43 U.S.C. §§ 371 et seq.

7. Defendant Bill E. Martin is the Regional Director for the Missouri Basin Region, U.S. Bureau of Reclamation (Bureau) which region includes the part of the North Platte River drainage that is relevant to this suit.

8. Defendants David G. Wilde, Project Manager, Kenneth C. Randolph, Chief of Land and Water Operations, and William McCracken, Hydrologic Technician, are employees of the U.S. Bureau of Reclamation in the North Platte River Projects Office in Mills, Wyoming and are responsible for the Bureau operations and facilities relevant to this action.

9. The Defendant United States owns and, through the remaining Defendants, controls the diversion structures, conveyance systems and storage facilities in the "North Platte Project" along with the other storage facilities on the North Platte River in Wyoming where the unlawful acts occur and are therefore necessary parties to this suit.

10. The "North Platte Project" consists of reservoirs, structures and a system of canals and ditches that convey and distribute waters of the North Platte River to lands in Wyoming and Nebraska as part of a federal reclamation project. Defendants' Pathfinder Reservoir, Guernsey Reservoir, Whalen Diversion Dam, the Interstate Canal and four off-channel reservoirs (hereinafter referred to as

the Inland Lakes) located in Nebraska and supplied by the Interstate Canal are the relevant component parts of the "North Platte Project."

11. The "North Platte Project" was planned, constructed and is to be operated in accordance with the provisions of an Act of Congress known as the Reclamation Act of 1902 as amended. 32 Stat. 388. Section 8 of that Act provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Id. at 390 (See 43 U.S.C. §§ 372, 383).

12. The North Platte River in Wyoming from which the unlawful diversions complained of herein are made is subject to administration according to Wyoming law and the terms and conditions of the Supreme Court's Order and Decree entered in *Nebraska* v. *Wyoming*, 325 U.S. 665, 66 S.Ct. 1, 89 L.Ed.2d 1857 (1945). Neither the Supreme Court's decree or its opinion in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815, (1945) relieved the Defendants from the duty of complying

with the provisions of Wyoming law in order to appropriate, divert or use the waters of the North Platte River in Wyoming.

13. Article 8 Section 1 of the Wyoming Constitution provides that the water of all natural streams, springs, lakes or other collections of still water within the boundaries of the State are property of the Plaintiff, State of Wyoming.

14. Article 8 Section 3 of the Wyoming Constitution provides that priority of appropriation for beneficial uses shall give the better right.

15. Article 8 Section 5 of the Wyoming Constitution empowers the State Engineer to supervise the distribution of the waters of the State.

16. Pursuant to W.S. 41-4-501, any person, association or corporation intending to beneficially use the public water of the State must apply for and obtain a permit before doing so.

17. Pursuant to W.S. 41-3-301 et seq. (1977), any person, corporation, association or organization, of any nature whatsoever, intending to divert water for beneficial use through storage must first apply for and obtain a permit before doing so.

18. Any person, association or corporation intending to store water in an off-stream reservoir is required to apply for and obtain a permit for the diversion of water through the reservoir supply canals to the reservoir and for the reservoir itself. W.S. 41-3-301 et seq. and W.S. 41-4-501 et seq. (1977).

19. Defendants are "persons" as defined by W.S. 8-1-102(a)(vi) and used in W.S. 41-4-301 et seq. and 41-3-501 et seq. and are subject to the provisions of Wyoming law.

20. Before Wyoming's waters can be appropriated, stored or diverted within this State for use outside of the State, compliance with the provisions of W.S. 41-3-115 (1977) is required.

21. Pursuant to Wyoming law, Defendants have secured adjudicated water rights for the "North Platte Project" for storage of water in Pathfinder Reservoir and Guernsey Reservoir. This water is allocated for irrigation of lands in Wyoming and Nebraska served through the Interstate Canal.

22. Defendants have not applied for or secured a permit to divert the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes pursuant to Wyoming law. There is no other means of acquiring the right to divert Wyoming water for that purpose than through those provisions of Wyoming law set forth above. *Lewis v. Board of Control*, 699 P.2d 822 (Wyo. 1986).

23. Defendants have been diverting, are not diverting, and intend to continue diverting the natural flow of the North Platte River at Whalen Diversion Dam, Goshen County, Wyoming through the Interstate Canal for storage in the Inland Lakes.

24. Defendant's diversion of the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes is unlawful and therefore must cease.

25. Additionally, Defendants have in the past, are now and intend to continue diverting, accumulating and storing the natural flow of the North Platte River in their reservoirs in Wyoming for the benefit of the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs contrary to Wyoming law.

26. Defendants have neither applied for nor secured the necessary permits pursuant to Wyoming law to divert, accumulate and store water for the benefit of Inland Lakes in the manner described above in allegation 25. W.S. 41-3-301 et seq. and 41-4-501 et seq.

27. Defendant's accumulation and storage of natural flow waters in their Wyoming reservoirs, in the manner described above in allegation 25 for the benefit of Inland Lakes is unlawful and therefore must cease.

WHEREFORE, Plaintiff prays:

1. That this Court declare that Defendants have no right to divert the natural flows of the North Platte River in Wyoming in any manner for storage in the Inland Lakes until they acquire such a right in the manner prescribed by Wyoming law.

2. That this Court permanently enjoin Defendants, their agents, employees, and representatives from diverting natural flows of the North Platte River in Wyoming through the Interstate Canal for storage in the Inland Lakes or in any manner diverting, accumulating and storing water within their Wyoming reservoirs on the North Platte River for the benefit of storage in the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs until the Defendants have complied with the laws of the State of Wyoming.

3. That this Court grant such other relief as it may deem necessary, just and proper.

Respectfully submitted this 3rd day of October, 1986.

/s/ A. G. McClintock

A. G. McClintock
Attorney General

/s/ Jennifer Hager

Jennifer Hager
Assistant Attorney General

/s/ DENNIS C. COOK

Dennis C. Cook
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

PLAINTIFF'S ATTORNEYS

State of Wyoming)
) ss
County of Laramie)

George L. Christopulos, being duly sworn, deposes and says: he is the State Engineer for the State of Wyoming, the above named Plaintiff; he has read the foregoing complaint and the same is true to the best of his knowledge and belief.

/s/ GEORGE L. CHRISTOPULOS

George L. Christopulos

Subscribed and sworn to before me this 3rd day of October, 1986.

/s/ FRANCIS A. CARR

Notary Public

My Commission expires: March 14, 1987.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40145

Supreme Court, U.S.
FILED
MAR 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

(1)

No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

ANSWER OF THE UNITED STATES

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ANDREW F. WALCH
JOHN E. LINDSKOLD
PATRICIA L. WEISS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

5 pp

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

ANSWER OF THE UNITED STATES

The United States, in response to the petition of the State of Nebraska to enforce the provisions of the Decree of October 8, 1945 (as amended on June 15, 1953) and for injunctive relief, states as to each averment of the petition:

1. The averments of paragraph 1 are admitted.

2. In response to the averments of paragraph 2, the United States avers that the Decree is an apportionment of the natural flow of the Platte River, one which places "a restraint on the storage of water in Pathfinder, Guernsey, Seminoe, and Alcova Reservoirs, so as to protect the Nebraska lands served by the French Canal and the State Line Canals" (*Nebraska* v. *Wyoming*, 325 U.S. 589, 630 (1945)) as well as Nebraska lands served by the Interstate Canal and the Ft. Laramie Canal (*id.* at 633). Except as so averred, the United States is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 2 of the petition.

3. In response to the averments of paragraph 3(d), the United States admits that the State of Wyoming has filed suit against it and Department of the Interior officials to enjoin them from continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage at the Inland Lakes of Nebraska, based on the allegation that the United States is without Wyoming water rights and must obtain Wyoming water rights for storage water at the Inland Lakes. Except as so admitted, the United States is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 3 of the petition.

4. The averments of paragraph 4 are admitted to the extent that they pertain to the averments of paragraph 3(d) of the petition. The United States is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 4 of the petition.

5. The United States is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 5 of the petition.

6. The United States is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 6 of the petition.

7. The averments of paragraph 7 are conclusions of law to which no response is required.

8. The United States admits that the portions of the Decree of October 8, 1945, as modified on June 15, 1953, are as quoted in paragraph 8 of the petition.

AFFIRMATIVE DEFENSES AND ADDITIONAL AVERMENTS

1. The United States, through the Bureau of Reclamation, operates the North Platte Project which, *inter alia*, provides irrigation water in Wyoming and Nebraska. For project purposes, the United States obtained water rights

from the State of Wyoming to divert and store the natural flow of the North Platte River, in part for delivery of water to the Inland Lakes of Nebraska for irrigation of lands in Nebraska.

2. The operation of the North Platte Project is in accordance with Federal reclamation law and laws authorizing appropriations for construction of the project. The diversion of winter water flows to the Inland Lakes has been in effect since the inception of project operations in 1915 and during the time of previous litigation that led to this Court's Decree of October 8, 1945. The diversion of winter water flows was recognized in the accompanying decision (325 U.S. at 646, 649 n.2). Accordingly, Wyoming is precluded and estopped from challenging this mode of operation in this proceeding.

3. Any modification of the decree must accommodate the contractual rights and obligations of the United States and the North Platte Irrigation Districts concerning management and operation of the North Platte Project.

4. Any modification of the decree should accommodate the habitat requirements of migrating birds, including whooping cranes and other threatened and endangered birds along the Platte River in Nebraska, and at the North Platte Wildlife Refuge at the Inland Lakes.

WHEREFORE, the United States respectfully prays that the Court issue an order protecting the rights of the United States in the North Platte Project and the interests of the United States in the Platte River System, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ANDREW F. WALCH
JOHN E. LINDSKOLD
PATRICIA L. WEISS
Attorneys

MARCH 1987

RECEIVED
MAR 19 1987
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 108, Original

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING ANSWER TO PETITION, MOTION FOR LEAVE TO FILE COUNTERCLAIM AND COUNTERCLAIM

JOSEPH B. MEYER
Attorney General
of Wyoming

DENNIS C. COOK
Senior Assistant
Attorney General
Counsel of Record

JENNIFER HAGER
Assistant
Attorney General

State Capitol
Room 123
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder, Colorado 80302
(303) 443-8782

March 18, 1987

No. 108, Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING ANSWER TO PETITION, MOTION FOR LEAVE TO FILE COUNTERCLAIM AND COUNTERCLAIM

ANSWER

Defendant, the State of Wyoming, pursuant to the Court's order dated January 20, 1987, answers the State of Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief as follows:

1. The allegation in paragraph 1 of the Petition is admitted, subject to the following qualifications:

> (a) The Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), as modified, 345 U.S. 981 (1953) ("the Decree"), does not define the extent of Wyoming's right to use water from the North Platte River basin. The Decree does impose certain restrictions on water uses in Wyoming. Wyoming is entitled to use water beneficially from the North Platte River basin, subject only to the restrictions specified in the Decree.

(b) The apportionment of North Platte River natural flows to Nebraska provided by the Decree is only to supply the present beneficial use requirements of lands supplied by diversions at or above Tri-State Dam (including the Ramshorn Canal), up to the amount of water required by such lands irrigated at the time of the Decree. No other interests in Nebraska have any rights to natural flows of the North Platte River under the Decree.

2. The allegations in paragraph 2 of the Petition are denied. Pathfinder and Guernsey Reservoirs are operated for the benefit of lands in both Nebraska and Wyoming. The "restraints on storage" in those reservoirs (as well as Seminoe, Alcova and Glendo Reservoirs) provided by Paragraph IV of the Decree require that they be operated as junior to the priorities of the State Line Canals and the French Canal to the extent of the requirements of the Nebraska lands supplied by those canals, up to the instantaneous and seasonal diversion limitations specified in said Paragraph IV.

3. Wyoming denies each allegation in paragraph 3 of the Petition that it is "presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree". Wyoming denies that it has violated or threatens to violate the Decree in any respect. Wyoming answers further:

(a) Wyoming admits that Grayrocks Reservoir causes certain depletions of the flows of the Laramie River, but denies that such depletions violate the Decree. Wyoming states further that the water rights for Grayrocks Reser-

voir are administered in accordance with Wyoming law.

(b) Wyoming admits that the Corn Creek Irrigation District proposes to construct the Corn Creek Project, including diversion facilities near the mouth of the Laramie River. The project would be supplied primarily by storage water from Grayrocks and Glendo Reservoirs, and also by natural flow diversions from the Laramie River. Wyoming denies that the resulting depletions would violate the Decree.

(c) Wyoming admits that the Wyoming Water Development Commission, an agency of the State, proposes to construct Deer Creek Reservoir, a municipal storage project, on Deer Creek, a tributary of the North Platte River between Pathfinder and Guernsey Reservoirs, and that the project will cause certain depletions to Deer Creek and consequently to the North Platte River. Wyoming denies that such depletions will violate the Decree.

(d) Wyoming admits that on October 3, 1986 (before this suit was filed by Nebraska), Wyoming filed a suit on behalf of the Wyoming State Engineer against the United States in a Wyoming District Court relating to four reservoirs in Nebraska known as the Inland Lakes. The suit seeks to require the Bureau of Reclamation to comply with Wyoming law in its diversion of North Platte River natural flows in Wyoming for storage in the Inland Lakes. Wyoming denies that the filing of the lawsuit or the granting of the relief requested therein

would violate Nebraska's rights under the Decree. Wyoming asserts that the Bureau of Reclamation has no right to divert natural flow water in Wyoming for storage in the Inland Lakes without the permits required by Wyoming law. Wyoming denies that its officials have taken any other action to prevent the Bureau of Reclamation's diversion of North Platte River water for storage in the Inland Lakes.

4. Each allegation in paragraph 4 of the Petition is denied.

5. Each allegation in paragraph 5 of the Petition is denied. Wyoming denies that Nebraska has made any earnest effort to resolve the matters raised by the allegations in its Petition.

6. Each allegation in paragraph 6 of the Petition is denied.

7. Each allegation in paragraph 7 of the Petition is denied.

8. Wyoming admits the allegation in paragraph 8 of the Petition, subject to the following qualification: The relief requested in the Petition is enforcement of the existing Decree; "Nebraska does not seek to modify the Decree in any respect. . . ." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2. In Paragraph XIII of the Decree, this Court retained jurisdiction for the purpose, *inter alia*, of enforcement of the Decree and thus has retained jurisdiction for purposes of the relief requested in this suit. The

Court's jurisdiction has not been invoked for any other purpose, and the references in the Petition to the Court's retained jurisdiction for other purposes therefore are irrelevant.

9. Each and every allegation in the Petition not expressly admitted or denied is hereby denied.

AFFIRMATIVE DEFENSES

1. Nebraska's Petition does not allege facts which, if true, would establish any violation or threatened violation of the Decree.

2. Nebraska has no right to water from the Laramie River because the Laramie River was fully apportioned between the states of Wyoming and Colorado in *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922); 353 U.S. 953 (1957). A claim to water from the Laramie River was asserted by Nebraska and rejected by this Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and that matter is *res judicata*.

3. Nebraska agreed to the construction and operation of the Grayrocks Reservoir in an Agreement of Settlement and Compromise dated December 4, 1978, among Nebraska, Basin Electric Power Cooperative (the operator of Grayrocks Reservoir) and others. That agreement provided for the construction and operation of Grayrocks Reservoir. Nebraska is estopped to assert that construction or operation of Grayrocks Reservoir in accordance with that agreement violates Nebraska's rights under the Decree.

4. Nebraska's claim here to water from the Laramie

River was previously asserted by Nebraska in a court of competent jurisdiction. *In re Corn Creek Irrigation District*, Civil Action No. 19-460, District Court, Eighth Judicial District of Wyoming. The decree entered by that court on January 20, 1978, determined that Nebraska had no right to water from the Laramie River under the North Platte Decree or otherwise. Nebraska chose not to appeal that determination. The time for appeal has expired, and that determination bars Nebraska's claim to Laramie River water in this proceeding or any subsequent proceeding.

5. Nebraska's claim to water from the Laramie River is barred by laches.

6. The Deer Creek Project is a proposed municipal storage project to supply water for ordinary and usual municipal purposes and consumption within the meaning of Paragraph X of the Decree. Therefore, Nebraska has no right under the Decree to complain about construction of Deer Creek Reservoir.

7. The Decree does not in any way restrict the use of water from any of the tributaries of the North Platte River below Pathfinder Dam. Therefore, the construction of Deer Creek Reservoir will not violate the Decree.

8. Nebraska's rights to natural flows under the Decree are limited to the irrigation canals specified in the Decree that supply lands in Nebraska with water diverted at or above Tri-State Dam (including the Ramshorn Canal). To the extent that Nebraska's claims here are asserted on behalf of interests other than those canals, Nebraska's claims are not cognizable under the Decree.

9. In the proceedings in which the Decree was entered, Nebraska affirmatively argued, and this Court determined, that the United States is subject to the laws of Wyoming with respect to the diversion or storage of water from sources in Wyoming. Nebraska is barred from asserting otherwise now.

10. The pending civil action regarding the Inland Lakes referred to in paragraph 3(d) of Wyoming's answer herein was initiated prior to this suit. That action was filed by Wyoming in a court of competent jurisdiction to determine the extent of the rights of the United States, a Wyoming appropriator, to divert the natural flows of the North Platte River in Wyoming for storage in the Inland Lakes. That pending action is the appropriate one to determine the water rights of the United States.

MOTION FOR LEAVE TO FILE COUNTERCLAIM

Defendant, State of Wyoming, hereby requests leave of the Court to file the counterclaim submitted herewith. The grounds for this motion are:

The Court has granted leave to Nebraska to file its Petition for an Order Enforcing Decree and for Injunctive Relief, and Wyoming has answered that Petition. The counterclaim submitted herewith would be permitted under FED. R. CIV. P. 13(b). The Federal Rules of Civil Procedure may be taken as a guide to procedure in original actions in this Court. SUP. CT. R. 9.2. The counterclaim would not unduly complicate this litigation, but instead would further clarify the parties' rights under the Decree. In the interests of judicial economy and equity, Wyoming should be allowed to seek redress

in this original action for Nebraska's violations of Decree.

The United States and Colorado have not filed pleadings disclosing their positions in this proceeding. Wyoming therefore reserves the right to assert claims against those parties after their status and position have been disclosed.

COUNTERCLAIM

Defendant, State of Wyoming, assert the following counterclaim against Plaintiff, State of Nebraska:

1. This Court has jurisdiction of this counterclaim under Article III, Section 2, Clause 2, of the Constitution of the United States, under Title 28, United States Code, Section 1251(a), and under Paragraph XIII of the Decree.

2. Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:

> (a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;
>
> (b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or author-

ized by the Decree; and

(c) By using Glendo Reservoir water outside of the basin of the North Platte River in western Nebraska, for uses other than irrigation and as a substitute for storage water previously available under permanent arrangements.

3. Nebraska's past and continuing violations of the Decree have caused and continue to cause irreparable injury to Wyoming and its citizens.

4. Wyoming has no adequate remedy at law to enforce its rights against Nebraska. Injunctive relief is necessary to enforce the Decree and to restrain further violations by Nebraska.

WHEREFORE, having fully answered and having asserted its affirmative defenses and counterclaim, Defendant Wyoming prays that the Court enter an order granting judgment for Wyoming and against Plaintiff Nebraska on each of Nebraska's claims and on Wyoming's counterclaim, and enjoining Nebraska from further violations of the Decree.

Wyoming further requests the Court to appoint a Special Master in this action. Wyoming has submitted herewith a Motion for Appointment of Special Master.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General
of Wyoming

DENNIS C. COOK
Senior Assistant
Attorney General
Counsel of Record

JENNIFER HAGER
Assistant
Attorney General

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder, Colorado 80302
(303) 443-8782

(3)

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

MOTION OF PLATTE RIVER TRUST FOR LEAVE TO INTERVENE AS PLAINTIFF

MEMORANDUM IN SUPPORT OF MOTION

AND

COMPLAINT IN INTERVENTION

ABBE DAVID LOWELL
(Counsel of Record)
PETER J. KIRSCH
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Attorneys for
Intervenor/Plaintiff
Platte River Whooping Crane
Critical Habitat Maintenance
Trust

Of Counsel:

EUGENE GRESSMAN
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

March 20, 1987

40PP

TABLE OF CONTENTS

Motion for Leave to Intervene as Plaintiff

Memorandum in Support of Motion for Leave to Intervene

	Page
Statement of the Case	1
Jurisdiction	2
Reasons for Granting Intervention:	
I. The Platte River Trust meets this Court's standards for intervention in original actions	2
II. The Platte River Trust has interests at issue that are compelling and protectable	4
III. The Platte River Trust's interests will be directly affected by this action	10
IV. The Platte River Trust will not be adequately represented by the existing parties	11
V. The Platte River Trust will present substantial issues which must be resolved in this action	15
VI. The Platte River Trust offers extensive expertise to aid in resolving issues before this Court	20
VII. This proceeding is the most efficient forum in which to address the Platte River Trust's compelling interests	21
Conclusion	23

Complaint in Intervention

Affidavit of Service

TABLE OF AUTHORITIES

	Page
CASES:	
Arizona v. California, 460 U.S. 605, 103 S.Ct. 1382 (1983)	3
Atlantis Development Corp. v. United States, 379 F.2d 818 (5th Cir. 1967)	11
Donaldson v. United States, 400 U.S. 517, 91 S.Ct. 534 (1971)	9
Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S.Ct. 1114 (1982)	9
Kentucky v. Indiana, 281 U.S. 163, 50 S.Ct. 275 (1930)	3,14
In Re Applications 15145, Etc., No. 86-692 (Neb. to be argued Mar. 31, 1987)	13
Little Rock School District v. Pulaski County Special School District, 738 F.2d 82 (8th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2926 (1986)	10,13
Maryland v. Louisiana, 451 U.S. 725, 101 S.Ct. 2114 (1981)	2,3,4,20
Nebraska v. Basin Electric Cooperative, 594 F.2d 870 (8th Cir. 1979)	5,6
Nebraska v. REA, 594 F.2d 870 (8th Cir. 1979)	5,6
Nebraska v. REA, Nebraska v. Ray, Nos. CV76-L-242, CV78-L-90 (D. Neb. Mar. 23, 1979)	5
Nebraska v. REA, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978)	6,22
Nebraska v. Wyoming, 345 U.S. 981, 73 S.Ct. 1041 (1953)	*passim*
Nebraska v. Wyoming, 325 U.S. 665, 66 S.Ct. 1 (1945)	*passim*
Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906 (1983)	22
New Jersey v. New York, 345 U.S. 369, 97 S.Ct. 1081 (1953)	3
Nuesse v. Camp, 385 F.2d 694 (D.C. Cir. 1967)	9,11
Oklahoma v. Texas, 258 U.S. 574, 42 S.Ct. 406 (1922)	3,4

	Page
Oneida Indian Nation v. New York, 732 F.2d 261 (2d Cir. 1984)	11
Riverside Irrigation District v. Stipo, 658 F.2d 762 (10th Cir. 1981), *on remand, Riverside Irrigation District v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985)	22
Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983)	12,13,21
SEC v. Flight Transportation Corp., 699 F.2d 943 (8th Cir. 1983)	9
Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977)	13
Texas v. New Jersey, 379 U.S. 674, 85 S.Ct. 626 (1965)	3
Trbovich v. United Mine Workers, 404 U.S. 528, 92 S.Ct. 630 (1972)	4,12
United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986), *cert. granted*, ____ U.S. ____, 106 S.Ct. 2273 (1986)	11,12
Utah v. United States, 394 U.S. 89, 89 S.Ct. 761 (1969)	4
STATUTES:	
Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986) *to be codified at* 16 U.S.C. § 797	15
Endangered Species Act, Pub. L. 93-205, 87 Stat. 884 (1973); Pub. L. 95-632, 92 Stat. 3751 (1978); Pub. L. 96-159, 93 Stat. 1225 (1979); Pub. L. 97-304, 96 Stat. 1426 (1982), *as codified at*, 16 U.S.C. §§ 1531-1543 (1982 & 1985 Supp.)	5-9,14,15
Fish and Wildlife Coordination Act, ch. 55, 48 Stat. 401 (1934); ch. 965, 60 Stat. 1080 (1946); Pub. L. 85-624, 72 Stat. 563 (1958), *as codified at*, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.)	14,15
Fish and Wildlife Conservation Act, Pub. L. 96-366, 94 Stat. 1322 (1980), *as codified at*, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.)	14,15

	Page
Judiciary Act, 28 U.S.C. § 1251(a) (1982 & 1985 Supp.)	2
Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918); ch. 634, 49 Stat. 1556 (1936); Pub. L. 93-300, 88 Stat. 190 (1974), *as codified at*, 16 U.S.C. §§ 703-712 (1982 & 1985 Supp.)	14
National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (1970), *as codified at*, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.)	15
Neb. Rev. Stat. § 46-2,108 (1984)	13
Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. § 37-430, *et seq.* (1984)	13
U.S. CONSTITUTION:	
U.S. Const. art. I, § 2, cl.2	2
ADMINISTRATIVE REGULATIONS AND ORDERS:	
50 C.F.R. § 17.11 (1986)	5
50 C.F.R. § 17.95 (1986)	5
50 *Fed. Reg.* 50,726 (Dec. 11, 1985)	5
50 *Fed. Reg.* 21,792 (May 28, 1985)	5
49 *Fed. Reg.* 10,526 (Mar. 20, 1984)	5
44 *Fed. Reg.* 3,547 (Jan. 17, 1979)	8
43 *Fed. Reg.* 59,871 (Dec. 22, 1978)	8
43 *Fed. Reg.* 20,938 (May 15, 1978)	5
43 *Fed. Reg.* 6,233 (Feb. 14, 1978)	5
40 *Fed. Reg.* 58,308 (Dec. 16, 1975)	5
35 *Fed. Reg.* 8,495 (June 2, 1970)	5
32 *Fed. Reg.* 4,001 (Mar. 11, 1967)	5
Letter from Lynn Greenwalt, Director, Fish and Wildlife Service to Robert Feragen, Administrator, Rural Electrification Administration (Dec. 8, 1978) ("Grayrocks Biological Opinion")	6-7,18
Decision and Order of the Endangered Species Committee on Application for Grayrocks Dam and Reservoir (Feb. 7, 1979) ("Exemption Decision")	8

	Page
Letter from Assistant Director, Nebraska Game and Parks Commission, to General Manager, Little Blue Natural Resources District in re: Biological Opinion on Catherland Project (Jan. 31, 1983) ("Nebraska Biological Opinion")	13,16,18
COURT RULES:	
Supreme Court Rule 9.2	2
Federal Rule of Civil Procedure 24	2,9,10, 23
OTHER AUTHORITIES:	
Agreement of Settlement and Compromise (Dec. 4, 1978)	5-9
Convention Between the United States and Japan, Mar. 4, 1972, 25 U.S.T. 3329, T.I.A.S. No. 7990	14
Convention Between the United States and the U.S.S.R., Nov. 19, 1978, 29 U.S.T. 4647, T.I.A.S. No. 9073	14
P. Currier, G. Lingle and J. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985) ("*Migratory Bird Habitat*")	5,16-18
H.R. Rep. No. 95-1804, 95th Cong., 2d Sess., *reprinted in* 1978 U. S. Code Cong. & Admin. News 9453	7
Nebraska Department of Natural Resources, *Surface Water Use in Nebraska's Platte River Valley* (1980)	16
Platte River Trust Declaration	4
Pub. L. 95-632, 95th Cong., 2d Sess, 92 Stat. 3751 (1978)	8
D. Sheer, "An Analysis of Alternative Operating Procedures for Bureau of Reclamation Reservoirs on the North Platte River, Wyoming," (U.S. Bureau of Reclamation 1985)	20
Staff Report to the Endangered Species Committee, "Grayrocks Dam and Reservoir" (Jan. 19, 1979)	8
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, (6th Ed. 1986)	3

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

MOTION OF PLATTE RIVER TRUST FOR LEAVE TO INTERVENE AS PLAINTIFF

The Platte River Whooping Crane Critical Habitat Maintenance Trust (hereinafter "The Platte River Trust"), by its attorneys, respectfully moves the Court for leave to intervene as plaintiff in this action pursuant to Rule 9.2 of the Rules of the Court, and to file a Complaint in Intervention in the form attached to this Motion.

The Platte River Trust seeks to have this Court enforce and modify its earlier Decrees in this action to require a regulated flow of the North Platte River necessary to protect migratory bird habitat. Intervention by The Platte River Trust is appropriate because it claims a compelling interest relating to the equitable apportionment of the waters of the North Platte River by virtue of its federally-endorsed, court-sanctioned, and congressionally-recognized obligation to protect the habitat of migratory birds on the Platte River; because it is so situated that any equitable apportionment of the North Platte will directly affect its interests and may, as a practical matter, impede its

ability to protect its interest in maintaining migratory bird habitat; and because neither the party States nor the federal government will adequately protect its interests in the resolution of this action.

Respectfully submitted this 20th day of March 1987,

ABBE DAVID LOWELL
(Counsel of Record)
PETER J. KIRSCH
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:

EUGENE GRESSMAN
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Attorneys for
Intervenor/Plaintiff
Platte River Whooping Crane
Critical Habitat Maintenance
Trust

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AS PLAINTIFF

STATEMENT OF THE CASE

This is an action to enforce and modify the equitable apportionment of the waters of the North Platte River among the States of Colorado, Wyoming, and Nebraska. The Court issued its first Decree in 1945, *Nebraska v. Wyoming,* 325 U.S. 665 (1945), which was later modified and supplemented upon the joint stipulation of the parties in 1953. *Nebraska v. Wyoming,* 345 U.S. 981 (1953). The Court has retained jurisdiction under those Decrees. 325 U.S. at 671-72, ¶ XIII. The Platte River Whooping Crane Critical Habitat Maintenance Trust (hereinafter "The Platte River Trust") seeks to intervene to ensure that any enforcement or modification of those Decrees recognizes the need for regulated river flows to preserve the downstream habitat of migratory birds.

JURISDICTION

The Court's original exclusive jurisdiction has been invoked by the State of Nebraska pursuant to Article III, Section 2, Clause 2, of the United States Constitution as implemented by the Judiciary Act, 28 U.S.C. § 1251(a). That jurisdiction has been retained by this Court to the present. 325 U.S. at 671 ¶ XIII.

REASONS FOR GRANTING INTERVENTION

I. THE PLATTE RIVER TRUST MEETS THIS COURT'S STANDARDS FOR INTERVENTION IN ORIGINAL ACTIONS.

This Court's standards for intervention in original actions all favor intervention by the Platte River Trust in this proceeding.

While there is no express rule governing intervention in original actions in the Supreme Court, Rule 9.2 of this Court provides in relevant part that "the Federal Rules of Civil Procedure . . . where their application is appropriate, may be taken as a guide to original actions in this Court." Rule 24 of the Federal Rules of Civil Procedure establishes the requirements for intervention in federal district courts.[1] The standards set by that rule are consistent with this Court's practice in allowing intervention in original actions.

---

[1] Rule 24 provides for permissive intervention, Fed. R. Civ. P. 24(b), and intervention of right, Fed. R. Civ. P. 24(a). Intervention of right shall be granted when a federal statute grants such right, Fed. R. Civ. P. 24(a)(1), or when:

> the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2). Permissive intervention is appropriate if intervention will not unduly delay or prejudice the proceedings and if the intervenor's claim has a question of fact or law in common with the main action. Fed. R. Civ. P. 24(b)(2).

Intervention in this Court is appropriate if the proposed intervenor claims a direct interest in the subject matter of the original action, *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981) (granting intervention to gas pipeline companies upon whom fell the burden of a tax being challenged), shows that its interest may not be vigorously represented by existing parties, *Arizona v. California*, 460 U.S. 605, 614 (1983) (granting intervention to numerous Indian tribes who claimed that the United States was not adequately representing their interests), or if adjudication of the dispute will, as a practical matter, adjudicate rights belonging to the intervenor, *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (granting intervention to property owners whose property was the subject of an interstate boundary dispute); *Texas v. New Jersey*, 379 U.S. 674, 677 (1965) (granting intervention to another State that claimed a right to escheat a portion of the property in question). *See generally*, R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* ¶ 10.10 (6th Ed. 1986).

This Court has recognized the need for both states and individuals to intervene in a variety of cases, including original actions. A private party may intervene in an original action if it can show that it has "some compelling interest in his own right, apart from his interest in a class with all citizens and creatures of the State, which interest is not properly represented by the State." *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953). In *New Jersey v. New York*, the Court denied intervention to the City of Philadelphia, holding that the City had not shown that it was inadequately represented by the State of Pennsylvania, which was already a party to the action. Similarly, in *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930), the Court denied intervention to a group of taxpayers because the citizens were only challenging the propriety of their own State's actions, and did not show "any further and proper interest" in the subject of the suit. The Court in *Kentucky v. Indiana* explained, however, that intervention would have been appropriate if the citizens had shown that they possessed an interest that distinguished them from the State's taxpayers in general. *Id.*

Precisely the situation envisioned by the Court in *Kentucky v. Louisiana* arose in the recent *Maryland v. Louisiana* case. In

that original action, the Court found that intervention by seventeen pipeline companies was appropriate both because the companies had "a direct stake in this controversy" and because intervention would aid the Court in "a full exposition of the issues." *Maryland v. Louisiana*, 451 U.S. at 745-46 n.21. Citing *Oklahoma v. Texas*, 258 U.S. 574 (1922), the Court noted that "it is not unusual to permit intervention of private parties in original actions." *Id.* *See Utah v. United States*, 394 U.S. 89 (1969) (intervention is appropriate if the intervenor and the United States have conflicting claims to the same property); *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 536-39 (1972) (permitting intervention by union members notwithstanding the presence of the Secretary of Labor to represent their interests because the public policy concerns of the government are not always exactly the same as the interests of individual union members).

As the succeeding portions of this Memorandum demonstrate, The Platte River Trust fully satisfies all the intervention standards established for original actions before this Court.

II. THE PLATTE RIVER TRUST HAS INTERESTS AT ISSUE THAT ARE COMPELLING AND PROTECTABLE.

The Platte River Trust is a tax-exempt trust, incorporated in Nebraska, with responsibility for monitoring, maintaining, and restoring migratory bird habitat in the Platte River valley. The Platte River Trust exists for

> carrying out . . . financing programs, activities, and acquisitions to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska. . . . The programs, activities, and acquisitions . . . shall be formulated to protect and maintain . . . the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life-support system for the whooping crane and other migratory species which utilize it.

Platte River Trust Declaration, ¶ II.

The Platte River Trust was funded in December 1978 by the Basin Electric Power Cooperative, Inc. to fulfill its obligations under the terms of a Settlement Agreement reached in litigation over construction and operation of the Grayrocks Dam and Reservoir in Wyoming. Agreement of Settlement and Compromise (Dec. 4, 1978); Order Dismissing with Prejudice, *Nebraska v. REA, Nebraska v. Basin Electric Cooperative*, 594 F.2d 870 (8th Cir. 1979); Order of Dismissal, *Nebraska v. REA, Nebraska v. Ray*, Nos. CV76-L-242, CV78-L-90 (D. Neb. Mar. 23, 1979) (collectively referred to hereinafter as the "Settlement Agreement").[2] At issue in the litigation was the applicability of the Endangered Species Act, Pub. L. 93-205, 87 Stat. 889, 16 U.S.C. §§ 1531-1543 to the Grayrocks project.[3] The Platte River Trust is administered by three trustees, one of whom is appointed by the State of Nebraska, one by the National Wildlife Federation, and one by the Missouri Basin Power Project (of which Basin Electric Power Cooperative, Inc. is the project manager).

---

[2] These documents appear as pages A-20 through A-36 of the Appendix to Wyoming's Brief in Opposition.

[3] Pursuant to the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531-1543 (and its predecessor, the Endangered Species Act of 1966, 80 Stat. 926, *repealed*, 87 Stat. 903 (1973)), the Secretary of Interior has published a list designating threatened or endangered species. 50 C.F.R. § 17.11 (1986). Included on the list of such species are the whooping crane, *designated as endangered*, 32 *Fed. Reg.* 4,001 (Mar. 11, 1967), 35 *Fed. Reg.* 8,495 (June 2, 1970); the bald eagle, *designated as endangered*, 32 *Fed. Reg.* 4,001 (Mar. 11, 1967), 43 *Fed. Reg.* 6,233 (Feb. 14, 1978); the peregrine falcon, *designated as endangered*, 49 *Fed. Reg.* 10,526 (Mar. 20, 1984); the eskimo curlew, *designated as endangered*, 32 *Fed. Reg.* 4,001 (Mar. 11, 1967), 35 *Fed. Reg.* 8,495 (June 2, 1970); the least tern, *designated as endangered*, 50 *Fed. Reg.* 21,792 (May 28, 1985); and the piping plover, *designated as threatened*, 50 *Fed. Reg.* 50,726 (Dec. 11, 1985). *See* 50 C.F.R. § 17.11 (1986) (list of endangered and threatened wildlife species). All of these species have naturally occurring habitat along the Platte or North Platte Rivers. P. Currier, G. Lingle and J. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985) 16-18, 22-54.

The Secretary of Interior has further determined, pursuant to 16 U.S.C. §§ 1533 and 1536, that the 53-mile-long Big Bend reach of the Platte River includes habitat which is critical to the continued survival of the endangered whooping crane. 40 *Fed. Reg.* 58,308 (Dec. 16, 1975) (proposed determination), 43 *Fed. Reg.* 20,938 (May 15, 1978) (final determination), 50 C.F.R. § 17.95 (1986).

The litigation which led to the formation of The Platte River Trust has been described briefly in Wyoming's Brief in Opposition to Motion for Leave to File Petition, in the instant case. Wyoming Brief in Opposition at 6. The State of Nebraska, among others, had filed suit in federal court in Nebraska, challenging a loan guarantee by the Rural Electrification Administration ("REA") and a dredge and fill permit granted by the U.S. Army Corps of Engineers, both for construction of the Grayrocks Dam and Reservoir on the Laramie River in Wyoming. *See Nebraska v. REA*, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *remanded and dismissed*, 594 F.2d 870 (8th Cir. 1979).

All the parties to that litigation participated in the Settlement Agreement. The United States' participation in the Settlement Agreement is significant because it had had serious concerns at the time over whether construction and operation of Grayrocks would violate the Endangered Species Act.[4] The parties to the Settlement Agreement, including the federal agencies, the State of Nebraska, a number of power companies, and several environmental groups, agreed that the operation of the Grayrocks project would not violate the requirements of the Endangered Species Act, *only so long* as the terms of the Settlement Agreement were satisfied. The federal government agreed to grant an exemption from the Endangered Species Act to permit the construction and operation of the Grayrocks project.

In December 1978, the Director of the U.S. Fish and Wildlife Service had found that construction and operation of the Grayrocks project "is likely to jeopardize the continued existence of the whooping crane and is likely to destroy or adversely modify the whooping crane's Critical Habitat." Letter from Lynn Greenwalt, Director, U.S. Fish and Wildlife Service to Robert Feragen, Administrator, Rural Electrification

---

[4] 16 U.S.C. §§ 1531-1543. Under the Endangered Species Act, a federal agency may not authorize, fund, or carry out any action if the Secretary of Interior makes a finding that the particular federal action will jeopardize an endangered species under section 1536(b)(3)(A), or if the action will have an adverse effect on critical habitat. *See id.* § 1536(a)(2).

Administration (Dec. 8, 1978) at 19 (hereinafter "Grayrocks Biological Opinion"). The Fish and Wildlife Service had concluded, however, that the existence of the whooping crane would not be jeopardized nor would its critical habitat be destroyed or adversely modified if the operator of the Grayrocks project:

> [E]stablish[ed] an irrevocable trust for the maintenance and improvement of whooping crane habitat on the Platte River. The principal contributed to this trust . . . must be adequate to generate sufficient income in any year . . . to provide for measures which offset the impact on the critical habitat of all water removed by the Grayrocks Power Project in that year. . . . This trust may be augmented by other firm and binding agreements which provide for *replacement by other means of portions of the flow removed by the Grayrocks Power Project.*

Grayrocks Biological Opinion at 18 (emphasis added).

It was not only the Department of Interior that had expressed concern about Grayrocks' effect on whooping crane habitat. Congress, while debating amendments to the Endangered Species Act in late 1978, gave particular attention to the effect of Grayrocks on crane habitat. The congressional committee considering the amendments concluded that the safeguards in the Settlement Agreement would provide sufficient protection for crane habitat:

> It is the intent of the committee that if the conflict between the parties in *Nebraska v. REA* in Federal district court in Nebraska is solved prior to the timetable established [in the Settlement Agreement], the requirements of [section 10(i)(1) of the Act, as amended] shall be deemed to have been met.

H.R. Rep. No. 95-1804, 95th Cong., 2d Sess. 24-25, *reprinted in* 1978 U.S. Cong. & Admin. News 9453, 9492-93. *See* Pub. L. 95-632, § 5, 92 Stat. 3751, 3761 (1978), *amending* Endangered Species Act of 1973, § 10(i)(1) (uncodified amendment).

Relying upon the protections afforded by the Settlement Agreement, Congress directed the cabinet-level Endangered Species Committee to grant an exemption from the Endangered Species Act to permit construction and operation of the Grayrocks project. Pub. L. 95-632, § 5, 92 Stat. 3751, 3761 (1978).

Once the Settlement Agreement was executed by the federal government, approved by the Court of Appeals, and endorsed by Congress, an exemption was granted under the Endangered Species Act, 16 U.S.C. §§ 1536(g), 1539, to permit the operation of Grayrocks. Decision and Order of the Endangered Species Committee on Application for Grayrocks Dam and Reservoir (Feb. 7, 1979) (hereinafter "Exemption Decision"). *See* 43 *Fed. Reg.* 59,871 (Dec. 22, 1978), 44 *Fed. Reg.* 3,547 (Jan. 17, 1979) (Committee consideration of exemption for Grayrocks project). The decision to grant an exemption, notwithstanding the finding of jeopardy in the Grayrocks Biological Opinion, was explicitly based upon the recommendation by the Committee staff (and the Congress) that the establishment of The Platte River Trust provided satisfactory protection for whooping crane habitat along the Platte River. Exemption Decision at 1-2; *see* Staff Report to the Endangered Species Committee, "Grayrocks Dam and Reservoir" (Jan. 19, 1979) at iv, 2.2.

Congress' review and approval, combined with the agreement by REA, the U.S. Army Corps of Engineers, and the Department of Justice to the terms of the Settlement Agreement, are clear expressions of administrative and legislative satisfaction that it provided sufficient protection for crane habitat. By the terms of the Settlement Agreement, the obligation under the Endangered Species Act, to ensure that crane habitat be adequately protected, was placed firmly in the hands of The Platte River Trust. So long as The Platte River Trust exists and effectively manages the Platte River to enhance migratory bird habitat, the terms and spirit of the Endangered Species Act will have been met.

The Settlement Agreement is unusual and affords The Platte River Trust a unique and compelling interest in the issues raised by the instant case. The Platte River Trust's obliga-

tion—to use the resources at its disposal to protect Platte River migratory bird habitat—has been imposed by the United States government, the State of Nebraska, and several private parties. Because Congress' and the Endangered Species Committee's exemption for the Grayrocks project was contingent upon the existence of The Platte River Trust, The Platte River Trust now has a special obligation to ensure that the letter and spirit of the Endangered Species Act continue to be observed. It is from this posture that The Platte River Trust moves for leave to intervene in the present proceeding.[5]

The Platte River Trust's compelling interest in protecting migratory bird habitat warrants intervention. Under Fed. R. Civ. P. 24(a)(2), for example, the interest which an intervenor must assert need not be a property right or a "specific legal or equitable interest." *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967). Instead, the "interest" requirement of that Rule has been interpreted broadly as a "practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* *See Donaldson v. United States*, 400 U.S. 517, 531 (1971) (interest need only be a "significantly protectable interest"); *SEC v. Flight Transportation Corp.*, 699 F.2d 943, 948 (8th Cir. 1983) (interest may be one which is contingent upon the outcome of the litigation). The Platte River Trust's interest in maintaining migratory bird habitat undoubtedly is "significantly protectable" under the *Donaldson* standard, both because its interest has been implicitly recognized as such by the federal government and the Congress, and because, as a practical matter, its interest is directly related to the issues in dispute in the present case.

---

[5] The Platte River Trust seeks to protect its own organizational interests. This Court has long recognized that an organization has standing to protect its organizational interests from injury, in addition to having standing to sue on behalf of the affected interests it represents. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

III. THE PLATTE RIVER TRUST'S INTERESTS WILL BE DIRECTLY AFFECTED BY THIS ACTION.

The Platte River Trust's obligation to protect and enhance the habitat of migratory birds along the Platte River has been met in the past, in part, through purchase and rehabilitation of wetland and riparian lands. Its ability to preserve and restore habitat, however, will be severely compromised if the North Platte River apportionment which Nebraska is afforded is insufficient to allow for downstream flow past this newly protected and restored habitat. The flow of the North Platte is absolutely key to the existence of habitat along the Platte River because the North Platte accounts for almost 80 percent of the flow of the Platte River in the important Big Bend reach. Even more importantly, if this Court does not impose restrictions on the seasonal variation in the North Platte flow at the Wyoming-Nebraska state line, Nebraska will be unable meet The Platte River Trust's seasonal water flow needs.

As explained in some detail in section V of this Memorandum, *infra*, protection of migratory bird habitat is absolutely dependent upon the flow of water in the Platte River. Without a satisfactory pattern of river flows, the habitat which The Platte River Trust must protect will be permanently destroyed. The interest of The Platte River Trust in the outcome of the present action could hardly be stronger: any decree which affects the flows of the Platte River may fundamentally determine the success or failure of The Platte River Trust's efforts. An equitable apportionment of the North Platte River will, of course, also have a significant precedential and practical effect upon The Platte River Trust's future ability to pursue regulatory or statutory water rights within or outside the State of Nebraska.

Using the "interest" requirement of Fed. R. Civ. P. 24(a)(2) as an analogy, the effect of a case on an intervenor's rights is to be read in practical terms. *Little Rock School District v. Pulaski County Special School District*, 738 F.2d 82, 84 (8th Cir. 1984), *cert. denied*, ____ U.S. ____, 106 S.Ct. 2926 (1986). Recent cases under Rule 24 have consistently held that the *stare decisis* effect of a case is a sufficient basis for

intervention of right. *Nuesse*, 385 F.2d at 702; *Atlantis Development Corp. v. United States*, 379 F.2d 818, 828-29 (5th Cir. 1967).

The *stare decisis* effect of a court decision is a particularly appropriate basis for intervention where, as in the instant proceeding, the case is one of first impression or the decision will be afforded unusually great weight in subsequent consideration of the subject. *Nuesse*, 385 F.2d at 702; *see Oneida Indian Nation v. New York*, 732 F.2d 261, 265 (2d Cir. 1984) (court granted intervention in an Indian land dispute, holding that there was a "significant likelihood that the ultimate resolution of this litigation will lead to the conclusions of law on issues of first impression . . . which will implicate principles of *stare decisis*."); *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *cert. granted*, ____ U.S. ____, 106 S.Ct. 2273 (1986) (the *stare decisis* effect of a decision in a government enforcement action could "as a practical matter result in [the intervenor] being precluded from litigating several of its claims" against the same parties). There can be no doubt that any decision by this Court equitably apportioning the North Platte River will receive great deference and will affect any decision concerning the Platte River for years to come. As a very practical matter, if The Platte River Trust's interests are not presented now, they may never receive the consideration they deserve.

IV. THE PLATTE RIVER TRUST WILL NOT BE ADEQUATELY REPRESENTED BY THE EXISTING PARTIES.

Because The Platte River Trust seeks to intervene as a plaintiff and petitioner in this action, its interests cannot be represented by the State of Wyoming, to which it would be adverse. *Stringfellow*, 783 F.2d at 828. At the same time, the United States and the State of Nebraska represent only similar but not identical interests to those of The Platte River Trust and cannot represent adequately its interests.

It is evident from the United States' Memorandum that its interest in this litigation is that of the United States Bureau of

Reclamation, which constructs and operates federal dams and other reclamation projects in Wyoming and western Nebraska. Memorandum for the United States at 2-3 & n.2. In the context of Nebraska's Petition, the Bureau of Reclamation's interest is in protecting the flow of water into the Interstate Canal system and to the Inland Lakes in Nebraska to satisfy the agency's contracts to provide irrigation water. The United States is pursuing interests which differ materially from those of The Platte River Trust because the applicable federal reclamation projects depend upon removing water from the river channel—precisely the opposite of what The Platte River Trust is seeking.

In a similar situation, the Ninth Circuit drew the distinction between adverse and diverse interests. Holding that a potential intervenor was not adequately represented by the Secretary of Interior, the Ninth Circuit in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983), permitted several national wildlife organizations to intervene as defendants in a suit challenging protection of certain federal land from development. That court explained that the adequacy of the government's representation of the intervenor's interests must be tested:

> In assessing the adequacy of the Interior Secretary's representation, we consider several factors, including whether the Secretary will undoubtedly make all of the intervenor's arguments, whether the Secretary is capable of and willing to make such arguments, and whether the intervenor offers a necessary element to the proceedings that would be neglected.

Id. *See Trbovich v. United Mine Workers*, 404 U.S. at 538-39 (granting intervention by union members because the Secretary of Labor's interest in protecting the public interest was "related, but not identical" to that of the individual union members); *Stringfellow*, 783 F.2d at 827 (the intervenor and the federal government were seeking "divergent remedial schemes," even though their interest in enforcement of hazardous waste disposal laws was the same). Like the intervenors in *Stringfellow*

and *Sagebrush Rebellion*, The Platte River Trust is seeking a regulated flow of the North Platte River, relief which may not be compatible with that which the United States is seeking.

There is, moreover, no basis for believing that The Platte River Trust's interests will be adequately represented by the State of Nebraska. Nebraska has not argued in the papers it has filed in this Court in favor of a regulated flow of water at the Wyoming-Nebraska state line. Neither has it argued that the need to protect migratory bird habitat militates in favor of modifying the equitable apportionment of the North Platte River. While Nebraska may be capable of making such arguments, it has indicated no willingness to do so.[6]

To have a right to intervene, The Platte River Trust need only show that representation by the State of Nebraska *may be* inadequate. *Little Rock School District*, 738 F.2d at 84; *see Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977) (since none of the parties "have either voiced [intervenor's] concerns or expressed a desire to do so, their interests are not adequately represented"). That standard applies with equal force, notwithstanding the doctrine of *parens patriae*, where the potential intervenor may make a more vigorous presentation of the relevant issues than the government. *Little Rock School District*, 738 F.2d at 84.

---

[6] Nebraska law permits the state to grant an in-stream appropriation of water for the protection of fish and wildlife. Neb. Rev. Stat. § 46-2,108 (1984). Notwithstanding this statute, Nebraska has never applied for, considered, or granted such an appropriation for the maintenance of migratory bird habitat on the Platte River. Furthermore, the State recently granted a water right to divert 125,000 acre feet of water annually from the Platte River near Overton, Nebraska, despite an opinion by the responsible state agency that the diversion would jeopardize the continued existence of the whooping crane, bald eagle and least tern. Letter from Assistant Director, Nebraska Game and Parks Commission, to General Manager, Little Blue Natural Resources District, in re: Biological Opinion on Catherland Project (Jan. 31, 1983) at 2. *See* Nongame and Endangered Species Conservation Act, Neb. Rev. Stat. § 37-430, *et seq.* (1984); *In Re Applications 15145, Etc.*, No. 86-692 (Neb. to be argued Mar. 31, 1987).

Consistent with this Court's holding in *Kentucky v. Indiana*, 281 U.S. at 173, The Platte River Trust is pursuing interests which transcend those of individual citizens of the State of Nebraska. The Platte River Trust's interest in protecting migratory bird habitat in the Platte River valley is one which the State of Nebraska cannot fully represent both because of the interstate character of the River and because of the interstate, indeed international, interest in protecting migratory bird habitat. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (implementing treaties with Canada, Mexico, Japan, and the USSR, providing international protection for certain migratory species, including several whose habitat includes the Platte River valley); Convention Between the United States and the U.S.S.R. (Nov. 19, 1978), 29 U.S.T. 4647, T.I.A.S. No. 9073; Convention Between the United States and Japan (Mar. 4, 1972), 25 U.S.T. 3329, T.I.A.S. No. 7990. It is, in fact, a mere happenstance of nature that Nebraska is home to one of the most attractive migratory bird roosting and nesting habitats in the Great Plains. The migratory species which use the Platte River as a nesting and roosting site also occupy habitat along the entire central flyway. Nebraska cannot represent the interest in protecting migratory bird habitat, an interest which the Congress has repeatedly recognized to be fundamentally national in character. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712; Endangered Species Act, 16 U.S.C. §§ 1531-1543; Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911, Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667.

Finally, both the United States and the State of Nebraska may be prevented from representing The Platte River Trust's interests. Wyoming has argued in its Brief in Opposition that, by virtue of the Settlement Agreement, the State of Nebraska is estopped from litigating matters relating to allocation of waters impounded by the Grayrocks Dam and Reservoir. Wyoming Brief in Opposition at 17. If the Court accepts Wyoming's argument, neither the United States nor Nebraska (as parties to the Settlement Agreement) can represent The Platte River Trust's interests with respect to matters relating to the operation of Grayrocks. If Wyoming prevails, only The Platte River

Trust can raise issues relating to the downstream effects of the operation of Grayrocks. Even if Wyoming's argument fails, it is particularly inappropriate for either the United States or the State of Nebraska, which were adverse parties in the Grayrocks litigation, to represent The Platte River Trust's interests in ensuring that the spirit and letter of the Settlement Agreement are met.

V. THE PLATTE RIVER TRUST WILL PRESENT SUBSTANTIAL ISSUES WHICH SHOULD BE RESOLVED IN THIS ACTION.

The Platte River Trust's Complaint requests that the Court order the State of Wyoming to comply with the terms of the 1945 and 1953 Decrees and that the Court modify its earlier Decrees to ensure Nebraska's equitable apportionment of the North Platte River be made available according to a seasonal schedule of flows which recognizes downstream migratory bird habitat needs. Both prayers for relief present substantial issues deserving of this Court's attention.[7]

Since this Court's 1945 and 1953 Decrees, there has been increasing scientific study of the relationship between the flow of the North Platte and Platte Rivers and the habitat needs of migratory birds along those rivers. This increase in scientific knowledge is, alone, a sufficiently important changed condition to warrant this Court's reconsideration of the bases of its earlier Decrees.[8]

---

[7] The Platte River Trust agrees with the State of Nebraska that the State of Wyoming is presently violating and threatens to violate the terms of the Court's 1945 and 1953 Decrees. It agrees further that there is strong need for the Court to order compliance with those Decrees. The arguments presented by the State of Nebraska are sound and need not be repeated here.

[8] In addition to better scientific knowledge about migratory bird habitat, congressional attention has increasingly focused on the ecological effects of water development on wildlife in general. The Court can take judicial notice that most of the federal environmental protection statutes have been enacted since the 1945 and 1953 Decrees. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982 & 1985 Supp.); National Environmental Policy Act, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.); Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.); Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986).

The Platte and North Platte Rivers provide one of the finest migratory bird habitats anywhere in the continent. The river valleys are the nesting and roosting-place for more than 230 species of migratory birds. *See* Grayrocks Biological Opinion; Letter to General Manager, Little Blue Natural Resources District from Assistant Director, Nebraska Game and Parks Commission, in re: Biological Opinion on Catherland Project (Jan. 31, 1983) (hereinafter "Nebraska Biological Opinion"). Six of these species are endangered or threatened, *see* note 3, *supra.*

The Platte River historically was subject to wide annual variations in flow, including an annual low flow season in the summer and an annual flooding season in the spring when the river generally filled or overflowed its banks. Both the low flow and flooding seasons were important for creating attractive bird habitat. The annual floods carried a great deal of sediment from the sandy streambed, and carved new, braided river channels. By mid-summer, as the flows declined, sediment was deposited across the river channel in a series of low-level, unvegetated sandbars. The sand-bottomed river channel was surrounded by marshlands, sloughs, and unforested wetland meadows. It is this pattern of high volume spring floods, followed by low summer flow along a wide, shallow river valley, unobstructed by trees or other tall vegetation, which has made the Platte River so attractive to migratory birds for roosting and nesting sites. All these characteristics depend for their existence upon the natural variations in flow in the river channel. P. Currier, G. Lingle and J. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* 93-95, 108-14 (1985) (hereinafter "*Migratory Bird Habitat*").

This historical pattern has been radically altered by continual depletion of Platte River flows for consumptive uses and the equally alarming decreases in the river's characteristic variation in flows. The spring floods have decreased in frequency and intensity as more and more upstream reservoirs have been built to provide water storage for the spring and summer irrigation season. Nebraska Department of Natural Resources, *Surface Water Use in Nebraska's Platte River Valley* 6-7 (1980). In the

past century, there has been a sixty eight per cent reduction in average peak flows at the western end of the Big Bend reach of the Platte. Like the peak flow, the average mean flow of the Platte at the same location has declined by sixty six per cent. *Migratory Bird Habitat* at 95-98.

The decreases in water quantity and flow variation have produced a Platte River channel that is increasingly static. The river channel has become deeper and narrower since it was the seasonal flooding that carried large loads of sediment, scoured the river bottom, and changed river channel locations. The narrowed river channel has also created more mid-river vegetated islands with woody plant growth. Islands and sandbars, once kept free of woody vegetation by annual high-water scouring and frequent sediment shifts, threaten to become permanent landscape features because tall vegetation (including trees) can take root. The longer such islands remain undisturbed by flooding, the more time there is for vegetation to stabilize the soil and the less chance that a subsequent flood will redirect the river. *Migratory Bird Habitat* at 98-109. Decreased channel width and uniform water flow of the Platte River has also threatened adjacent wetlands. The decreased water flow has caused the local water table to fall; thus, the wetlands have dried up, and grasslands have been converted into croplands. *Migratory Bird Habitat* at 108-14.

The changes in the character of the river channel and the formation of mid-channel islands have been disastrous to migratory bird habitat. Significant habitat locations have been destroyed because the lower, more regular river flows are incompatible with the need for open, unobstructed, unvegetated, shallow river channels as roosting locations for whooping cranes, sandhill cranes, piping plovers, and other wading and shorebirds. *Migratory Bird Habitat* at 95-98, 119-20.

Changes in Platte River flows have altered three major migratory bird habitat types: open, unvegetated river channel and upland grasslands (needed, for example, as habitat for horned lark, lark sparrow, grasshopper sparrow, western meadowlark, sharptailed grouse, and greater prairie chicken), and lowland wetland meadows (needed, for example, as habitat for

upland sandpiper, Wilson's phalarope, sora, Virginia rail, bobolink, eastern meadowlark, dickcissel, and other waterfowl). *Migratory Bird Habitat* at 137-38. As the areas have been drained and replaced by croplands, the wetland aquatic life, which forms the protein base of many migratory bird species, has disappeared. *Migratory Bird Habitat* at 107-12, 137.

Recent studies by the U.S. Fish and Wildlife Service (including the Grayrocks Biological Opinion), the Nebraska Game and Parks Commission (including the Nebraska Biological Opinion), and The Platte River Trust, among others, have shown that the only effective way to preserve the diversity of migratory bird habitat in the Platte valley is to maintain the unique shallow, braided character of the Platte River. The only way to maintain that channel is to ensure that the flow of the River follows its natural pattern as closely as possible. Recognizing, of course, that upstream consumptive uses prevent the volume of river water (and overall width of the river channel) from ever being what it was one hundred years ago, it is apparent that a profile of flows, regulated for variation throughout the year, may go a long way toward retaining the viability of the Platte River as the premium migratory bird habitat location in the Great Plains. Research on whooping crane, sandhill crane, bald eagle, piping plover, and least tern habitat has shown that the profile of flows shown in TABLE I will optimize the ability of the Platte River to support the diversity of bird life which presently depends on the river.[9]

---

[9] The flows described in this brief are considered to be "jeopardy" flows. River flows below these amounts will jeopardize both the habitat of specific migratory birds and the overall biological diversity of the Platte River valley.

TABLE I
ANNUAL REGULATED FLOWS
NEEDED TO AVOID JEOPARDIZING
MIGRATORY BIRD HABITAT
IN THE BIG BEND REACH
OF THE PLATTE RIVER

Season	Calendar Dates	Instantaneous Instream Flow [10]
Autumn	Sept. 20-Nov. 10	2000-2400 cubic feet/second
Winter	Nov. 11-Feb. 26	1100-5000 cubic feet/second
Spring	Feb. 27-May 10	2000-2400 cubic feet/second
Summer	May 11-Sept. 19	800-2500 cubic feet/second
Annual	May 10-June 15	8000 cubic feet/second or more for five days duration; twice every three years

If the Platte River Trust is granted leave to intervene, it will present this Court with the scientific support for a regulated pattern of annual flows through the crucial Big Bend reach of the Platte River. It will, further, provide evidence on the downstream effects of regulation of the North Platte River, and on why the North Platte rather than the South Platte River determines downstream Platte River flows. The Platte River Trust will argue to this Court that regulation of the North Platte River can have a significant salutary effect on migratory bird habitat along the Platte River, including especially the vitally important Big Bend reach of the Platte River. Improved

[10] Flows are required year-round to sustain fish populations which provide the food base for bald eagles, least terns, and other fish-eating species of migratory birds.

Winter flows are required to maintain ice-free conditions for bald eagle feeding habitat and waterfowl roosting and feeding habitat. Autumn and spring flows are needed for crane roosting habitat and waterfowl feeding and roosting habitat. Summer flows are required for nesting and feeding habitat for least terns and piping plovers. Finally, the annual flushing or scouring flow is needed two out of every three years to scour the river channel, carry sediment, move sandbars, and prevent the formation of permanent islands and woodland growth. Because upstream dams on the North Platte River trap needed sediment loads, that river alone should not provide this needed peak flow.

regulation of upstream dams can result in greater available firm water supplies for both the State of Wyoming and the State of Nebraska. *See* D. Sheer, "An Analysis of Alternative Operating Procedures for Bureau of Reclamation Reservoirs on the North Platte River, Wyoming," (U.S. Bureau of Reclamation 1985). System-wide regulation can also provide the pattern of flows which is needed to preserve downstream migratory bird habitat.

Regulation of North Platte River flow presents a substantial issue which none of the existing parties to this action has indicated any ability or intent to present to this Court. Intervention by The Platte River Trust will allow the Court the benefit of The Platte River Trust's argument that such regulation can result in greater predictable water supply in both the State of Wyoming and the State of Nebraska, and will, generally, aid the Court in a full exposition of the issues presented by Nebraska's Petition. *See Maryland v. Louisiana*, 451 U.S. at 745-46 n. 21 (intervention appropriate if it aids the Court in a full exposition of the issues presented).

VI. THE PLATTE RIVER TRUST OFFERS EXTENSIVE EXPERTISE TO AID IN RESOLVING ISSUES BEFORE THIS COURT.

Intervention by The Platte River Trust is particularly appropriate because The Platte River Trust offers this Court the benefit of its unique expertise on management of the Platte River.

The Settlement Agreement allows The Platte River Trust to use its funds for scientific studies, for acquiring rights to water or water storage, for acquiring land or interest in land, and for managing land and water for the benefit of migratory birds. The Platte River Trust may use formal, informal, judicial, and non-judicial ways to fulfill these goals. The Platte River Trust has developed a habitat monitoring plan which gathers together all available information on the physical and biological habitat requirements of several migratory bird species. In addition, it has begun management programs to maintain or restore the dwindling supply of grasslands and

potential migratory bird roost sites. The Mormon Island Crane Meadows, a 6000-acre riparian grassland complex owned by The Platte River Trust, is being managed to encourage native grassland growth, to reduce the invasion of woodland, and to increase earthworm and snail production for crane foraging. Scientific and technical data and reports generated by The Platte River Trust have been used by the U.S. Fish and Wildlife Service, Bureau of Reclamation, and the Nebraska Game and Parks Commission. The Platte River Trust has been widely cited for its geographic data base, and its whooping and sandhill crane habitat models, and has been commonly called as an expert witness in water rights hearings. The scientific staff of The Platte River Trust has published or has in preparation numerous professional papers, including papers in the fields of animal behavior, habitat use and habitat reclamation, and is generally recognized as the premier authority on migratory bird use and habitat of the Platte River.

It is from The Platte River Trust's expertise in management of migratory bird habitat along the Platte River that comes its ability to present this Court with reliable scientific data on the Platte River flows needed to maintain habitat along the Platte and North Platte Rivers. The Platte River Trust is uniquely well qualified to present issues relating to habitat maintenance to this Court. No other party in this proceeding is able or willing to make the scientific arguments which the Court must consider in equitably apportioning the waters of the North Platte River. Intervention is particularly appropriate for this reason alone. *See Sagebrush Rebellion*, 713 F.2d at 528 (granting intervention in part because intervenor offered expertise different from that of the other parties).

VII. THIS PROCEEDING IS THE MOST EFFICIENT FORUM IN WHICH TO ADDRESS THE PLATTE RIVER TRUST'S COMPELLING INTERESTS.

By granting leave for Nebraska to file its most recent Petition, this Court has assumed original jurisdiction of the dispute among Colorado, Wyoming, and Nebraska over equitable apportionment of the waters of the North Platte River. *See* Order Granting Leave to File Petition, ____ U.S. ____

(Jan. 20, 1987). The Court has, furthermore, asserted continuing jurisdiction over any disputes among the party States over allocation of the North Platte River. *Nebraska v. Wyoming*, 325 U.S. at 671-72. So long as this Court retains jurisdiction over this interstate dispute, its jurisdiction is exclusive and The Platte River Trust may be limited in its ability to raise matters relating to interstate water allocation in other federal fora.

It is one of the purposes of this proceeding to decide once and for all how much water each State is entitled to distribute to its appropriators. *See Nevada v. United States*, 463 U.S. 110, 129-30, 143 (1983). Allocation of water in the Platte River system has been the subject of intense regional and congressional debate, and the subject of at least two multi-party suits. *See Nebraska v. REA*, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978); *Riverside Irrigation District v. Stipo*, 658 F.2d 762 (10th Cir. 1981), *on remand, Riverside Irrigation District v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985).

Whenever allocation or appropriation of the Platte River system has been at issue, preservation of migratory bird habitat has been an issue of primary concern. The purpose of this proceeding will be frustrated if crucial issues remain unlitigated after the apportionment of the North Platte. As a practical matter, judicial efficiency demands that The Platte River Trust intervene to present evidence relating to downstream migratory bird habitat needs along the North Platte and Platte Rivers.

CONCLUSION

The Platte River Trust respectfully submits that its Motion for Leave to Intervene should be granted. This Court's precedents in original actions, as well as analogous cases decided under Fed. R. Civ. P. 24, strongly favor the right to intervene where, as here, the intervenor has a compelling interest at issue which is not adequately represented by the existing parties and where judicial economy would favor resolving all issues in a single action.

Respectfully submitted this 20th day of March 1987,

ABBE DAVID LOWELL
(Counsel of Record)
PETER J. KIRSCH
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Attorneys for
Intervenor/Plaintiff
Platte River Whooping Crane
Critical Habitat Maintenance
Trust

Of Counsel:

EUGENE GRESSMAN
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

COMPLAINT IN INTERVENTION

The Platte River Whooping Crane Critical Habitat Maintenance Trust (hereinafter "The Platte River Trust") hereby complains as follows:

JURISDICTION

(1) This Court has jurisdiction over this action pursuant to section 1251 of Title 28 of the United States Code, and pursuant to Article III, Section 2, Clause 2, of the United States Constitution. This Court has retained jurisdiction over this action, following the invocation of jurisdiction by the State of Nebraska in *Nebraska v. Wyoming*, 325 U.S. 665, 671-72 ¶ XIII (1945).

PARTIES

(2) Plaintiff, the State of Nebraska, and defendants, State of Colorado and State of Wyoming, are sovereign states of the United States of America.

(3) Intervenor, The Platte River Trust, is a Nebraska not-for-profit corporation, with its principal place of business at Grand Island, Nebraska, organized as a trust fund and established in settlement of federal litigation by the State of Nebraska, the United States, and several private parties.

EARLIER PROCEEDINGS

(4) The Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the States of Colorado, Wyoming, and Nebraska. That Decree was modified and supplemented upon the Court's approval of a stipulation among the parties in 1953. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

(5) The Court has retained jurisdiction in this action for later enforcement, supplementation, or modification of the Decrees. Paragraph XIII of the 1945 Decree, 325 U.S. at 671, provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

(6) The Platte River Trust incorporates by this reference the Bill of Complaint in Equity filed in 1934 by the State of Nebraska in this action.

PRESENT PROCEEDINGS

(7) Since the Court's 1945 and 1953 Decrees in this action, a number of conditions have changed, events occurred, and new information has become available which make it appropriate and necessary for the Court to modify the Decrees. These changes include:

(a) Construction and operation of the Grayrocks Dam and Reservoir on the Laramie River in Wyoming in 1980 with its accompanying storage capacity of 104,000 acre feet of water and potential annual consumptive use of 23,250 acre feet of water;

(b) Enactment of the National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (1970), *as codified at* 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.), by which the Congress has ordered that federal actions which significantly affect the human environment be accompanied by an examination of the environmental impact of the proposed action;

(c) Enactment of amendments to the Fish and Wildlife Coordination Act, in 1946, 60 Stat. 1080, in 1958, 72 Stat. 564, and in 1965, 79 Stat. 216, *as codified at*, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.), by which the Congress has required that, before diverting or impounding waters, federal agencies consult with the U.S. Fish and Wildlife Service with a view to conservation of fish and wildlife resources;

(d) Enactment of the Fish and Wildlife Conservation Act of 1980, Pub. L. 96-366, 94 Stat. 1322, *as codified at*, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.), by which the Congress has encouraged each state, in coordination with federal, state, and local agencies, to develop conservation plans for fish and wildlife, with special attention to indigenous species;

(e) Enactment of the Electric Consumers Protection Act, Pub. L. 99-495, 100 Stat. 1243 (1986), by which the Congress directed that the Federal Energy Regulatory Commission "give equal consideration to . . . the protec-

tion, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)," before granting federal licenses for power projects, *id.* § 3;

(f) Conclusion of treaties with the Soviet Union, 29 U.S.T. 4647, T.I.A.S. No. 9073 (Nov. 19, 1976), and Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 (Mar. 4, 1972), by which the United States has pledged to protect certain migratory bird species, including the whooping crane, peregrine falcon, eskimo curlew, bald eagle, sandhill crane, and other bird species whose natural habitat includes areas within the Platte River or North Platte River valleys;

(g) Enactment of the Endangered Species Act, Pub. L. 93-205, 87 Stat. 889 (1973), *as amended by* Pub. L. 95-632, 92 Stat. 3751 (1978); Pub. L. 97-304, 96 Stat. 1426 (1982), *as codified at*, 16 U.S.C. §§ 1531-1543 (1982 & 1985 Supp.), by which the Congress pledged "to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction," 16 U.S.C. § 1531(a)(4), and declared it to be the policy of the United States that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species," 16 U.S.C. § 1531(c)(2);

(h) Determination, pursuant to the Endangered Species Act, 16 U.S.C. § 1533(a), that the following migratory bird species whose natural habitat exists along the North Platte River or Platte River, are threatened or endangered: the whooping crane, bald eagle, peregrine falcon, eskimo curlew, least tern, and piping plover, 50 C.F.R. § 17.11 (1986);

(i) Designation, pursuant to 16 U.S.C. § 1533(a), that the Big Bend reach of the Platte River constitutes critical habitat for the whooping crane, 50 C.F.R. § 17.95 (1986);

(j) Conclusion by the U.S. Fish and Wildlife Service in December 1978 that construction and operation of the

Grayrocks Dam and Reservoir would jeopardize the critical habitat of the whooping crane;

(k) Granting of an exemption by the federal Endangered Species Committee from the prohibitions of the Endangered Species Act, to permit the construction and operation of the Grayrocks Dam and Reservoir, subject to conditions placed on the operator of the Grayrocks project, including a requirement that The Platte River Trust be established; and

(l) Creation of The Platte River Trust by the United States and the State of Nebraska, among others, to mitigate the effects of the construction and operation of Grayrocks Dam and Reservoir on the habitat of the whooping crane and other migratory birds in the Platte River valley.

(8) The State of Wyoming is presently violating and threatens to violate the terms of the Decrees in the manner more particularly described in paragraph 3 of the "Petition for an Order Enforcing Decree and for Injunctive Relief," filed by the State of Nebraska in this action on October 6, 1986, which paragraph is incorporated herein by this reference.

THE PLATTE RIVER TRUST'S INJURY

(9) The Platte River Trust has a trust obligation to protect, enhance, promote, and maintain migratory bird habitat in the Big Bend reach of the Platte River in Nebraska so that the area continues to support a wide diversity of migratory bird habitat.

(10) The manner in which the Court resolves the issues raised in Nebraska's "Petition for an Order Enforcing Decree and for Injunctive Relief," will profoundly affect the vital habitat of the endangered whooping crane, least tern, and threatened piping plover and will profoundly affect other downstream migratory bird habitat because any equitable apportionment of waters will determine the maximum amount of water which the State of Nebraska may have available to allocate for preservation of such habitat.

(11) The manner in which the Court resolves the issues raised in Nebraska's "Petition for an Order Enforcing Decree and for Injunctive Relief," will, as a practical matter, have a strong precedential and potentially prejudicial effect upon The Platte River Trust's ability in the future to ensure that regulated flow in the Platte River is sufficient to avoid jeopardizing habitat essential for the survival of the whooping crane and other endangered or threatened species since lower courts may defer to this Court's conclusions on how best to accommodate migratory bird habitat in an equitable apportionment of water.

(12) Neither the States of Nebraska, Colorado, or Wyoming, nor the United States, can nor will adequately represent the interests of The Platte River Trust in maintenance of migratory bird habitat on the Platte River since the States and the United States are primarily concerned with consumptive uses like irrigation and power generation.

(13) The habitat vital for the survival of the whooping crane, sandhill crane, white-fronted goose, least tern, piping plover and bald eagle, and the species themselves will be jeopardized if the manner in which the Court resolves the issues raised in Nebraska's "Petition for an Order Enforcing Decree and for Injunctive Relief," does not provide for seasonal regulated flows in the Platte River from Overton, Nebraska to Grand Island, Nebraska, of at least the amounts shown in Table I.

Table I

Required Flow Regulation

Season	Calendar Dates	Instantaneous Instream Flow
Autumn	Sept. 20-Nov. 10	2000-2400 cubic feet/second
Winter	Nov. 11-Feb. 26	1100-5000 cubic feet/second
Spring	Feb. 27-May 10	2000-2400 cubic feet/second
Summer	May 11-Sept. 19	800-2500 cubic feet/second
Annual	May 10-June 15	8000 cubic feet/second or more for five days duration; twice every three years

(14) Changed conditions, manifested by recent federal statutes and better scientific knowledge about the environmental effects of water allocations, demand that this Court modify the terms of the Court's 1945 and 1953 Decrees to afford consideration to such effects in any equitable apportionment.

(15) The current and imminent actions of the State of Wyoming contravene the rationale and purpose of the Court's 1945 equitable apportionment (as modified in 1953) by appropriating water and constructing storage capacity which the Decrees did not anticipate.

WHEREFORE, The Platte River Trust prays that the Court enter an order enforcing and modifying its 1945 and 1953 Decrees to:

(1) Require the State of Wyoming to comply with the provisions of the 1945 and 1953 Decrees in this action;

(2) Require that the State of Wyoming make available to the State of Nebraska the water apportioned to that State in a manner and according to an annual schedule which recognizes the downstream river flow needs of migratory bird habitat; and

(3) Provide such other and further relief as this Court shall deem proper, necessary, and equitable in the circumstances.

Respectfully submitted this 20th day of March 1987,

ABBE DAVID LOWELL
(Counsel of Record)
PETER J. KIRSCH
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:

EUGENE GRESSMAN
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Attorneys for
Intervenor/Plaintiff
Platte River Whooping Crane
Critical Habitat Maintenance
Trust

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

AFFIDAVIT OF SERVICE

DISTRICT OF COLUMBIA
CITY OF WASHINGTON } ss

I, Peter J. Kirsch, being first duly sworn on oath, hereby certify that three true and correct copies of the foregoing (1) Motion of Platte River Trust for Leave to Intervene as Plaintiff, (2) Memorandum in Support of Motion for Leave to Intervene, and (3) Complaint in Intervention, were served on each of the parties required to be served, in accordance with Supreme Court Rule 9.3, by depositing the same in the United States mail, with first-class postage prepaid, and addressed on this 20th day of March to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Tenth and Pennsylvania Avenues, N.W.
Washington, D.C. 20530

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable A.G. McClintock
Attorney General of the State of Wyoming
State Capitol, Room 123
Cheyenne, Wyoming 82002

The Honorable Roy Romer
Governor of the State of Colorado
State Capitol Room 136
Denver, Colorado 80203

The Honorable Duane Woodard
Attorney General of the State of Colorado
Department of Law
1525 Sherman Street—Third Floor
Denver, Colorado 80203

Richard A. Simms
Counsel of Record for the State of Nebraska
Hinkle, Cox, Eaton, Coffield & Hensley
Post Office Box 2068
Santa Fe, New Mexico 87504-2068

The Honorable Kay A. Orr
Governor of the State of Nebraska
State Capitol
Lincoln, Nebraska 68509

The Honorable Robert M. Spire
Attorney General of the State of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509

Peter J. Kirsch
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Subscribed and sworn to before me, this day of March 1987:

Notary Public

MOTION FILED
MAR 23 1987

(4)

No. 108, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION OF THE NATIONAL AUDUBON SOCIETY FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

HOPE BABCOCK
NATIONAL AUDUBON SOCIETY
801 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 547-9009

JOSEPH N. ONEK *
PAUL J. VAN DE GRAAF
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MOTION TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

The National Audubon Society hereby moves the Court for leave to intervene in this proceeding on the following grounds:

1. The Court's decision in this proceeding will affect rights to the natural flow of the Platte River, which provides habitats for a number of endangered bird species.

2. The Endangered Species Act, 16 U.S.C. §§ 1531-1543, gives Audubon the right to enforce federal law provisions aimed at protecting these endangered species.

3. Audubon has a direct stake in this proceeding in that its interests recognized by federal law may be adversely affected by the Court's decision.

4. Audubon's interests are not adequately represented by any other party to this proceeding.

WHEREFORE, Audubon prays that the Court allow Audubon to intervene or to participate as litigating amicus curiae in this proceeding.

Respectfully submitted,

HOPE BABCOCK
NATIONAL AUDUBON SOCIETY
801 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 547-9009

JOSEPH N. ONEK *
PAUL J. VAN DE GRAAF
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

COMPLAINT IN INTERVENTION

---

1. The National Audubon Society, one of the Nation's oldest and largest conservation organizations with a membership in excess of 500,000, is dedicated to the protection of the environment and the conservation of natural resources. It manages numerous wildlife sanctuaries, including the Lillian Annette Rowe Sanctuary on the Platte River in Central Nebraska.

2. This Court's decisions apportioning waters of the North Platte River among Wyoming, Colorado and Nebraska affect the flow of the Platte River in Central Nebraska.

3. A number of endangered bird species, including the Whooping Crane, the Piping Plower and the Least Tern, use the Platte River in Central Nebraska as habitats.

4. The Court's decision in this proceeding implicates a number of requirements under the Endangered Species Act, 16 U.S.C. §§ 1531-1534:

a) It will authorize federal agency action triggering the need to assess whether that action is likely to jeopardize endangered or threatened species, 16 U.S.C. § 1536.

b) It will authorize state apportionments the exercise of which may violate the Act's prohibition on harming or harrassing endangered or threatened species, 16 U.S.C. § 1538.

c) It will alter the bases for the consideration of exemptions from the Act's coverage, 16 U.S.C. § 1536, 1539.

5. The conduct of the parties in the proceeding will itself trigger coverage under the ESA and may involve violations of the ESA.

6. The National Audubon Society has rights to enforce the Endangered Species Act and seek review of federal agency action under the Act, 16 U.S.C. §§ 1536, 1540.

Respectfully submitted,

HOPE BABCOCK
NATIONAL AUDUBON SOCIETY
801 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 547-9009

JOSEPH N. ONEK *
PAUL J. VAN DE GRAAF
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	3
A. Audubon's Interests in Relation to This Proceeding	3
B. This Proceeding's Effect on Audubon's Interests	7
C. Audubon's Interests May Not Be Adequately Represented	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: Page

Arizona v. California, 460 U.S. 605 (1983) 10
Maryland v. Louisiana, 451 U.S. 725 (1981) 3, 11
Nebraska v. Rural Electrification Administration, 12 E.R.C. 1156 (D. Neb. 1978) 4
Nebraska v. Wyoming, 325 U.S. 589 (1945) 1, 4
Nebraska v. Wyoming, 325 U.S. 655 (1945) 1, 4
Nebraska v. Wyoming, 345 U.S. 981 (1953) 1
New Jersey v. New York, 345 U.S. 369 (1953) 3, 10
Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 10
TVA v. Hill, 437 U.S. 153 (1978) 5, 6, 10
Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972), modified, 503 F.2d 1305 (5th Cir. 1974) .. 11

Statutes and Other Authorities:

Endangered Species Act, 16 U.S.C. §§ 1531-1543 ... *passim*
National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 4
Fed. R. Civ. P. 24(a)(2) 10
50 C.F.R. § 17.3 6
50 C.F.R. § 17.95 7
H.R. Rep. No. 567, 97th Cong., 2nd Sess. (1982) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

STATEMENT OF THE CASE

This proceeding involves a continuation of a dispute among Wyoming, Nebraska and Colorado over water rights to the North Platte River. In 1945, this Court issued an opinion providing for an equitable apportionment of the natural flow of the North Platte River, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and entered a decree placing certain restrictions on diversions and storage of water from the North Platte, *Nebraska v. Wyoming*, 325 U.S. 655 (1945). At the same time the Court recognized the need to allow for sufficient flexibility to adjust the decree "to meet . . . new conditions." 325 U.S. at 620. It thus retained jurisdiction in the case to consider requests for modification of the decree or for "further relief." 325 U.S. at 671.[1]

---

[1] In 1953, the Court modified the decree at the request of all the parties. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

Regulation of the natural flow of the North Platte River has had significant effects on the character of the North Platte River in central Nebraska. As the flow of the North Platte, a significant tributary of the Platte, has decreased and natural fluctuations in the flow have been reduced, the Platte River channel has lost many of its natural contours. In many places the Platte has gone from a predominantly wide and shallow river with few trees on its shores to a series of narrow and deep channels running by tree-lined shores. Further reductions in the Platte's flow are likely to exaggerate these changes. This potential for additional radical change in the character of the Platte has led to fears about the effects such changes would have on a number of endangered bird species that use the Platte, such as the Whooping Crane, the Least Tern, and the Piping Plover. This potentially affected area of the Platte River is also a critical staging area for approximately eighty percent of the world's population of migrating Sandhill Cranes.

On October 6, 1986, Nebraska filed a motion in this Court seeking leave to enforce the Court's apportionment decree based on allegations that Wyoming is violating or threatens to violate the decree in four ways. Specifically, Nebraska asserts that Wyoming's use of waters from the Greyrocks Reservoir, its construction of two water projects on the North Platte River—the Corn Creek Project and the Deer Creek Project—and its attempted regulation of canals used for the transportation of water to Nebraska are impermissible. While Nebraska contends that it does not seek modification of the decree, it is clear that resolution of the controversy between Wyoming and Nebraska may have profound effects on the natural flow of the Platte. After the United States and Wyoming responded to Nebraska's petition, this Court granted the petition on January 20, 1987, giving defendants 60 days within which to file answers.

ARGUMENT

Because intervention in cases arising under this Court's original jurisdiction is rarely sought by private parties, the Court has had little opportunity to formulate precise standards governing leave to intervene. Nevertheless, the Court has stated some general principles for determining whether intervention is appropriate. In *Maryland v. Louisiana*, 451 U.S. 725, 746 n.21 (1981), the Court approved of intervention by a number of gas pipeline companies in a case involving the constitutionality of a state tax law, because the companies had a direct stake in the controversy. By contrast, the Court rejected intervention by the City of Philadelphia in a water dispute among New Jersey, New York and Pennsylvania. *New Jersey v. New York*, 345 U.S. 369 (1953). The Court reasoned that "[a]n intervenor whose state is already a party [has] the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. In this case, the Court need not grapple with the question of what minimum showing is necessary to warrant intervention. Audubon has interests that are recognized by federal law and that give it the kind of direct stake in the litigation that this Court has already found merits intervention.

A. Audubon's Interests in Relation to This Proceeding

The National Audubon Society, which has a long-standing interest in wildlife and particularly in migrating birds and their habitats, believes, based on numerous studies, that further reductions in the natural flow of the North Platte would create significant possibilities of harm to migrating bird populations. Audubon's interest in and understanding of the Platte grow in part out of its ownership and maintenance of the Lillian Annette Rowe Sanctuary, composed of 800 acres of Platte River

habitat. In addition, Audubon has worked with landowners to encourage their cooperation in maintaining the wildlife habitats on the Platte, such as by entering into leases for the seasonal protection of hundreds of acres.[2]

Audubon's concerns with the environmental quality of the Platte and with the prevention of harm to wildlife led Audubon to file a lawsuit a decade ago against the Rural Electrification Administration, seeking to enjoin construction of the Grayrocks Reservoir on the grounds of noncompliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 ("NEPA"), and the Endangered Species Act, 16 U.S.C. §§ 1531-1543 ("ESA" or "Act"). These claims related to the potential adverse effects of reductions in the flow of the Platte River on bird populations. The Audubon suit was consolidated with a suit brought by Nebraska also challenging the construction, in part on the grounds that use of the reservoir would violate this Court's decree in *Nebraska v. Wyoming*, *supra*. The district court found that the federal government had not satisfied its obligations under NEPA and the ESA and enjoined construction. *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978). While this decision was pending on appeal, the parties entered into a settlement that among other things addressed the ESA claims by providing that a certain quantity of water would be released from the reservoir for purposes of contributing to the flow to the Platte.

As the district court's decision in *Nebraska v. Rural Electrification Administration* shows, further decreases or regulation of the natural flow of the North Platte River raise significant questions under the ESA. This proceeding likewise implicates a number of distinct federal interests under the Act, a statute that represents

---

[2] Audubon is also a participant in the Platte River Management Joint Study, along with federal and state agencies.

Congress's efforts to design measures "to restore species that are so depleted in numbers that they are in danger of, or threatened with, extinction." H. R. Rep. No. 567, 97th Cong., 2nd Sess. 10 (1982).[3] Substantively, the ESA is intended to guarantee that federal actions are conducted to the greatest extent possible in a manner that protects endangered or threatened species. 16 U.S.C. § 1536. Section 1536(a)(2) states in relevant part that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the habitat of such species . . . , unless such agency has been granted an exemption for such action." Section 1536 goes on to provide a mechanism for this jeopardy assessment and a process for seeking an exemption from the requirement of not acting in a way that may jeopardize an endangered or threatened species. *Id.* § 1536(b)-(j), (o). The criteria for exemption include both the availability of "reasonable and prudent alternatives to the agency action" and the balance between the benefits of the agency action and the benefits of "alternative courses of action." *Id.* § 1536(h)(1)(A).

Section 1538 sets out a more general prohibition on conduct that adversely affects endangered or threatened species. It prohibits "any person subject to the jurisdiction of the United States" from "taking"—harassing or harming—a protected species. *Id.* § 1538(a)(1)(B). Under regulations promulgated pursuant to the Act, "harass" has been defined as "an intentional or negligent

---

[3] Congress stated that "[the] purpose [of this chapter is] to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). This Court in *TVA v. Hill*, 473 U.S. 153, 180 (1978), called the Act "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."

act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering." 50 C.F.R. § 17.3. Likewise, "harm" has been defined as "an act which actually kills or injured wildlife" including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Ibid.* Again, the ESA goes on to provide a mechanism for exemption from this prohibition, which includes consideration of alternative actions and the practical extent of minimizing the harm. 16 U.S.C. § 1539(a)(2)(A), (B).

Congress has also made clear that private parties, such as Audubon, have the right to assert these federal interests. While ESA's protective measures expressly cover only species listed by federal authorities as endangered or threatened,[4] the statute gives Audubon a right to challenge the failure to list a species that faces a threat to its continued existence. *Id.* §§ 1533(a), 1540(g)(6). It also authorizes judicial review of an exemption decision under section 1536. *Id.* § 1536(n). Finally, and most significantly, it confers authority on Audubon to enforce its prohibitions by giving Audubon a cause of action "to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof." *Id.* § 1540(g)(1)(A). In short, as this Court wrote in *TVA v. Hill*, 437 U.S. 153, 181 (1978), "[c]itizen involvement was encouraged by the Act."

---

[4] The statute also provides for the designation of critical habitats for certain endangered or threatened species. 16 U.S.C. § 1533(a)(3).

The federal interests recognized by the ESA become relevant to this proceeding in light of the potential adverse effects of this Court's apportionment decision on the endangered species that use the Platte. For example, it is essential for the habitat of the Whooping Crane [5] that the flow of the Platte be sufficient between March and April—and again in the Fall—to maintain a river that allows the Cranes to roost. Moreover, there need be periodic scouring and flooding flows that maintain a wide, shallow channel in the river and help clear the vegetation that could otherwise create unsuitable habitats for the Cranes. The Least Tern and the Piping Plover need sand bars in the river channel during the summer to nest, and also an adequate flow to protect the sand bars from predators. Any decision by this Court that authorizes severe reductions in current flows or fails to guarantee that flows are scheduled to provide for conditions needed by these endangered species would certainly raise significant concerns under the Act.[6] In sum, this proceeding closely relates to Audubon's interests under federal law.

B. This Proceeding's Effect on Audubon's Interests

Our position is that intervention is appropriate because the proceeding in this Court may impair Audubon's ability to enforce the provisions of the Endangered Species Act in three ways. First, denying Audubon the ability to intervene will prevent the organization from asserting

---

[5] A section of the Platte has been designated as a "critical habitat" for the Whooping Crane. 50 C.F.R. § 17.95.

[6] While the Sandhill Crane is not currently listed as a threatened endangered species, further degradation of the Platte raises serious concerns for these birds as well, because 80% of world's Sandhill Cranes rely on the Platte as a staging area in March and early April. Further crowding of the Sandhill Cranes on the Platte could make them more susceptible to disease, natural predators, or adverse weather conditions, and might result in wiping out specific races of the species.

its rights under the ESA to challenge the positions taken by the federal government in this proceeding.[7] The statute, in essence, not only regulates the federal government's conduct in the field concerning water policy, but also certain conduct in this litigation. Specifically, section 1536(a)(2) clearly places an obligation on the United States *as a party to this proceeding* "to insure that [its actions are] not likely to jeopardize the continued existence of any endangered species." By extension the ESA gives Audubon the right to assure that when the United States presents positions to this Court, such positions are based on assessments about the impact of those actions on endangered species. Obviously, Audubon's federal law rights to challenge the conduct of the federal government during the proceeding will be entirely lost if Audubon is not permitted to intervene.

Second, it is unlikely that either the federal government or a lower court will look beyond any water appropriation decision by this Court. Specifically, a claim by Audubon seeking to guarantee federal compliance with section 1536 will probably be rejected in favor of implementation of this Court's decision. For example, if this Court were to hold that Wyoming is entitled to certain amounts of the natural flow of the North Platte and can store that water at the Deer Creek Project, it will be very difficult to convince a district court that federal implementation of this Court's decision should be halted, and that the

---

[7] It is essential to recognize that federal agencies have a pervasive and significant role in the management and allocation of water in the Platte River basin. For example, the Army Corps of Engineers must grant permits for the construction of almost any reservoir or canal used to direct water from the North Platte. The Bureau of Reclamation constructs, manages and maintains many of the reservoirs along the North Platte. The Federal Energy Regulatory Commission licenses the use of hydroelectrical power plants at a number of those reservoirs. And the Rural Electrification Administration provides financial assistance for the construction of such power plants. In short, water policy for the North Platte is entwined with federal action.

federal government should consider whether to modify the effect of this Court's decision because of the possibility of jeopardy to an endangered species.[8]

The Court's decision will similarly impair Audubon's ability subsequently to assert claims under section 1538 that implementation of the Court's decision will harm an endangered species. If the Court has apportioned Wyoming a certain amount of water from the North Platte, it may be impossible as a practical matter to convince a lower court to prevent enforcement of this Court's decree because Wyoming's use of water would harm Whooping Cranes in Nebraska. In other words it is entirely reasonable to fear that any ESA claim by Audubon aimed at altering the effect this Court's decree will not be considered because no court or federal agency will assert the power to so alter rights under the decree.[9]

Third, the Court's apportionment decision will make it easier for federal or state agencies to seek exemptions from the Act's coverage. As noted above, the bases for exemptions from ESA coverage include consideration of the factual context of the agency action—such as whether there are reasonable alternatives to the action adversely affecting the endangered species. 16 U.S.C. §§ 1536(h), 1539(a). And decisions about what water will flow from the North Platte into Nebraska and on to the

---

[8] Audubon's argument in favor of intervention is bolstered by its interest in protecting its rights against the federal government under the settlement agreement in the Greyrocks litigation. Specifically, it would want to: 1) guarantee that the federal government does not take a position inconsistent with the agreement and 2) argue that this Court should not authorize the federal government to act in violation of the agreement.

[9] If this Court decides to consider the relationship between apportionment and wildlife concerns, its decision will be definitive not only as a practical matter but also as a legal matter, under principles of stare decisis.

Platte will alter the calculus for determining whether exemptions should be granted from the jeopardy assessments requirement and harm prohibition. Put simply, a decision by the Court to apportion more water to Wyoming or the failure properly to schedule the remaining flow will make it much easier for Nebraska to seek an exemption from the prohibition against harming the endangered species relying on the Platte.[10]

C. Audubon's Interests May Not Be Adequately Represented

Finally, Audubon's interests are distinct from those of the other parties in this proceeding. It is not asserting an interest merely as a part of a class of other citizens of one of the states in the proceeding—as did the City of Philadelphia in *New Jersey v. New York*; it is asserting its rights under federal law. Nor are these federal law rights properly represented by the United States. The United States is representing federal agencies, such as the Army Corps of Engineers and the Bureau of Reclamation, that have interests distinct from and possibly adverse to those interests protected by the ESA. *See, e.g., TVA v. Hill, supra*; *see also Trbovich v. United Mine Workers*, 404 U.S. 528, 536-39 (1972).[11] Furthermore, the ESA itself contemplates the necessity of compliance oversight by private parties, such as Audubon.[12]

---

[10] Although it is too early to describe precisely Audubon's contemplated role in this proceeding, at a minimum Audubon will seek to establish for the Court minimum water flows and release schedules essential for maintaining the habitats of the endangered bird populations.

[11] In any event, the United States in its initial filing in this proceeding gave no indication that it intended to litigate ESA issues here.

[12] Audubon's intervention is also supported by reference to the standards for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. While the requirements of Rule 24 do not govern the Court's intervention decision here, *Arizona v. California*, 460 U.S. 605 (1983), reference to those requirements

In sum, much like the pipeline companies in *Maryland v. Louisiana*, *supra*, Audubon has a "direct stake in [the] controversy" before the Court and, further, its participation would lead to "a full exposition of the issues" involved. The latter is particularly significant in light of Audubon's long-standing interest in and study of the endangered species that rely on the Platte. Indeed, Audubon has a particularized interest in the bird habitat on the Platte in that it owns a bird sanctuary maintained for the purposes of wildlife preservation and study. The organization's expertise in these important wildlife resource issues is certain to assist the Court in its consideration of the impact of the Endangered Species Act. Because of this expertise, if the Court were to hold that intervention is inappropriate, Audubon would request permission to assist the Court concerning wildlife issues as litigating amicus curiae. *See, e.g., Wyatt v. Stickney*, 344 F. Supp. 373, 375 & n.3 (M.D. Ala. 1972) (allowing several interested parties to participate as litigating amici), *modified*, 503 F.2d 1305 (5th Cir. 1974).

---

bolsters our position. Under the federal rules, intervention as of right requires a three-part showing: (1) that Audubon "claim an interest relating to the property or transaction which is the subject of the action" (2) that Audubon "is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest"; and (3) that Audubon's "interest is [not] adequately represented by existing parties." As described above, each of these three requirements is satisfied here.

CONCLUSION

For the reasons stated above, Audubon's motion to intervene should be granted.

Respectfully submitted,

HOPE BABCOCK
NATIONAL AUDUBON SOCIETY
801 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 547-9009

JOSEPH N. ONEK *
PAUL J. VAN DE GRAAF
ONEK, KLEIN & FARR
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

* Counsel of Record

Supreme Court, U.S.
FILED
APR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

IN THE
Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF PLATTE RIVER TRUST FOR LEAVE TO INTERVENE

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

April 3, 1987

BOWNE OF PHOENIX, Law Printers (602) 468-1012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF PLATTE RIVER TRUST FOR LEAVE TO INTERVENE	1
CONCLUSION	5
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

Page

CASES:

Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982) 2

Columbia Gas & E. Co. v. American Fuel & Power Co., 322 U.S. 379 (1944) 4

Kansas v. Colorado, 206 U.S. 46 (1907) 2

Utah v. United States, 394 U.S. 89 (1969) 4

Vinson v. Washington Gas Light Co., 321 U.S. 489 (1944) 3

STATUTES:

Neb. Stats. Section 46-2,108 through 46-2,119 2

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF PLATTE RIVER TRUST FOR LEAVE TO INTERVENE

The State of Nebraska opposes the intervention of the Platte River Trust because any possible interest that the Trust might have would be adequately represented by Nebraska and because the Trust's Complaint in Intervention would raise matters that are extraneous to the case.

Representation

In its memorandum in support of its motion to intervene, the Platte River Trust states that it "exists for:"

> [C]arrying out . . . financing programs, activities, and acquisitions to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska . . . .
>
> The programs, activities, and acquisitions . . . shall be formulated to protect and maintain . . . the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a

> life-support system for the whooping crane and other migratory species which utilize it.

Platte River Trust Declaration, Para. II; Memorandum at 4. The language omitted from the Trust Declaration, however, defines the State of Nebraska's relation *parens patriae* to the Trust:

> The purpose of this Trust shall be *to operate exclusively in connection with the carrying out of certain purposes of the State of Nebraska* . . . by financing programs, etc. . . .

Platte River Trust Declaration Para. II (emphasis added). The same language is found in Article III of the Trust's articles of incorporation.

In carrying out certain "purposes of the State of Nebraska," the Platte River Trust is subordinate to the state and is subsumed within the state's exercise of authority *parens patriae*. *Cf., Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 601-609 (1982); *Kansas v. Colorado,* 206 U.S. 46 (1907).

With respect to the state's case to enforce the existing apportionment of the waters of the North Platte River and to prevent Wyoming from violating the Court's decree, the Platte River Trust's interests are fully and adequately represented by the State of Nebraska. The Trust, however, wants to go beyond the apportionment. Notwithstanding that the upstream reservoirs in Wyoming and Nebraska are used pursuant to the present decree for irrigation and power purposes, the Trust wants the Court to enter a new decree compelling regulation for a distinctly different purpose, namely to provide certain minimum instream flows between Overton and Grand Island, Nebraska, some 120 miles downstream from the Wyoming Nebraska stateline.[1]

---

[1] Nebraska law provides the appropriate legal mechanism for obtaining a right to a minimum instream flow. Neb. Stats. Sections 46-2,108 through 46-2,119. The proper forum is an administrative proceeding before the Director of Water Resources.

Extraneous Issues

Aside from its representation problem, the Platte River Trust seeks to raise issues in this case that are beyond the scope of the Court's apportionment decree. In its statement of the case, the Trust asserts that "[t]his is an action to enforce and modify the equitable apportionment of the waters of the North Platte River . . . ." Memorandum at 1. There is nothing in Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief, however, which seeks to "modify" the 1945 and 1953 decrees.[2]

This case was tried as an equitable apportionment of the North Platte River among the states of Nebraska, Wyoming, and Colorado. From Nebraska's perspective the apportionment was effectuated by placing certain restrictions on the diversion of water from the North Platte and its tributaries in Wyoming and by awarding 75% of the natural flow of the river between Whalen and Tri-State Dam to Nebraska.

In contrast to the case as litigated and decided, the Platte River Trust seeks to litigate post-decree developments and "[c]hanged conditions manifested by recent federal statutes and better scientific knowledge about the environmental effects of water allocations . . . ." Complaint in Intervention at 7. The Trust also ignores the essence of the suit, *i.e.*, the division of water at the stateline, and seeks intrastate relief in the form of minimum instream flows in Nebraska.

Given the issues sought to be litigated and the relief sought by the Trust, it is clear that the Trust does not seek to intervene in the ordinary sense of the word, but to try a new and different case. The Trust should not be allowed to enlarge the issues or alter the nature of the proceedings. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("[O]ne of the most usual procedural

---

[2] While Nebraska does not seek to modify the decrees, that is not to say that clarification of the decrees may not be necessary to protect the apportionment. Nebraska does intend to seek whatever clarification that is needed, including the express articulation of tacit elements of the decrees.

rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding.") While the Federal Rules of Civil Procedure are no more than a guide to procedures in an original action [*Utah v. United States*, 394 U.S. 89 (1969)], it is fundamental that an intervenor is limited to the issues tried by the original parties. *Columbia Gas & E. Co. v. American Fuel & Power Co.*, 322 U.S. 379 (1944).

CONCLUSION

Although the Platte River Trust's interests are fully and adequately represented by the State of Nebraska and the request for intervention should be denied, Nebraska does not oppose the Trust's participation in the conventional role of an *amicus curiae*.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 3rd day of April, 1987 to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Wyoming Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

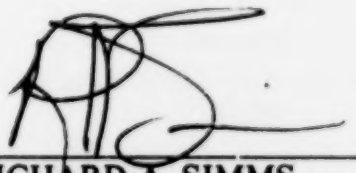
The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Duane Woodard
Colorado Attorney General
Department of Law
1525 Sherman Street, Third Floor
Denver, Colorado 80203

Charles N. Woodruff
Moses, Wittemyer, Harrison and Woodruff, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302

Abbe David Lowell
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Joseph N. Onek
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

SUPREME COURT, U.S.
FILED
APR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE NATIONAL AUDUBON SOCIETY FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

April 3, 1987

BOWNE OF PHOENIX, Law Printers (602) 468-1012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE NATIONAL AUDUBON SOCIETY FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE	1
CONCLUSION	3
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

Page

CASES:

Columbia Gas & E. Co. v. American Fuel & Power Co., 322 U.S. 379 (1944) 2

Kansas v. Colorado, 206 U.S. 46 (1907) 1

Vinson v. Washington Gas Light Co., 321 U.S. 489 (1944) 2

Wyoming v. Colorado, 259 U.S. 419 (1922) 1

STATUTES:

Endangered Species Act, 16 U.S.C. §§ 1531-1543 1

Endangered Species Act, 16 U.S.C. § 1531(c)(2) 2

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO THE MOTION OF THE NATIONAL AUDUBON SOCIETY FOR LEAVE TO INTERVENE OR TO PARTICIPATE AS LITIGATING AMICUS CURIAE

The National Audubon Society owns and maintains the Lillian Annette Rowe Sanctuary, some 800 acres of habitat along the Platte River, and is currently participating with the State of Nebraska in the Platte River Management Joint Study. To the extent that the Society has water rights associated with the sanctuary and to the extent that it has elected to cooperate with the state in analyzing the management of the Platte River in Nebraska, the Society is adequately represented in these proceedings by the State of Nebraska. *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907).

The Audubon Society, however, asserts that it has a unique interest in Nebraska's petition to enforce the Court's Decree of October 8, 1945, as amended on June 15, 1953. According to the Society, "it is asserting its rights under federal law." Brief in Support of Motion for Leave to Intervene at 10.

The federal law to which the Audubon Society alludes is the Endangered Species Act, 16 U.S.C. Sections 1531-1543, passed in 1973. The Act was prospective in nature, declaring the policy of

the United States to "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." 16 U.S.C. Section 1531(c)(2). Failing to recognize that Nebraska seeks to enforce a 40 year old apportionment decree, as opposed to seeking a new apportionment, the Audubon Society complains that "decisions about what water will flow from the North Platte into Nebraska and on to the Platte" may impair Audubon's ability to enforce the Endangered Species Act. *Ibid.* at 9-10. The apportionment, however, is an historic fact.

Not knowing "precisely [it's] contemplated role in this proceeding," Audubon asserts that "at a minimum [it] will seek to establish . . . minimum water flows and release schedules essential for maintaining the habitats of . . . endangered bird populations." *Id.* at 10 n. 10. Like the Platte River Trust, in other words, Audubon does not seek to intervene in the ordinary sense of the word, but to try a new and different case. Audubon should not be allowed to enlarge the issues or alter the nature of the proceedings. *Vinson v. Washington Gas Light Co.*, 321 U.S. 489 (1944). Like any other intervenor, Audubon is limited to the issues tried by the original parties. *Columbia Gas & E. Co. v. American Fuel & Power Co.*, 322 U.S. 379 (1944). Accordingly, Audubon should be precluded from intervening for the purposes it seeks to intervene.

CONCLUSION

To the extent the National Audubon Society seeks to aid in the enforcement of the decree, its interests are fully and adequately by the State of Nebraska. Nebraska, however, does not oppose Audubon's appearance in the conventional role of an *amicus curiae*.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or to Participate as Litigating Amicus Curiae were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 3rd day of April, 1987 to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Wyoming Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Duane Woodard
Colorado Attorney General
Department of Law
1525 Sherman Street, Third Floor
Denver, Colorado 80203

Charles N. Woodruff
Moses, Wittemyer, Harrison and Woodruff, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302

Abbe David Lowell
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Joseph N. Onek
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

FILED

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

COLORADO RESPONSE TO PLATTE RIVER TRUST AND NATIONAL AUDUBON SOCIETY MOTIONS FOR LEAVE TO INTERVENE

DUANE WOODARD
Attorney General of Colorado
CHARLES B. HOWE
Chief Deputy Attorney General
RICHARD H. FORMAN
Solicitor General
WENDY C. WEISS
First Assistant Attorney General
Natural Resources Section
LOIS G. WITTE
Assistant Attorney General
Natural Resources Section
Counsel of Record
Attorneys for State of Colorado
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

April 3, 1987

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

COLORADO RESPONSE TO PLATTE RIVER TRUST AND NATIONAL AUDUBON SOCIETY MOTIONS FOR LEAVE TO INTERVENE

Defendant, the State of Colorado, joins the State of Wyoming in opposing the motions for leave to intervene filed by the Platte River Whooping Crane Critical Habitat Maintenance Trust and the National Audubon Society. The State of Colorado concurs in the Wyoming Memorandum in Opposition to Platte River Trust and National Audubon Society Motions for Leave to Intervene, except that the State of Colorado does not concede that allowing intervention would require the Court to consider whether Colorado has a responsibility to supply water for migratory bird habitat in eastern Nebraska from the South Platte River, or would transform this proceeding into one involving the relationship between the migratory bird habitat in eastern Nebraska and water uses in the entire North Platte, South Platte, and Platte River basins upstream in the three states.

Respectfully submitted,

DUANE WOODARD
Attorney General of Colorado

CHARLES B. HOWE
Chief Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

WENDY C. WEISS
First Assistant Attorney General
Natural Resources Section

BY: _____

LOIS G. WITTE
Assistant Attorney General
Natural Resources Section
Counsel of Record

Attorneys for State of Colorado

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: (303) 866-5114

Supreme Court, U.S.
FILED
APR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO PLATTE RIVER TRUST AND NATIONAL AUDUBON SOCIETY MOTIONS FOR LEAVE TO INTERVENE

JOSEPH B. MEYER
Attorney General
of Wyoming

DENNIS C. COOK
Senior Assistant
Attorney General
Counsel of Record

JENNIFER HAGER
Assistant
Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder, Colorado 80302
(303) 443-8782

April 3, 1987

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

AGRUMENT 2

I. INTERVENTION BY THE PLATTE RIVER TRUST AND AUDUBON WOULD ENLARGE THE SCOPE OF THIS PROCEEDING AND THE RELIEF REQUESTED AGAINST WYOMING 2

II. CONSIDERATIONS OF *PARENS PATRIAE* AND SOUND JUDICIAL ADMINISTRATION OF THIS UNIQUE PROCEEDING OVERRIDE ANY REASONS FOR INTERVENTION 6

III. THIS COURT'S ORIGINAL JURISDICTION DOES NOT EXTEND TO THE CLAIMS ADVANCED BY THE PLATTE RIVER TRUST AND AUDUBON 12

IV. RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT REQUIRE THE COURT TO PERMIT INTERVENTION HERE 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES — Pages

Arizona v. California,
460 U.S. 605 (1983) 10,11,15

Kansas v. Colorado,
206 U.S. 46 (1907) 7

Kentucky v. Indiana,
281 U.S. 163 (1930) 11,12

Maryland v. Louisiana,
451 U.S. 725 (1981) 10,11

Massachusetts v. Missouri,
308 U.S. 1 (1939) 13

Missouri v. Fiske,
290 U.S. 18 (1933) 14,15

Nebraska v. Rural Electrification Administration,
12 ERC 1156 (D. Neb. 1978) 16

Nebraska v. Wyoming,
295 U.S. 40 (1935) 7,8

Nebraska v. Wyoming,
325 U.S. 589 (1945) 4,7,8

Nebraska v. Wyoming,
325 U.S. 665 (1945),
modified, 345 U.S. 981 (1953) 1,4,8

Nevada v. United States,
463 U.S. 110 (1983) 17

Pages

New Jersey v. New York,
345 U.S. 369 (1952) 7,8,9

Ohio v. Wyandotte Chemicals Corp.,
401 U.S. 493 (1971) 9

Oklahoma v. Texas,
258 U.S. 574 (1922) 12

Pennhurst State School & Hosp. v. Halderman,
465 U.S. 89 (1984) 14

Texas v. New Jersey,
379 U.S. 674 (1965) 12

Trbovich v. United Mine Workers,
404 U.S. 528 (1972) 12

United States v. Hooker Chemicals & Plastics Corp.,
749 F.2d 968 (2d Cir. 1984) 15,17

United States v. Nevada,
412 U.S. 534 (1973) 8,14

Utah v. United States,
394 U.S. 89 (1969) 10,12,14

CONSTITUTION

Eleventh Amendment 14

U.S. CONST. art III, § 2, cl. 2 13

STATUTES AND COURT RULES

Endangered Species Act:
16 U.S.C. §§ 1531, *et seq.* 5

Pages

16 U.S.C. § 1540 9
16 U.S.C. § 1540(c) 5

FED. R. CIV. P. 24 15,16

SUP. CT. R. 9.2 15

MISCELLANEOUS

G. Bogert, *Law of Trusts* § 163A (5th ed. 1973) 3

R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, Para. 10.6 (6th ed. 1986) 13

No. 108, Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO PLATTE RIVER TRUST AND NATIONAL AUDUBON SOCIETY MOTIONS FOR LEAVE TO INTERVENE

INTRODUCTION

The Platte River Whooping Crane Critical Habitat Maintenance Trust ("Platte River Trust") and the National Audubon Society ("Audubon") have moved for leave to intervene as parties plaintiff to enforce and modify this Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), as modified , 345 U.S. 981 (1953) ("North Platte Decree"). They seek to modify the North Platte Decree to require Wyoming to deliver a "regulated flow of water at the Wyoming-Nebraska state line" to meet the "downstream river flow needs of migratory bird habitat" in eastern Nebraska. Platte River Trust Motion for Leave to Intervene as Plaintiff, at 1, Complaint in Intervention, at 7, and Memorandum in Support of Motion to Intervene, at 13, 19-20; Audubon Brief in Support of Motion for Leave to Intervene, etc., at 10, n.10. Because their asserted interests and positions appear to be essentially identical, and in the interests of brevity, Wyoming responds

to the motions of the Platte River Trust and Audubon together.

Original jurisdiction proceedings concerning the apportionment of interstate waters involve the sovereign states in their role as *parens patriae*. Of course, there are many important and diverse interests within each state, but an adjudication of those competing interests is not the role of this Court. Rather, its role is to achieve an equitable adjustment of the sovereign rights of the states as necessary to prevent the actions of one state from causing serious injury to another. The need to provide an adequate forum for that purpose is paramount over conflicting considerations supporting intervention by private parties in other types of proceedings. Even if the Platte River Trust and Audubon could demonstrate that they meet the technical requirements of the Federal Rules of Civil Procedure for intervention in proceedings subject to those rules, their intervention or participation as litigants here would not be appropriate. For this and other reasons summarized hereafter, Wyoming requests the Court to deny the motions to intervene, including the alternative motion of Audubon for leave to participate as litigating *amicus curiae*.

ARGUMENT

I. INTERVENTION BY THE PLATTE RIVER TRUST AND AUDUBON WOULD ENLARGE THE SCOPE OF THIS PROCEEDING AND THE RELIEF REQUESTED AGAINST WYOMING.

The Platte River Trust apparently misunderstands the nature of this proceeding. It asserts that it is both

for the enforcement and for the modification of the North Platte Decree. *See, e.g.*, Platte River Trust Memorandum in Support of Motion, at 1. This proceeding, as framed by the pleadings of the parties, is for the enforcement of the existing North Platte Decree, not for its modification. Nebraska has expressly disclaimed that it seeks to "modify the Decree in any respect". Nebraska Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition, at 2. None of the parties seeks to modify the Decree.

The Platte River Trust and Audubon seek to modify the North Platte Decree to require Wyoming to deliver North Platte River flows at the state line in accordance with an annual schedule which they claim is needed for migratory bird habitat in eastern Nebraska.[4] The migratory bird habitat for which they seek regulated flows is located on the Platte River downstream of the confluence of the North Platte River and the South Platte River. The habitat area is more than 230 miles downstream from the Wyoming-Nebraska state line.

[4] A question exists as to whether the Platte River Trust has authority to attempt to intervene in this proceeding at all. The Trust Declaration creating the Trust provides: "No part of the activities of this Trust shall be the participation in, or intervention in . . . any litigation other than litigation directly related to the administration of the Trust." The Platte River Whooping Crane Habitat Maintenance Trust Declaration, at 9. *See generally*, G. Bogert, *Law of Trusts* § 163A (5th ed. 1973). It is unclear whether the Trust, if granted intervention, intends to attack or merely enforce the Grayrocks Reservoir Settlement Agreement pursuant to which it was created. Platte River Trust Memorandum in Support of Motion to Intervene, at 14-15. Surely the Trust is not authorized to attack the very agreement creating it nor to argue that operation of Grayrocks Reservoir in accordance with the agreement injures the Trust's or Nebraska's rights.

The North Platte Decree apportions water to Nebraska only for the benefit of certain specified irrigation canals diverting at or above Tri-State Dam, which is located in Nebraska a short distant downstream of the Wyoming-Nebraska state line.[2] The North Platte Decree does not provide for or contemplate the delivery of "regulated flows" for any uses supplied by diversions below Tri-State Dam. The Court found that return flows and local supplies were adequate for such downstream uses. *Nebraska v. Wyoming*, 325 U.S. 589, 607, 654 (1945).

Intervention by the Platte River Trust and Audubon would greatly enlarge the scope of this proceeding and the relief requested against Wyoming. For example, the North Platte Decree expressly does not affect the apportionment of the South Platte River between Colorado and Nebraska made by the South Platte River Compact.[3] North Platte Decree, Para. XII(e). If this Court is to determine in this proceeding whether the North Platte Decree shall be modified to provide water for migratory bird habitat in eastern Nebraska, then equity surely would require that the Court also consider whether Colorado and Nebraska have responsibility to supply water for that purpose from the South Platte River. Equity also would

[2] V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five percent to Nebraska. . . . North Platte Decree, Para. V.

[3] Nor does it affect "[t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." North Platte Decree, Para. XII(d).

require the Court to consider whether operation of diversion and storage projects in Nebraska, such as Lake McConaughy (Kingsley Dam), should be modified to assure delivery of regulated flows for migratory bird habitat.[4]

Audubon makes clear that its purpose in participating in this case is to protect the migratory bird habitat from further depletions in Wyoming and to secure regulated flows for the habitat through enforcement of the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.* Audubon assumes that the Secretary of Interior will fail to carry out his duties under that Act. Of course, any such failure would be subject to judicial review in the United States District Courts. 16 U.S.C. § 1540(c). There is no merit to the assertion that the Endangered Species Act properly can be applied in a proceeding such as this involving equitable apportionment of interstate waters between sovereign states. The Act's mandate extends to federal actions, including the operation of federal programs, and to any actions constituting takings of threatened or endangered species. No such actions are involved in this proceeding. The point is that Nebraska does not claim such relief here. This is not a suit to enforce the Endangered Species Act. To permit the Platte River Trust or Audubon to intervene for that purpose would enlarge the relief claimed against Wyoming.

This proceeding, as it stands, is one to determine whether certain actions or proposed actions in the North Platte basin in Wyoming, and Nebraska violate

[4] Because of its location between the Wyoming-Nebraska state line and the habitat area, no "regulated flows" delivered at the state line from Wyoming could reach the habitat area without passing through Lake McConaughy (1.9 million acre-feet capacity).

the existing North Platte Decree. Intervention by the Platte River Trust or Audubon would transform the proceeding into one involving the relationship between the migratory bird habitat in eastern Nebraska and water uses in the entire North Platte, South Platte and Platte River basins upstream in the three states. That relationship involves extremely complex and disputed scientific, factual matters. Those matters, including a determination of the water requirements for the migratory bird habitat, would necessitate extensive evidentiary proceedings which would dominate these proceedings in terms of time and expense.

II. CONSIDERATIONS OF *PARENS PATRIAE* AND SOUND JUDICIAL ADMININSTRATION IN THIS UNIQUE PROCEEDING OVERRIDE ANY REASONS FOR INTERVENTION.

We are unable to find a single case where this Court has permitted a party other than a state or the United States to intervene in an original jurisdiction action for the equitable apportionment of interstate waters. There are sound reasons why the Court has consistently limited participation in such actions. Equitable apportionment proceedings in the exclusive original jurisdiction of this Court are unique because their purpose is to make complex adjustments of the conflicting soverign interests of states:

> [W]henever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute

> between them, and this Court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. . . . If the two states were absolutely independent nations it would be settled by treaty or by force. Neither of these ways being practicable, it must be settled by decision of this Court.

Kansas v. Colorado, 206 U.S. 46, 97-98 (1907). In such proceedings, each state is deemed to represent all of its citizens. *New Jersey v. New York*, 345 U.S. 369, 372 (1952); *Nebraska v. Wyoming*, 295 U.S. 40, 43; 325 U.S. 589, 616, 629 (1945).

As this Court observed in *New Jersey v. New York*:

> The principle [of *parens patriae*] is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a State might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

345 U.S. at 373. There, Philadelphia was denied leave to intervene for the purpose of protecting its water supply from the Delaware River because Pennsylvania was already a party and Philadelphia was unable to show a "compelling interest" that was not properly represented by the State.

The interests of the Platte River Trust and Audubon in securing instream flows in the Platte River for

migratory bird habitat are not necessarily paramount to or more compelling than other water interests represented by Nebraska. Such other interests include instream flows for other purposes, as well as conflicting diversion to supply municipal, industrial, agricultural and other uses. The interest of the Platte River Trust and Audubon in this proceeding is certainly not more compelling than Philadephia's was in *New Jersey v. New York, supra*. Philadelphia's water supply was threatened by New York's proposed diversion. It is difficult to imagine an interest more direct and compelling than that. Certainly, Philadelphia's interest in protecting its municipal water supply was exclusive and different from other water users in Pennsylvania. Yet it was not allowed to intervene because the state represented its interests *parens patriae*. The Platte River Trust and Audubon simply are not able to show that they have a protectable interest in this proceeding that is so different from other Nebraska water interests that it cannot be represented adequately by Nebraska.

The Platte River Trust and Audubon seek to have this Court in effect allocate water among competing interests within Nebraska. The Court has declined to get involved in such intrastate allocation, confining itself to determination of the relative rights of the States. *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Nebraska v. Wyoming*, 325 U.S. 589, 627 (1945). In fact, the North Platte Decree itself expressly provides that it does not affect the relative rights of water users within the respective states. North Platte Decree, Para. XII(a). In the first proceeding in *Nebraska v. Wyoming*, 295 U.S. 548 (1935), the Court denied the Platte Valley Public Power and Irrigation District's motion to intervene. It was the sponsor of the Kingsley Dam (Lake McConaughy) and one of the major water

users on the North Platte River in Nebraska, as is its successor the Central Nebraska Public Power and Irrigation District.

If the Platte River Trust or Audubon were permitted to intervene, the Court could then be required to evaluate all of the competing water interests within the individual states. As this Court recognized in *New Jersey v. New York*, 345 U.S. 369, 373 (1953):

> If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth. . . . Our original jurisdiction should not be thus expanded to the dimensions of ordinary class actions.

Moreover, the interests of sound judicial administration dictate against using this Court's original jurisdiction to undertake an unwieldly, complex interstate and intrastate adjudication of conflicting claims to water in the entire Platte River basin. *Cf. Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 504-05 (1971). Determination of the relative rights of the states acting *parens patriae* for all of their water interests is stress enough on the Court's original jurisdiction.

Other adequate and more appropriate forums exist in which the Platte River Trust and Audubon may participate to insure that the Endangered Species Act is properly enforced. The Act itself provides for lower federal court jurisdiction over suits by citizens to require the United States to comply with the Endangered Species Act and to otherwise enforce the provisions of the Act. 16 U.S.C. § 1540. Wyoming submits

that the Court should dispose of the motions to intervene here as it did Morton International, Inc.'s motion in *Utah v. United States*, 394 U.S. 89, 96 (1969):

> While Morton doubtless wishes to have us settle its additional claims, we decline to permit intervention for the sole purpose of permitting a private party to introduce new issues which have not been raised by the sovereigns directly concerned. We are thus constrained to require the company to seek another forum which may, with greater efficiency, hear and decide its claims, together with any defenses the sovereign concerned wishes to interpose.

The Platte River Trust points out that private parties have been permitted to intervene in other original jurisdiction proceedings. None of those cases, however, was an original jurisdiction proceeding for the apportionment of interstate waters or for enforcement of an equitable apportionment decree. In *Arizona v. California*, 460 U.S. 605 (1983), the Court permitted the Indian Tribes to intervene. But there, the action was brought for the adjudication of the Tribes' federal reserved water rights and the Tribes were the sole claimants of the water rights for omitted lands and boundary lands. No other claims were before the Court. The suit to modify the decree was brought on their behalf by the United States, and their intervention did not enlarge the claims or issues.

The Platte River Trust and Audubon rely principally on *Maryland v. Louisiana*, 451 U.S. 725 (1981), where seventeen natural gas pipeline companies were

permitted to intervene in an original jurisdiction suit challenging Louisiana's tax on certain natural gas production. The companies were found to have a direct stake in the controversy because the tax in question was imposed on them directly as owners of the gas. *Id.* at 745, n.21. The companies were more directly affected by the tax in question than the consumers represented by the plaintiff states *parens patriae*. In contrast, the Platte River Trust and Audubon have no stake in the existing controversy, since the apportionment under the existing North Platte Decree which Nebraska seeks to enforce is limited to the irrigation canals diverting at or above Tri-State Dam. Even if the suit here were for modification of the Decree, the Trust and Audubon have no more direct stake in the controversy than does any other particular water interest in Nebraska. Their interests therefore are required to be represented by Nebraska *parens patriae*. Moreover, in *Maryland v. Louisiana*, intervention by the pipeline companies did not raise new claims or issues, since all of the parties were challenging the same tax.[5]

The Platte River Trust also relies on *Kentucky v. Indiana*, 281 U.S. 163 (1930), as authority for the intervention standard in original jurisdiction cases. That case did not involve intervention at all. The individual citizens of Indiana were defendants, not applicants for intervention. The issue was whether relief should be granted against them as well as the State of Indiana in the original jurisdiction suit filed by Kentucky. The Court held that relief against those defendants was not proper and dismissed the com-

[5] That decision did not compromise the state's sovereign immunity protected by the Eleventh Amendment. *Arizona v. California*, 460 U.S. 605, 614 (1983). *See* Argument, Part III.

plaint as against them because Indiana represented their interests *parens patriae*. *Id.* at 173-75. Therefore, the only relevance of *Kentucky v. Indiana* here is that a state shall represent all of its citizens *parens patriae* in original actions.

The other cases on which the Platte River Trust and Audubon rely do not support the intervention requested here. *Oklahoma v. Texas*, 258 U.S. 574 (1922), was essentially a quiet title action where the private parties allowed to intervene claimed title to the very property that was in the exclusive possession of the Court. In *Utah v. United States*, 394 U.S. 89, 92 (1969), intervention was denied in "the interests of justice and sound judicial administration". The Court noted that intervention by one party would lead to many others, "greatly increasing the complexity of this litigation". *Id.* at 95-96. That same concern is pertinent here. *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), was not an original jurisdiction case, and the Secretary of Labor there was not acting in a *parens patriae* role comparable to a state's role in an equitable apportionment proceeding. *Texas v. New Jersey*, 379 U.S. 674 (1965), involved the intervention of another state and so did not address the problems raised by intervention of a private party.

III. THIS COURT'S ORIGINAL JURISDICTION DOES NOT EXTEND TO THE CLAIMS ADVANCED BY THE PLATTE RIVER TRUST AND AUDUBON.

To permit intervention of the Platte River Trust and Audubon would be tantamount to creating a private right of action for equitable apportionment in the original jurisdiction. There can be no doubt that

those parties could not invoke this Court's original jurisdiction in the first instance to assert the claims set forth in their respective complaints. They cannot evade the constitutional and self-imposed limitations of this Court's original jurisdiction by asserting the claims as intervenors in Nebraska's suit for enforcement of the North Platte Decree. They admit that they are seeking relief not claimed by any other party to this proceeding.[6] Platte River Trust Memorandum in Support of Motion at 13, 20; Audubon Brief in Support of Motion, at 10.

The exclusive original jurisdiction of the Court is invoked in this case because there is a dispute between the states over enforcement of the North Platte Decree. U.S. Const., art. III, § 2, cl. 2. There is no dispute before the Court among the states and the United States regarding enforcement of the Endangered Species Act or regarding whether the North Platte Decree should be modified to provide regulated flows for the migratory bird habitat. The claims of the Platte River Trust and Audubon lie elsewhere than in this Court's original jurisdiction because, being asserted by private parties, they are outside the scope of Article III, Section 2, of the Constitution.

Even where this Court has original jurisdiction, it has used restraint in exercising that jurisdiction. The Court's self-imposed restraints extend even to exclusive original jurisdiction cases. R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice*, Para. 10.6 (6th ed. 1986); *Massachusetts v. Missouri*, 308 U.S. 1 (1939) (Fac-

[6] Neither Nebraska nor the United States requests modification of the North Platte Decree or delivery of regulated flows. The Answer of the United States herein states that "[a]ny modification of the decree should accommodate the habitat requirements of migrating birds. . .", at 3.

tors considered in restraint of exercise of original jurisdiction include (1) availability of another forum, (2) magnitude of the sovereign interest affected, (3) impact on the Supreme Court's workload and resources); *United States v. Nevada*, 412 U.S. 534 (1973) (Availability of another forum and non-existence of a dispute between the states was ground for denying leave to file complaint). These same considerations should compel the Court to deny these motions to intervene, which seek to expand the original jurisdiction to new parties and new claims. *Utah v. United States*, 394 U.S. 89 (1969).

Finally, the Eleventh Amendment of the United States Constitution precludes the Platte River Trust and Audubon from asserting the claims set forth in their tendered complaints. In *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-101 (1984), this Court presents a detailed discussion of its cases construing and applying the Eleventh Amendment and concludes:

> It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. [Cites omitted]. This jurisdictional bar applies regardless of the nature of the relief sought. See, e.g., *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State").

The Court also held that claims otherwise barred by the Eleventh Amendment could not be asserted in a federal court on the theory that they are ancillary to other properly asserted claims holding that,

> "The Eleventh Amendment is an explicit limitation of the judicial power of the United States." *Missouri v. Fiske*, 290 U.S. at 25. It deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction.

Id. at 119-120.

This action by its very nature is one against the state in its sovereign capacity. Since the Platte River Trust and Audubon, if permitted to intervene, would "bring new claims or issues" against Wyoming, their intervention is precluded by the Eleventh Amendment. *Arizona v. California*, 460 U.S. 605, 614 (1983).

IV. RULE 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT REQUIRE THE COURT TO PERMIT INTERVENTION HERE.

The Federal Rules of Civil Procedure do not bind this Court but may be taken as a guide where their application is appropriate. SUP. CT. R. 9.2. Even if FED. R. CIV. P 24 were controlling, the Platte River Trust and Audubon have not demonstrated that they have a protectable interest in this proceeding which would be impaired and which cannot be adequately represented by the existing parties.

As Judge Friendly observed in *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984), application of Rule 24 requires "that its com-

ponents be read not discretely, but together," and "with an eye to the posture of the litigation at the time the motion is decided." *Id.* He notes also that "[t]he rule was designed with the more traditional private action in mind, and its adaptation to other contexts requires a flexible reading of its provisions." *Id.* Perhaps more importantly, he noted that the current Rule 24 rejects "formalistic restrictions in favor of 'practical considerations' to allow courts to reach pragmatic solutions to intervention problems." *Id.* Here, practical considerations dictate that intervention be denied.

Since intervention by the Platte River Trust and Audubon is precluded for the purpose of asserting claims or issues different from those asserted by the other parties, they are left in the position of having to justify their intervention to assert the same claims as Nebraska for enforcement of the North Platte Decree, and must show why Nebraska should not stand in judgment for them under the doctrine of *parens patriae*. This they have failed to do.

Nebraska has demonstrated its willingness and ability to represent the interest of the migratory bird habitat in Nebraska. In fact, Nebraska filed a lawsuit to enjoin construction of the Grayrocks Reservoir on the Laramie River in Wyoming on the ground, *inter alia*, that the federal permitting agencies failed to consider effects of the project on the habitat. *Nebraska v. Rural Electrification Administration*, 12 ERC 1156 (D. Neb. 1978). Nebraska was aligned with Audubon in that litigation. The litigation resulted in the Settlement Agreement which created the Platte River Trust.

The Platte River Trust and Audubon have also assumed, without basis, that the United States will fail

to carry out its obligations under the Endangered Species Act and cannot adequately represent their interest in the migratory bird habitat. This Court has recognized that Congress' imposition of diverse obligations on a federal agency is no impediment to the agency's ability to carry out those obligations. *Nevada v. United States*, 463 U.S. 110, 128 (1983) (U.S. Department of Interior represented interests of both Indian Tribes and water users under a Bureau of Reclamation project in adjudication of water rights).

Where governmental entities are already parties to an action in their *parens patriae* role, a private party seeking to intervene must demonstrate "a strong showing of inadequate representation". *United States v. Hooker Chemicals & Plastics Corp., supra*, at 985-87. Even if this were an action to modify the North Platte Decree, the Platte River Trust and Audubon's assertions regarding inadequate representation are not sufficient. They are outweighed by the strong considerations in favor of limiting participation in equitable apportionment proceedings to sovereigns.

In summary, intervention by these parties and the attempted intervention by other parties that would follow would greatly increase the scope and the expense of the proceeding. The proceeding and its attendant uncertainty would be prolonged, to the prejudice of the existing parties. Wyoming submits that the Platte River Trust and Audubon do not meet the requirements of the Federal Rules of Civil Procedure for intervention in proceedings subject to those rules. But even if they did, their intervention or participation as litigants here should not be permitted. The proceeding for apportionment of the North Platte River was initiated in 1934. The North Platte Decree

was entered in 1945, eleven years later. Wyoming has a strong interest in a more expeditious resolution of the issues now before the Court regarding enforcement of the Decree.

CONCLUSION

For the foregoing reasons, the motions should be denied.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

JENNIFER HAGER
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

Supreme Court, U.S.
FILED
APR 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

REPLY MEMORANDUM IN SUPPORT OF MOTION BY THE PLATTE RIVER TRUST FOR LEAVE TO INTERVENE AS PLAINTIFF

ABBE DAVID LOWELL
(Counsel of Record)
PETER J. KIRSCH
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Attorneys for
Intervenor/Plaintiff
Platte River Whooping Crane
Critical Habitat Maintenance
Trust

Of Counsel:

EUGENE GRESSMAN
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

April 10, 1987

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Reply Memorandum in Support of Motion by The Platte River Trust for Leave to Intervene as Plaintiff	
Introduction	1
The Parens Patriae Doctrine Is Irrelevant	2
Neither Nebraska Nor The Platte River Trust Seeks to Reopen the Earlier Decrees	3
Conclusion	5
Appendix A	A-1

TABLE OF AUTHORITIES

	Page(s)
Cases:	
Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592 (1982)	2,3
Arizona v. California, 460 U.S. 605 (1983)	2
Kentucky v. Indiana, 281 U.S. 163 (1930)	2
Louisiana v. Texas, 176 U.S. 1 (1900)	2
Nebraska v. Wyoming, 325 U.S. 665 (1945)	4
New Jersey v. New York, 345 U.S. 369 (1953)	2
United States v. Nevada, 412 U.S. 534 (1973)	2

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,
Plaintiff

v.

STATE OF WYOMING,
Defendant

No. 108, Original

REPLY MEMORANDUM IN SUPPORT OF MOTION BY THE PLATTE RIVER TRUST FOR LEAVE TO INTERVENE AS PLAINTIFF

INTRODUCTION

The Platte River Whopping Crane Critical Habitat Maintenance Trust ("The Platte River Trust") timely moved for leave to intervene as a plaintiff in this original action. The States of Nebraska, Wyoming and Colorado (collectively the "States") filed briefs in opposition.[1] In their briefs, the States have needlessly confused two issues in their attempt to make this proceeding appear more complicated than it need be.[2]

---

[1] The United States has not filed any memorandum in response to The Platte River Trust's Motion. In its Answer, however, the United States acknowledged that "[a]ny modification of the decree should accommodate the habitat requirements of migrating birds . . ." Answer of the United States at 3, ¶ 4.

[2] If nothing else, the issues raised in the States' opposition briefs demonstrate the substantiality of the issues raised in The Platte River Trust's Motion. Significant issues relating to *parens patriae*, the scope of the 1945 and 1953 Decrees, and the scope of the present proceeding are too important to be resolved summarily on the parties' preliminary papers. Such issues further point to the need for the appointment of a special master.

THE PARENS PATRIAE DOCTRINE IS IRRELEVANT

All three States turn the doctrine of *parens patriae* on its head by arguing that that doctrine should act to *prevent* intervention by The Platte River Trust. The doctrine is utterly irrelevant to The Platte River Trust's intervention since the doctrine only determines whether a *state* has standing to assert claims based on injury to its citizens. The standing of the States is not an issue in this case. As this Court explained in *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 601-09 (1982), the doctrine enables a state to sue on behalf of its citizens. The doctrine allows a state to bring an action when neither its proprietary nor its sovereign interests are at stake. *Id.; see Louisiana v. Texas,* 176 U.S. 1, 19 (1900). Generally, a state invokes the doctrine to vindicate the economic interests of all, or a group, of its citizens. *Snapp,* 458 U.S. at 607. *See e.g., United States v. Nevada,* 412 U.S. 534, 539 (1973); *Louisiana v. Texas,* 176 U.S. at 19.

This Court has never held that *parens patriae* applies with regard to standing of individual citizens. The closest this Court has ever come to such a holding is the statement in *New Jersey v. New York,* 345 U.S. 369, 372-73 (1953), in which it noted that, when a state sues *parens patriae,* there is a natural assumption that it represents all, not just some, of its citizens with regard to the particular interest at issue. *Id., citing, Kentucky v. Indiana,* 281 U.S. 163, 173-74 (1930). *See United States v. Nevada,* 412 U.S. at 539. This Court has repeatedly recognized, of course, that that presumption is rebuttable. *See, e.g., Arizona v. California,* 460 U.S. 605, 615 (1983); Memorandum in Support of Motion for Leave to Intervene at 3-4 (and cases cited therein).

None of the States has claimed in this case that it is suing *parens patriae* for its citizens, or that it is pursuing any rights other than its sovereign water rights and boundary interests. In none of its papers filed in this action has the State of Nebraska asserted that it is representing *parens patriae* the interest in protecting migratory bird habitat on the Platte River. Furthermore, not only has none of the States asserted The Platte River

Trust's interests *parens patriae,* but The Platte River Trust has rebutted any presumption that the State of Nebraska could do so. *See* Memorandum in Support at 4-9, 11-15. Contrary to the misquotation in Nebraska's Opposition Brief, the State of Nebraska could probably not represent The Platte River Trust *parens patriae* because The Platte River Trust exists not just to serve the interests of the State of Nebraska but to serve the national and international interests defined in its Trust Declaration.[3] Under the proper formulation of *parens patriae,* it is arguable that none of the States has standing to represent The Platte River Trust because of its unique interstate interests. *See Snapp,* 458 U.S. at 607 (state cannot sue *parens patriae* if the state could not redress the alleged injury through exercise of its own sovereign legislative powers). To clarify the source of The Platte River Trust's interests, the relevant sections of its Trust Declaration are reprinted in Appendix A.

NEITHER NEBRASKA NOR THE PLATTE RIVER TRUST SEEKS TO REOPEN THE EARLIER DECREES

The States either misunderstand the relief which The Platte River Trust is seeking or else they are trying to distract this Court's attention from the limited scope of The Platte River Trust's proposed intervention. The Platte River Trust is *not* seeking to disturb the historical regime by which the State of Nebraska receives 75 per cent of the natural flow of the North Platte River; is *not* seeking an allocation of water; and most certainly is *not* seeking an appropriation from the State of Nebraska.[4] The Platte River Trust does not, in fact, seek to

---

[3] By filing one opposition brief, Wyoming tries to link The Platte River Trust and the National Audubon Society. The Court should not be sidetracked by Wyoming's attempt to ignore the unique source of The Platte River Trust's interest in the Platte River. The Platte River Trust and the Audubon Society are totally unrelated parties. Their interests are quite different, as are their grounds for intervention.

[4] The Platte River Trust agrees that this proceeding is not the appropriate forum for raising intrastate water rights issues. But The Plate River Trust may not be able to pursue such rights in Nebraska fora if this Court's apportionment makes the water unavailable. The Platte River Trust also agrees with the State of Colorado that this proceeding is not the appropriate forum in which to raise issues regarding South Platte River apportionment.

disturb the apportionment of waters among the States. Rather, The Platte River Trust requests that this Court affirm the State of Nebraska's claim to North Platte River water and ensure that the delivery of that water to Nebraska follows a natural flow pattern which makes it possible for the State of Nebraska to maintain existing water uses, including instream flow for migratory bird habitat. That relief is a far cry from the apportionment or appropriation specter raised by the States. That relief, moreover, could not be inconsistent with any of the States' interests in apportionment of water, unless the States were also seeking a particular annual pattern of river flows. None of the States has requested such relief.

Finally, the States are engaged in semantics by arguing that The Platte River Trust wants more modifications to the 1945 and 1953 Decrees than does the State of Nebraska. The Platte River Trust has asked this Court to hold that the "natural flow" of the North Platte River, as that phrase is used in *Nebraska v. Wyoming*, 325 U.S. 665, 666-70 (1945), requires maintenance of natural flow patterns of the North Platte River. The Platte River Trust has called that relief a "modification" of the Decrees. The State of Nebraska seeks the same type of relief through an "express articulation of the *tacit* elements of the decrees," Nebraska Memorandum in Opposition at 3 n.2 (emphasis added), but calls it a mere "clarification," *id.*, designed to prevent Wyoming from "increasing its depletion of the *natural flows* of the North Platte River." Nebraska Petition at 3-4 (emphasis added). Beyond counsel's choice of different words, there is no meaningful difference in the scope of the requested relief. The basis for both complaints lies in the substance of, and equitable apportionment made by, the 1945 and 1953 Decrees.

CONCLUSION

For the reasons discussed in this Memorandum, and for the reasons more particularly addressed in The Platte River Trust's Memorandum in Support of Motion for Leave to Intervene, this Court should grant intervention to The Platte River Trust.

Respectfully submitted this 10th day of April 1987,

ABBE DAVID LOWELL
(Counsel of Record)
PETER J. KIRSCH
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Attorneys for
Intervenor/Plaintiff
Platte River Whooping Crane
Critical Habitat Maintenance
Trust

Of Counsel:

EUGENE GRESSMAN
BRAND & LOWELL
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

APPENDIX A

THE PLATTE RIVER WHOOPING CRANE HABITAT MAINTENANCE TRUST DECLARATION

[EXCERPT]

(Restated to include all amendments to said Trust Declaration duly adopted by the Trustees of the Trust and approved by the Court, as of November 20, 1981.)

I. *Establishment of Trust:* In order to ensure that the operation of the Grayrocks Dam and Reservoir does not jeopardize the continued existence of the endangered Whooping Crane (*Grus americana*) or result in the adverse modification of its designated Platte River critical habitat in Nebraska, Basin Electric Power Cooperative of Bismarck, North Dakota (hereinafter referred to as the "Settlor") as the Project Manager and Operating Agent of the Missouri Basin Power Project, a joint venture of Basin Electric Power Cooperative, Tri-State Generation and Transmission Association, City of Lincoln Electric System, Heartland Consumers Power District, Western Minnesota Municipal Power Agency and Wyoming Municipal Power Agency, has agreed, as an element of the settlement dated December 4, 1978, of the litigation styled *Nebraska, et al. v. Ray* and *Nebraska, et al. v. REA, et al.,* Case Nos. CV 78-L-90 and CV 76-L-242, respectively, in the United States District Court for the District of Nebraska (*Nebraska, et al. v. REA, et al.,* No. 78-1775, and *Nebraska, et al. v. Ray, et al.,* No. 78-1778, respectively, in the United States Court of Appeals for the Eighth Circuit), and by conveying to the Trustees hereinafter provided for, within ten (10) days after written notice from the Trustees, cash in the form of a check in the amount of seven and a half million dollars (receipt of which upon payment of said check is hereby acknowledged) to have and to hold IN TRUST, NEVERTHELESS, does hereby establish a trust to be known as "The Platte River Whooping Crane Critical Habitat Maintenance Trust" (hereinafter the

"Trust") for the purposes and on the terms and conditions hereinafter set forth.

II. *Purpose of the Trust:* The purpose of this Trust shall be to operate exclusively in connection with the carrying out of certain purposes of the State of Nebraska and the National Wildlife Federation, by financing programs, activities, and acquisitions to protect and maintain the migratory bird habitat in the so-called Big Bend area of the Platte River between Overton and Chapman, Nebraska. This area contains habitat (hereinafter referred to as "critical crane habitat") which the Secretary of Interior pursuant to Section 7 of the Endangered Species Act of 1973 (P.L. 93-205), has determined to be critical to the continued survival of the endangered whooping crane, which determination was published at 43 Fed. Reg. 20938-20942 on May 15, 1978. This area also contains habitat essential to the continued well-being of the lesser sandhill crane (*Grus canadensis*) and for millions of migratory waterfowl. The programs, activities, and acquisitions referred to above shall be formulated to protect and maintain, consistent with the provisions hereof, the physical, hydrological, and biological integrity of the Big Bend area so that it may continue to function as a life-support system for the whooping crane and other migratory species which utilize it.

III. *Trustees:* The Trust established by this Declaration shall be administered by three trustees (hereinafter collectively referred to as the "Trustees"), one of whom shall be designated by the Missouri Basin Power Project, one of whom shall be designated by the Governor of the State of Nebraska, and one of whom shall be designated by the National Wildlife Federation. Each Trustee shall serve at the pleasure of the organization or person authorized to designate him or her and may, therefore, be removed and replaced by the designating organization or person at any time. Except as hereinafter otherwise expressly provided, the agreement of any two of the three Trustees shall be sufficient to take any action or make any decision authorized or required in the administration or execution of this Trust.

* * * * *

MOTION FILED
APR 13 1987

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO INTERVENE MEMORANDUM IN SUPPORT OF MOTION AND ANSWER

EDWARD WEINBERG
(*Counsel of Record*)
FREDERICK L. MILLER, JR.
DUNCAN, WEINBERG & MILLER, PC
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck , ND 58501
(701) 223-0441

April 13, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO INTERVENE

Basin Electric Power Cooperative ("Basin"),[1] as Project Manager and Operating Agent for the Missouri Basin Power Project ("MBPP"), by its attorneys, moves for leave to intervene in this action under Rule 9.2 of this Court's Rules and to file an answer in the form attached to this motion.

Basin seeks to intervene to (1) protect its existing rights to store water from the Laramie River by means of Grayrocks Dam and Reservoir (a feature of the MBPP) for use in the operation of another feature of the MBPP, a thermal electrical generating plant known as the Laramie River Station, (2) assure that it can honor its existing contractual obligation to store

---

[1] List of affiliates required by Rule 28.1 is appended to this Motion.

water in Grayrocks Reservoir for release to downstream users, and (3) assure that it can honor its commitments with respect to storage of water in and release from Grayrocks Reservoir under an Agreement of Settlement and Compromise. Basin's intervention is appropriate because:

(a) it has a compelling interest in the storage and diversion of the waters of the Laramie River, a principal tributary of the North Platte, by means of Grayrocks Dam and Reservoir;

(b) the applicability of the Decree of this Court entered in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), to Basin's rights to the waters of the Laramie for the purposes described above is one of the principal issues in this proceeding;

(c) Basin is so situated that this Court's disposition of this action may as a practical matter impair or impede Basin's ability to protect its interests in the operation of Grayrocks Dam and Reservoir; and

(d) neither Nebraska, Wyoming, nor the United States will adequately protect Basin's interests in the proper resolution of this action.

Respectfully submitted this 13th day of April, 1987.

EDWARD WEINBERG
(Counsel of Record)

FREDERICK L. MILLER, JR.
DUNCAN, WEINBERG & MILLER, PC
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

APPENDIX

LIST OF AFFILIATES REQUIRED BY RULE 28.1

(Basin has no parent company and all subsidiaries are wholly owned *)

COLORADO

Highline Electric Association
P.O. Box 57
407 East Denver Street
Holyoke, CO 80734-0057

K.C. Electric Association, Inc.
P.O. Box 8
422 3rd Street
Hugo, CO 80821-0008

Morgan County Rural Electric Cooperative
P.O. Box 738
20169 Hwy 34
Fort Morgan, CO 80701-0738

Mountain Parks Electric, Inc.
P.O. Box 66
81 West Agate - Hwy 40
Granby, CO 80446-0066

Mountain View Electric Association, Inc.
P.O. Drawer M
1655 5th Street
Limon, CO 80828-0346

Poudre Valley Rural Electric
Association, Inc.
P.O. Box 1727
4809 S College
Fort Collins, CO 80522-1727

---

* Of the other Participants in the Missouri Basin Power Project, listed in n. 1, p. 3 of Basin's Memorandum in Support of Motion for Leave to Intervene, only Tri-State Generation and Transmission Association, Thornton, Colorado, is a corporation.

Tri-State G&T Association, Inc.
P.O. Box 33695
12076 Grant Street
Denver, CO 80233-0695

Union Rural Electric Association, Inc.
P.O. Box 929
18551 East 160 Avenue
Brighton, CO 80601-0929

Y-W Electric Association, Inc.
P.O. Box Y
250 Main Street
Akron, CO 80720-0570

IOWA

Cherokee County Rural Electric Cooperative
P.O. Box 361
Hwy 3 West
Cherokee, IA 51012-0361

Harrison County Rural Electric Cooperative
P.O. Box 2
61-65 4th Street
Woodbine, IA 51579-0002

Ida County Rural Electric Cooperative
P.O. Box 72
Hwy 59 & 175 East
Ida Grove, IA 51445-0072

L and O Power Cooperative
315 First Avenue
Rock Rapids, IA 51246

Lyon Rural Electric Cooperative
116 S. Marshall
Rock Rapids, IA 51246-1518

Monona County Rural
Electric Cooperative
P.O. Box 359
Hwy 175 East
Onawa, IA 51040-0359

Nishnabotna Valley Rural Electric
Cooperative
P.O. Box 589
1317 Chatburn Avenue
Harlan, IA 51537-0589

Northwest Iowa Power Cooperative
P.O. Box 240
Hwy 75 South
LeMars, IA 51031-0240

O'Brien County Rural Electric
Cooperative
P.O. Box 458
160 S. Hayes
Primghar, IA 51245

Osceola Electric Cooperative, Inc.
204 8 Street
Sibley, IA 51249-1699

Plymouth Electric Cooperative
Association
P.O. Box 440
45 First Avenue SW
Le Mars, KA 51031-3590

Sioux Electric Cooperative Association
415 Eighth Street SE
Orange City, IA 51041-1999

South Crawford Rural Electric Cooperative
P.O. Box 428
Hwy 39 North
Denison, IA 51442-0428

Western Iowa Municipal Electric
Cooperative Association
317 Main Street
Manning, IA 51455-1030

Woodbury County Rural Electric
Cooperative Association
P.O. Box AG
RR East
Moville, IA 51039-0509

MINNESOTA

Lyon-Lincoln Electric Cooperative, Inc.
P.O. Box 639
West Hwy 14
Tyler, MN 56178-0639

Minnesota Valley Cooperative Light
and Power Association
P.O. Box 717
501 South First Street
Montevideo, MN 56265-0717

Renville-Sibley Cooperative Power Association
P.O. Box 68
103 Oak Street
Danube, MN 56230-0068

Southwestern Minnesota Cooperative Electric
P.O. Box 336
East Hwy 30
Pipestone, MN 56164-0336

Traverse Electric Cooperative, Inc.
Box 66
T.H. 27 & 17 Street
Wheaton, MN 56296-0066

MONTANA

Beartooth Electric Cooperative, Inc.
P.O. Box 1119
North of Red Lodge
Red Lodge, MT 59068-1119

Big Flat Electric Cooperative, Inc.
P.O. Box H
333 S. Seventh Street East
Malta, MT 59538-0288

Central Montana Electric Power Cooperative, Inc.
P.O. Box 50085
848 E. Main Street
Billings, MT 59105-0085

Fergus Electric Cooperative, Inc.
P.O. Box 4040
Giltedge Route
Lewistown, MT 59457

Goldenwest Electric Cooperative, Inc.
P.O. Box 245
108 West 1st Avenue South
Wibaux, MT 59353-0245

Hill County Electric Cooperative, Inc.
P.O. Box 430
2121 Hwy 2 NW
Havre, MT 59501-0430

Lower Yellowstone Rural Electric
Association, Inc.
P.O. Box 951
310 Second Ave NE
Sidney, MT 59270-0951

Marias River Electric Cooperative, Inc.
P.O. Box 729
910 Roosevelt Hwy
Shelby, MT 59474-0729

McCone Electric Cooperative, Inc.
P.O. Box 368
117 East Main
Circle, MT 59215-0368

Mid-Yellowstone Electric Cooperative, Inc.
P.O. Box 386
203 Elliot
Hysham, MT 59038-0386

Northern Electric Cooperative
P.O. Box 287
Main Street
Opheim, MT 59250-0287

Park Electric Cooperative, Inc.
P.O. Box 908
306 South 12
Livingston, MT 59047-0908

Sheridan Electric Cooperative, Inc.
P.O. Box 227
Hwy 16 North
Medicine Lake, MT 59247-0227

Southeast Electric Cooperative
P.O. Box 368
Main Street #1
Ekalaka, MT 59324-0368

Sun River Electric Cooperative
P.O. Box 217
1st Avenue South
Fairfield, MT 59436-0217

Tongue River Electric Cooperative, Inc.
P.O. Box 138
Main Street
Ashland, MT 59003-0138

Upper Missouri G&T Electric Cooperative
P.O. Box 1069
Sidney, MT 59270-1069

Valley Electric Cooperative, Inc.
P.O. Box 392
1130 Hwy 2 West
Glasgow, MT 59230-0392

Yellowstone Valley Electric Cooperative
P.O. Box 8
113 Northern Avenue
Huntley, MT 59037-0008

NEBRASKA

Chimney Rock Public Power District
P.O. Box 608
805 West 8th Street
Bayard, NE 69334-0608

Midwest Electric Membership Corporation
P.O. Box 970
1st & Washington Avenue
Grant, NE 69140-0098

Northwest Rural Public Power District
P.O. Box 249
South Hwy 87
Hay Springs, NE 69347-0249

Panhandle Rural Electric Membership Association
P.O. Box 677
319 Black Hills
Alliance, NE 69301-0677

Roosevelt Public Power District
P.O. Box 97
1633 13 Street
Mitchell, NE 69357-0097

Wheatbelt Public Power District
P.O. Box 177
2104 Illinois Street
Sidney, NE 69162-0177

NORTH DAKOTA

Baker Electric Cooperative, Inc.
P.O. Box 608
609 4th Avenue
Cando, ND 58324-0608

Burke-Divide Electric Cooperative, Inc.
RR #1 Box 6
Columbus, ND 58727

Capital Electric Cooperative, Inc.
P.O. Box 730
4111 State Street
Bismarck, ND 58502-0730

Central Power Electric Cooperative, Inc.
P.O. Box 1576
525 20 Avenue SW
Minot, ND 58701-1576

James Valley Electric Cooperative, Inc.
RR 02 Box 22
Edgeley, ND 58433-9802

Kem Electric Cooperative, Inc.
P.O. Box 904
107 South Broadway
Linton, ND 58552-0904

McKenzie Electric Cooperative, Inc.
P.O. Box 649
Hwy 23 East
Watford City, ND 58854-0649

McLean Electric Cooperative, Inc.
P.O. Box 399
Hwy 37 East
Garrison, ND 58540-0399

Mor-Gran-Sou Electric Cooperative, Inc.
P.O. Box 297
202 6th Avenue West
Flasher, ND 58535-0297

Mountrail Electric Cooperative, Inc.
P.O. Box 129
242 Main Street
Stanley, ND 58784-0129

North Central Electric Cooperative, Inc.
P.O. Box 9
Hwy 5 West
Bottineau, ND 58318-0009

Oliver-Mercer Electric Cooperative, Inc.
801 Highway Drive, Route 3
Hazen, ND 58545

R.S.R. Electric Cooperative, Inc.
P.O. Box 158
Hwy 13 West
Milnor, ND 58060-0158

Slope Electric Cooperative, Inc.
P.O. Box 338
116 E 12th Street
New England, ND 58647-0338

Tri-County Electric Cooperative, Inc.
P.O. Box 180
1515 West Main
Carrington, ND 58421-0180

Verendrye Electric Cooperative, Inc.
RR 01 Box 13
Hwy 52 West
Velva, ND 58790-9703

West Plains Electric Cooperative, Inc.
P.O. Box 1038
2156 4th Avenue East
Dickinson, ND 58601-1038

Williams Electric Cooperative, Inc.
P.O. Box 1346
Hwy 85 North
Williston, ND 58802-1346

SOUTH DAKOTA

Beadle Electric Cooperative, Inc.
P.O. Box 38
Hwy 14 East
Huron, SD 57350-0038

Black Hills Electric Cooperative, Inc.
P.O. Box 112
West Hwy 16
Custer, SD 57730-0112

Bon Homme-Yankton Electric
Association, Inc.
P.O. Box 158
Lidice Street
Tabor, SD 57063-0158

Butte Electric Cooperative, Inc.
P.O. Box 137
109 S. Dartmouth
Newell, SD 57760-0137

Cam-Wal Electric Cooperative, Inc.
P.O. Box 135
404 West Scranton
Selby, SD 57472-0135

Charles Mix Electric Association, Inc.
P.O. Box 9
440 Lake Street
Lake Andes, SD 57356-0009

Cherry-Todd Electric Cooperative, Inc.
P.O. Box 169
West Hwy 18
Mission, SD 57555-0169

Clay-Union Electric Corporation
P.O. Box 71
1410 East Cherry Street
Vermillion, SD 57069-0071

Codington-Clark Electric Cooperative, Inc.
P.O. Box 880
3 8th Avenue SE
Watertown, SD 57201-0880

Douglas Electric Cooperative, Inc.
P.O. Box 338
South Main Street
Armour, SD 57313-0338

East River Electric Power Cooperative, Inc.
P.O. Drawer E
121 SE First Street
Madison, SD 57042

Fem Electric Association, Inc.
P.O. Box 468
800 5th Avenue
Ipswich, SD 57451-00468

Grand Electric Cooperative, Inc.
P.O. Box 39
Main Street North
Bison, SD 57620

H-D Electric Cooperative, Inc.
P.O. Box 307
423 3rd Avenue South
Clear Lake, SD 57226-0307

Intercounty Electric Association, Inc.
P.O. Box 850
1420 North Main
Mitchell, SD 57301-0850

Kingsbury Electric Cooperative, Inc.
P.O. Box E
511 5th Street SW
DeSmet, SD 57231-0126

LaCreek Electric Association, Inc.
P.O. Box 220
East Hwy 18
Martin, SD 57551-0220

Lake Region Electric Association, Inc.
P.O. Box 341
1212 North Main
Webster, SD 57274-0341

Lincoln-Union Electric Company
P.O. Box 65
Hwy 11 North
Alcester, SD 57001-0065

McCook Electric Cooperative, Inc.
P.O. Box 250
236 North Main
Salem, SD 57058-0250

Moreau-Grand Electric Cooperative, Inc.
P.O. Box 8
405 9th Street
Timber Lake, SD 57656-0008

Northern Electric Cooperative, Inc.
P.O. Box 457
Hwy 12
Bath, SD 57427-0457

Oahe Electric Cooperative, Inc.
P.O. Box 216
Hwy 14
Blunt, SD 57522-0216

Ree Electric Cooperative, Inc.
P.O. Box 227
10th & Broadway
Miller, SD 57362-0227

Rosebud Electric Cooperative, Inc.
P.O. Box 439
114 East 6th Street
Gregory, SD 57533-0439

Rushmore Electric Power Cooperative, Inc.
P.O. Box 2414
231 East St. Joseph
Rapid City, SD 57709-0214

Sioux Valley Empire Electric
Association, Inc.
P.O. Box 216
Junction Hwy 34 & 77
Colman, SD 57017-0216

Spink Electric Cooperative, Inc.
P.O. Box 40
6 East 7th Avenue
Redfield, SD 57469-0040

Tri-County Electric Association, Inc.
P.O. Box 130
151 South Main
Plankinton, SD 57368-0130

Turner-Hutchinson Electric Cooperative, Inc.
P.O. Box 388
508 South Broadway
Marion, SD 57043-0388

Union County Electric Cooperative, Inc.
P.O. Box 459
West Main Street
Elk Point, SD 57025-0459

West Central Electric Cooperative, Inc.
P.O. Box 17
204 Main Street
Murdo, SD 57559-0017

West River Electric Association, Inc.
P.O. Box 412
506 Glen Street
Wall, SD 57790-0412

Whetstone Valley Electric
Cooperative, Inc.
P.O. Box 512
East Hwy U.S. 12
Milbank, SD 57252-0512

WYOMING

Big Horn Rural Electric Company
P.O. Box 270
208 South 5th Street
Basin, WY 82410-0270

Carbon Power & Light, Inc.
P.O. Box 579
110 East Spring Street
Saratoga, WY 82331-0579

Hot Springs County REA, Inc.
P.O. Box 630
504 Fremont Street
Thermopolis, WY 82443-0630

Niobrara Electric Association
P.O. Box 697
3951 U.S. Hwy 20
Lusk, WY 82225-0697

Riverton Valley Electric Association, Inc.
P.O. Box 713
230 West Main Street
Riverton, WY 82501-0713

Rural Electric Company
P.O. Box 518
220 Main Street
Pine Bluffs, WY 82082-0518

Sheridan-Johnson REA
P.O. Box 5087
1095 Brundage Lane
Sheridan, WY 82801-1387

Shoshone River Power, Inc.
P.O. Box 640
226 Yellowstone
Cody, WY 82414-0640

Tri-County Electric Association, Inc.
P.O. Box 930
221 Main Street
Sundance, WY 82729-0930

Wheatland Rural Electric Association
P.O. Box 120
2154 South Rd.
Wheatland, WY 82201-0120

Wyrulec Company
P.O. Box 359
221 Main Street
Lingle, WY 82223-0359

TABLE OF CONTENTS

	Page
MEMORANDUM IN SUPPORT OF MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO INTERVENE	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING INTERVENTION	2
I. The Standards for Intervention in Original Actions are Satisfied by Basin	2
A. Basin Has a Direct Interest in the Subject Matter of This Action Which is Compelling and Deserving of Protection	3
II. Basin's Interests May be Adversely Impacted by the Outcome of This Case	8
III. Basin's Interests Will Not Be Adequately Represented by Any Other Party	9
IV. Basin's Participation Can Facilitate the Court's Disposition of this Action	11
CONCLUSION	12
ANSWER OF INTERVENOR BASIN ELECTRIC POWER COOPERATIVE TO PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF	14
APPENDIX	
Map depicting North Platte and Laramie Rivers and location of various features	A-1
Letter of January 5, 1978 from Secretary of the Interior concurring in the Settlement Agreement	A-2
Official Decision of the Endangered Species Committee	A-4

Letter of December 28, 1978 from Wyoming Attorney General to counsel for Basin A-8

Letter of April 2, 1986 from Superintendent of Wyoming's Water Division No. 1 to Plant Manager of Laramie River Station A-10

TABLE OF AUTHORITIES

CASES:	Page
Maryland v. Louisiana, 451 U.S. 725 (1981)	12
Nebraska v. Rural Electrification Administration, 12 ERC 1156 (D. Neb. 1978)	5
Nebraska v. Wyoming, 325 U.S. 589 (1945)	1
Nebraska v. Wyoming, 345 U.S. 981 (1953)	1
New Jersey v. New York, 345 U.S. 369 (1953) ...	10
STATUTES:	
Clean Water Act, 33 U.S.C. § 1344	4
Endangered Species Act, 16 U.S.C. § 1531 *et seq.*	5,6,7,11
Endangered Species Act Amendments of 1978, § 5, 92 Stat. 3751 (uncodified)	7
National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO INTERVENE

STATEMENT OF THE CASE

This action, accepted by the Court's Order of January 20 (55 LW 3493), was brought by Nebraska and alleges a number of violations by Wyoming of this Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) as amended in 1953, 345 U.S. 981 (1953) (hereinafter, collectively, the "Decree"). The relief sought is enforcement of the Decree in the particulars allegedly violated and injunctive relief. Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief (hereinafter "Nebraska's Complaint"), at 3-4. Nebraska eschews any intent to seek a modification of the Decree. Nebraska's Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition at 2.

The allegations of Wyoming's violations in the Nebraska Complaint are four in number. Two involve the North Platte itself and do not impact movant, Basin Electric Power Cooperative (hereinafter "Basin").

Two of the violations charged, however, directly and adversely impact Basin. Paragraph 3a of Nebraska's Complaint charges that Wyoming is violating Nebraska's decreed rights by:

> Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River.

Paragraph 3b charges that Wyoming is violating Nebraska's decreed rights by:

> Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers.

Basin seeks to intervene to ensure that any disposition on the merits of this case protects its existing water rights and ensures that Basin can continue to honor its obligations under an Agreement of Settlement and Compromise to which Basin and Nebraska, among others, are parties.

REASONS FOR GRANTING INTERVENTION

I. The Standards for Intervention in Original Actions Are Satisfied by Basin

The standards under which the Court considers intervention in original actions are reviewed at pages

3 and 4 of the Memorandum submitted by the Platte River Trust in support of its motion for leave to intervene and, in the interests of brevity, are not repeated here. As will be shown, Basin satisfies those standards.

A. Basin Has a Direct Interest in the Subject Matter of This Action Which is Compelling and Deserving of Protection

Basin is the Project Manager and Operating Agent of the Missouri Basin Power Project (hereinafter "MBPP") which commenced operation in 1980. MBPP is owned by a consortium made up of Basin and six other consumer or cooperatively owned electric utilities in the Missouri River Basin.[1] The MBPP Participants and their member distribution systems serve more than 1,200,000 people in eight of the Missouri River Basin states.[2]

The MBPP consists primarily of a 1500 megawatt electric generating station (the Laramie River Station) located near Wheatland, Wyoming, associated transmission facilities and Grayrocks Dam and Reservoir (hereinafter "Grayrocks"). The total capital cost of MBPP is approximately $1,340,000,000.

---

[1] The Participants in the MBPP are:

Basin Electric Power Cooperative	42.27%
Tri-State Generation and Transmission Association of Thornton, Colorado	24.13%
Western Minnesota Municipal Power Agency, Ortonville, Minnesota	16.47%
City of Lincoln, Nebraska	12.76%
Heartland Consumers Power District	3.00%
Wyoming Municipal Power Agency, Lusk, Wyoming	1.37%

[2] The states are North Dakota, South Dakota, Montana, Wyoming, Colorado, Nebraska, Iowa and Minnesota.

Grayrocks is located on the Laramie River some 10 miles above the confluence of the Laramie with the North Platte River. See Appendix A-1.[3] With a storage capacity of about 104,000 acre-feet, Grayrocks Reservoir provides cooling water essential to the operation of the Laramie River Station.

Grayrocks will also supply a portion of the water for the Corn Creek irrigation development, planned by the Corn Creek Irrigation District, if and when that development materializes. Corn Creek proposes to divert water from the Laramie River at its confluence with the North Platte. It is the diversion occasioned by the potential Corn Creek project which, as explained in Wyoming's Brief in Opposition to Nebraska's Motion for Leave to File Petition, at pp. 7-8, is the alleged violation complained of by Nebraska in ¶ 3b of its Complaint.

While the Laramie River Station and Grayrocks were under construction, Nebraska joined with others, including the National Wildlife Federation and the National Audubon Society, in lawsuits (hereinafter the "Grayrocks litigation") challenging both the Rural Electrification Administration's issuance of loan guarantees for a substantial part of the MBPP's cost and the grant by the United States Army Corps of Engineers of a dredge and fill permit under section 404 of the Clean Water Act, 33 U.S.C. § 1344. Named

---

[3] Appendix A-1 is a map showing the location of Grayrocks, the Laramie River Station, the Big Bend reach of the Platte and most of the Bureau of Reclamation dams involved in the Nebraska Complaint. It also shows the location of Kingsley Dam of the Central Nebraska Public Power and Irrigation District and of its reservoir, Lake McConaughy, which has an original storage capacity of over 1,000,000 acre-feet.

as defendants were the Administrator of the Rural Electrification Administration and the Omaha District Engineer of the U.S. Army Corps of Engineers. Basin and some of the other MBPP Participants intervened as defendants.

Among other allegations, the complaints in the Grayrocks litigation charged that the depletion of the flow of the Laramie River resulting from the operation of Grayrocks and the Laramie River Station would, in turn, deplete and change the flow of the Platte River through what is known as the Big Bend reach of the Platte in Nebraska, stretching from Overton to Grand Island, a distance of some 53 miles. Overton itself is some 300 river miles downstream from Grayrocks. *See* Appendix A-1.

The changes in the regimen of the Big Bend reach attributed to the operation of Grayrocks would, it was further alleged, result in serious damage to the whooping crane, long designated as an endangered specie under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, and for which the Big Bend reach had been designated "critical habitat" pursuant to that Act.

The cases were consolidated by the District Court and decided as *Nebraska v. Rural Electrification Administration*, 12 ERC 1156 (D. Neb. 1978). The District Court found violations of both the Endangered Species Act and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and enjoined further construction of Grayrocks Dam and the Laramie River Station until the requirements of those statutes were met.

On December 4, 1978, while the cases were pending on appeal in the Eighth Circuit, all parties entered

into an Agreement of Settlement and Compromise (hereinafter "Settlement Agreement").

So far as here material, by the Settlement Agreement:

1. Plaintiffs withdrew all objections to the actions theretofore taken by the federal defendants.

2. All parties agreed that compliance by MBPP with the Settlement Agreement satisfied the requirements of the Endangered Species Act.

3. The MBPP Agreed:

(a) to limit its consumptive use of Laramie River water for the Laramie River Station to a specified annual maximum;

(b) to make specified releases of water from Grayrocks;

(c) in the event the Corn Creek irrigation project were to come into operation, to deliver specified quantities of water into the mouth of the Laramie and certain specified quantities of water into the North Platte itself (these deliveries would constitute up to one-half of the Laramie depletion attributable to Corn Creek);

(d) through Basin, to establish, and provide initial capital ($7,500,000) for, the Platte River Whooping Crane Habitat Maintenance Trust (hereinafter the "Platte River Trust") under a trust declaration in the form included as an exhibit to the Settlement Agreement.

The effectiveness of the Settlement Agreement was conditioned on three conditions subsequent:

(a) Concurrence of the Secretary of the Interior in the parties' agreement that compliance by the MBPP

with the Settlement Agreement satisfied the requirements of the Endangered Species Act.

(b) An exemption for Grayrocks under the Endangered Species Act by the Endangered Species Act Committee as provided in section 5 of the Endangered Species Act Amendments of 1978, § 5, 92 Stat. 3751 (uncodified).

(c) Vacation of the Judgment of the District Court and dismissal of the lawsuits with prejudice.

Upon the effectuation of the first two conditions, the parties executed and filed with the Eighth Circuit a "Stipulation" so informing that Court. As requested in the Stipulation, the Eighth Circuit dismissed the appeals and remanded the cases to the District Court with instructions to dismiss the cases with prejudice, subject to the right of any party to the Settlement Agreement to petition the District Court for interpretation and enforcement of any of the terms of the Settlement Agreement itself.

The Settlement Agreement, the Stipulation and the District Court's Order of Dismissal are reproduced at Appendix A-20-36 of Wyoming's Brief in Opposition to Motion for Leave to File Petition. The concurrence of the Secretary of the Interior in the parties' agreement that compliance by MBPP with the Settlement Agreement would satisfy the requirements of the Endangered Species Act is reproduced in the Appendix hereto at p. A-2 and the formal decision of the Endangered Species Committee exempting Grayrocks is reproduced at p. A-4.

II. Basin's Interests May be Adversely Impacted by the Outcome of This Case

As noted earlier, Nebraska's Complaint charges that its rights to water under the Court's Decree are violated by the depletions of the North Platte's flows occasioned by operation of Grayrocks. Neb. Comp. ¶ 3a.

As also earlier noted, Nebraska further charges that its decreed rights would be violated by depletions at the confluence of the Laramie and the North Platte that would result if the potential Corn Creek irrigation development were to materialize. Neb. Comp. ¶ 3b. This charge also implicates Grayrocks because, under an agreement between Basin and the Corn Creek Irrigation District recognized by the Settlement Agreement, a portion of Corn Creek's water requirements will be provided from Grayrocks storage. If Nebraska prevails on this claim and Corn Creek becomes a reality, the draft on Grayrocks storage occasioned by Corn Creek could conceivably substantially increase, thereby impairing the electrical output of the Laramie River Station through a reduction in the availability to it of cooling water from Grayrocks.

Pending before this Court is the Motion of the Platte River Trust for leave to intervene. The Trust, it will be recalled, exists by reason of the Settlement Agreement, having been established and funded by Basin pursuant thereto. Nevertheless, the Trust endorses Nebraska's claims of Wyoming's violations of the Decree. Memorandum in Support of [Platte River Trust's] Motion to Intervene as Plaintiff, 15 n.7. One of Nebraska's charged violations is, of course, the North Platte River depletions occasioned by Grayrocks itself. Neb. Comp. ¶ 3a. Since Grayrocks went

into operation, no one, including Nebraska, has heretofore charged that Basin's depletions violate the Settlement Agreement.

Further, the relief sought by the Trust includes a modification of the Decree in order to require Wyoming to make Nebraska's North Platte water allocation available in accordance with a schedule to meet migratory bird needs in the Big Bend reach of the Platte. Platte River Trust's Complaint in Intervention ¶¶ 1, 3, Prayer ¶ 2. To the extent that such a schedule were to require changes in the timing or magnitude of Grayrocks' releases, it would be inconsistent with the Settlement Agreement, thereby also obviously adversely impacting Basin. In the event this Court allows the Trust's intervention, and Basin is also permitted to intervene, Basin will seek to amend appropriately its answer in this proceeding.

III. Basin's Interests Will Not Be Adequately Represented by Any Other Party

Basin obtained water rights for Grayrocks and the Laramie River Station pursuant to Wyoming law. Basin shares Wyoming's view that Nebraska is bound by the Settlement Agreement to which it is a party and that Grayrocks' operation does not violate any rights of Nebraska under the North Platte Decree.

Nevertheless, Wyoming itself was not a party to the Settlement Agreement, claims not to be bound by its provisions and, in important respects, has put Basin on notice that it questions the validity of some of them. In a letter of December 28, 1978 to Basin's Counsel, Wyoming's then Attorney General questioned, *inter alia*, the authority of Basin under Wyoming law, to make the releases contemplated by

paragraphs 4 and 5 of the Settlement Agreement. *See* Appendix at p. A-8. Similar admonitions have been repeated by responsible water administrators of the State of Wyoming, as is shown by the letter of April 2, 1986 from the Superintendent of Wyoming's Water Division No. 1 to the Plant Manager of the Laramie River Station. This letter, reproduced as Appendix at p. A-10, is representative of similar letters in past years.

In these circumstances, given Wyoming's expressed position, Basin clearly meets the burden of demonstrating a compelling interest in its own right justifying intervention even though Wyoming, which would otherwise be a parens patriae state, is a party. *See New Jersey v. New York*, 345 U.S. 369, 373 (1953).

Nor can Basin's interests be adequately represented by the United States. Both in December of last year, when the federal government filed its original Memorandum in this action, and again in March when the federal government's answer was filed, federal government counsel was apparently unaware of the Grayrocks litigation, the Settlement Agreement and the federal government's connection therewith. The fact that the federal government was a party to the Grayrocks litigation and Settlement Agreement has now been brought to counsels' attention. Presumably, the federal government will, by appropriate amendment of its pleadings and in its presentation to the Special Master if one should be appointed, undertake to protect the rights and obligations of the federal government in the operation of Grayrocks as in the Settlement Agreement provided. Nevertheless, even in that event, while the federal government's interest would, to a degree, parallel some of Basin's interests,

Basin's interests would not be adequately represented by the United States.

Basin's interests (and those of the other Participants in the MBPP) include protection in this litigation of their considerable financial stake in maintaining the generating capability of the Laramie River Station within the constraints of the operation of Grayrocks permitted under the Settlement Agreement, as well as the interests of more than a million users of electricity in eight states that rely on MBPP for the continued availability of electricity therefrom. These interests are separate and apart from the federal government's own concerns in this litigation. The federal government's interests are the maintenance of adequate security for the loans guaranteed by the Rural Electrification Administration (which, however, constitutes only a portion of MBPP's financing[4]), the protection of the Bureau of Reclamation's interests in the North Platte and other federal reclamation projects involved, and the protection of the actions taken or approved by the federal government under the Endangered Species Act, including the premise upon which the exemption of MBPP from the Endangered Species Act was based.

IV. Basin's Participation Can Facilitate the Court's Disposition of this Action

There is an additional important consideration which warrants the according of intervenor status to Basin.

---

[4] Only two of the Participants, Basin and Tri-State, received REA loan guarantees. The other Participants financed their shares of MBPP's construction cost with bond issues which were not guaranteed by REA or any other federal (or state) agency.

In addition to the valuable rights it seeks to protect in this litigation, Basin is in a unique position to make available information to the Court which will be critical to a resolution of this Case. Wyoming's third affirmative defense and Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File a Petition recognizes that the Settlement Agreement is an issue relative to the determination of the rights to flows from the Laramie River. Since Wyoming was not a party to the Settlement Agreement and Nebraska was a plaintiff in the Grayrocks litigation which resulted in the Settlement Agreement (as was the Intervenor-Applicant National Audubon Society), Basin is in the unique position of being able to provide valuable information to the Court in the interpretation of that document and its relevancy to this case. The application of the Settlement Agreement clearly will be one of the issues in the resolution of the dispute between Nebraska and Wyoming over the waters of the Laramie River.

In *Maryland v. Louisiana*, 451 U.S. 725, 745-46, n.21 (1981), this Court approved intervention by a number of parties because they had "a direct stake in [the] controversy" that would facilitate "a full exposition of the issues," adding that "it is not unusual to permit intervention of private parties in original actions."

CONCLUSION

For the foregoing reasons, Basin's motion should be granted.

Respectfully submitted this 13th day of April, 1987.

EDWARD WEINBERG
(Counsel of Record)
FREDERICK L. MILLER, JR.
DUNCAN, WEINBERG & MILLER, PC
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power
Cooperative
1717 E. Interstate Ave.
Bismarck , ND 58501
(701) 223-0441

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

ANSWER OF INTERVENOR BASIN ELECTRIC POWER COOPERATIVE TO PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

Answer

Intervenor Basin Electric Power Cooperative ("Basin") in answer to the State of Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief, states as follows:

1. The allegations in paragraph 1 are admitted.

2. While Basin's intervention does not relate to the matters alleged in paragraph 2, the allegation that the North Platte Decree establishes restraints on storage of water in the Pathfinder and Guernsey Reservoirs is admitted. Basin is without knowledge or information sufficient to form a belief as to the truth of each and every other allegation in paragraph 2.

3. The allegation in the introductory clause of paragraph 3 as it relates to subparagraph a and b is denied. The allegation that the operation of Grayrocks Reservoir depletes the flows of the North Platte River is admitted, but Basin denies that such depletions violate the North Platte Decree or Nebraska's equitable apportionment thereunder. Basin, on information and belief, understands that the depletions alleged in subparagraph b of paragraph 3 are those that would be made by an irrigation development that has been proposed by the Corn Creek Irrigation District. If and when constructed, a portion of the water required by the Corn Creek development would be supplied from water stored in Grayrocks Reservoir and released into the Laramie River for delivery to the Corn Creek development pursuant to the terms of a contract between Basin and the Corn Creek Irrigation District. Basin denies that such storage, release and delivery of water from Grayrocks Reservoir, if and when undertaken, would violate the North Platte Decree or Nebraska's equitable apportionment thereunder. Basin denies that any water has been, or is about to be, stored in or released from Grayrocks Reservoir for the Corn Creek development and denies further, on information and belief, that the Corn Creek development is a present reality or that it is under construction. Basin is without knowledge or information sufficient to form a belief as to the truth of each and every other allegation in paragraph 3, none of which is relevant to Basin's intervention.

4. The allegations in paragraph 4 are denied. Except as such allegations relate to subparagraphs a and b of paragraph 3, they are not relevant to Basin's intervention.

5. Basin is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5.

6. Insofar as they relate to subparagraphs a and b of paragraph 3, the allegations of paragraph 6 are denied. Insofar as they relate to each and every other allegation in paragraph 3, Basin is without knowledge or information sufficient to form a belief as to the truth thereof.

7. The allegations of paragraph 7, being conclusions of law, do not require a response.

8. The allegations of paragraph 8 are admitted. Their relevance to subparagraphs a and b of paragraph 3 is denied.

Affirmative Defenses

1. Nebraska's Petition does not allege facts upon which relief can be granted.

2. Nebraska consented to the construction and operation of Grayrocks Reservoir in an Agreement of Settlement and Compromise dated December 4, 1978. Parties to that agreement included, *inter alia*, Basin, the State of Nebraska, the Rural Electrification Administration of the United States Department of Agriculture and the Corps of Engineers of the United States Department of the Army. The agreement further provided for the very operation of Grayrocks Reservoir and releases therefrom of which Nebraska's Petition complains, including, *inter alia*, the storage for and delivery of water to the Corn Creek Irrigation District. Nebraska is accordingly estopped from asserting that the construction or operation of Gray-

rocks Dam and Reservoir violates the North Platte Decree or its equitable apportionment thereunder.

3. The allegations of paragraph 3b do not constitute a case or controversy within this Court's jurisdiction under Article III, Section 2 of the Constitution of the United States.

4. Nebraska has no right to the waters of the Laramie River because (a) these waters were fully and equitably apportioned under the Decree of this Court in *Wyoming v. Colorado*, 259 U.S. 419 *modified*, 260 U.S. 1 (1922); 353 U.S. 953 (1957), and (b) such a claim is barred by *res judicata*, Nebraska having unsuccessfully asserted a right to such water in *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

WHEREFORE, Basin prays that the Court enter an order affirming Basin's rights to use water from the Laramie River and its right to continue operation of Grayrocks Dam and Reservoir in accordance with the Agreement of Settlement and Compromise, and for such other and further relief as the Court deems just and proper in the circumstances.

Respectfully submitted this 13th day of April 1987.

EDWARD WEINBERG
(Counsel of Record)
FREDERICK L. MILLER, JR.
DUNCAN, WEINBERG & MILLER, PC
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

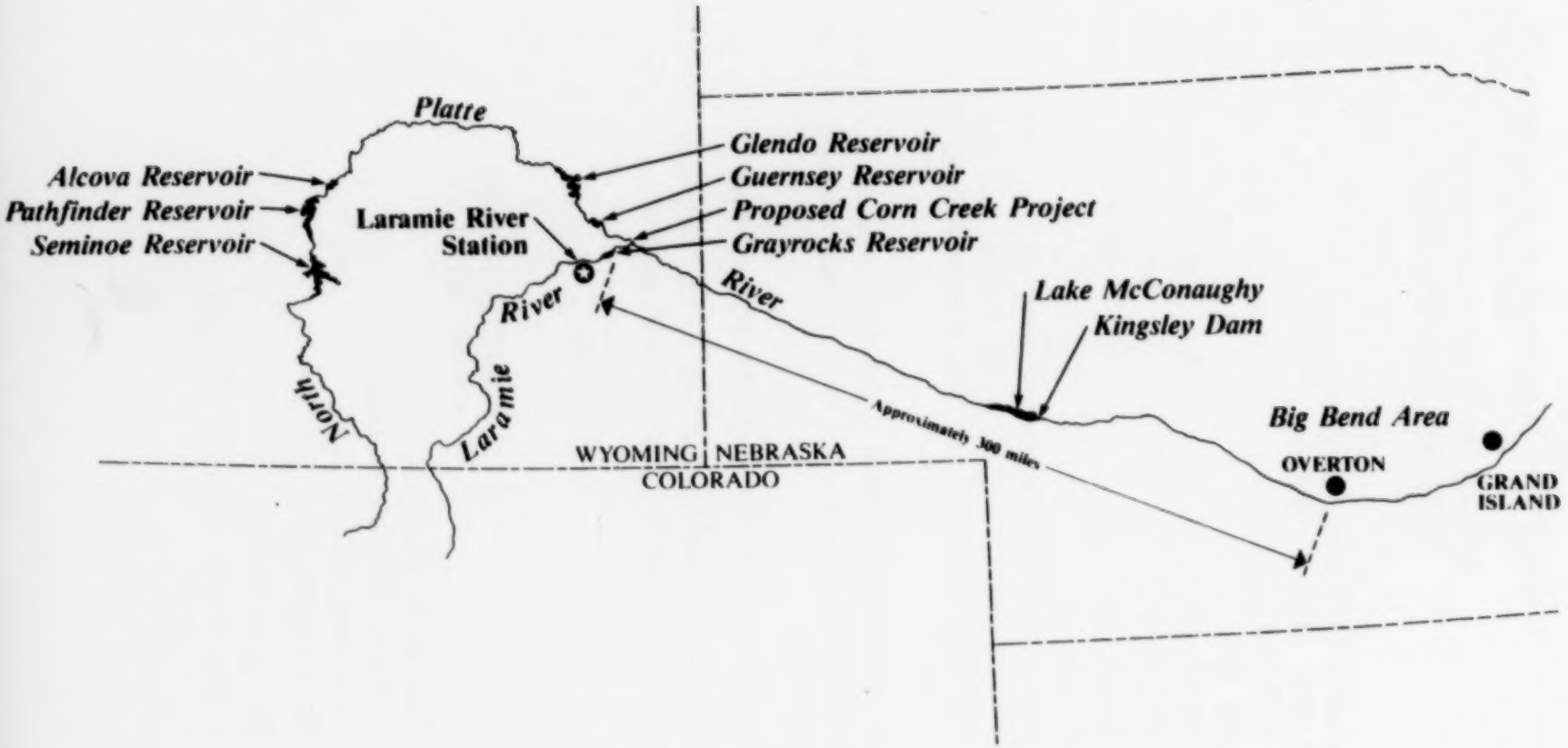
MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck , ND 58501
(701) 223-0441

APPENDIX


Platte
Alcova Reservoir
Pathfinder Reservoir
Seminoe Reservoir
Laramie River Station
Glendo Reservoir
Guernsey Reservoir
Proposed Corn Creek Project
Grayrocks Reservoir
River
River
North
Laramie
Lake McConaughy
Kingsley Dam
Approximately 300 miles
Big Bend Area
OVERTON
GRAND ISLAND
WYOMING
NEBRASKA
COLORADO

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 05 1978

Edward Weinberg, Esquire
Duncan, Brown, Weinberg
& Palmer, P.C.
Suite 1200
1775 Pennsylvania Ave., N.W.
Washington, D. C. 20006

Dear Mr. Weinberg:

I have received an executed copy of the agreement submitted by you on behalf of all parties for the settlement of the litigation involving the Missouri Basin Power Project.

The agreement (section 14(a)) requires, as a condition to its effectiveness, that I concur with section 12 of the agreement.

I hereby express the requisite concurrence.

I am pleased that the parties to the litigation have found a suitable means to resolve their conflict.

Sincerely,

/s/ JAMES A. JOSEPH
Acting Secretary

cc: Patrick A. Parenteau, Esquire
National Wildlife Federation
1412 16th Street, N.W.
Washington, D.C. 20009

Mr. Paul Snyder
Office of the Attorney General

Department of Justice
2115 State Capitol
Lincoln, Nebraska 68508

Mr. David Palmerlee
P.O. Box 6288
Sheridan, Wyoming 82801

Mr. William E. Holland
Kutak, Rock, and Huie
The Omaha Building
1650 Farnam Street
Omaha, Nebraska 68102

ENDANGERED SPECIES COMMITTEE:

APPLICATION FOR EXEMPTION FOR

GRAYROCKS DAM AND RESERVOIR

DECISION: Exemption granted, with specified mitigation and enhancement measures.

PROPOSED AGENCY ACTION:

The project at issue is the Grayrocks Dam and Reservoir, which is part of the Missouri Basin Power Project. It is subject to the Endangered Species Act limitations on federal actions because the federal Rural Electrification Administration (R.E.A.) is guaranteeing a portion of the construction costs and because it requires an Army Corps of Engineers permit for discharge of dredged or fill material into navigable waters pursuant to Section 404 of the Federal Water Pollution Control Act.

The Missouri Basin Power Project also includes the Laramie River Power Station and associated transmission facilities. The Laramie River Power Station will produce 1500 megawatts of electricity from three coal-fired steam electric generating plants. The Grayrocks Dam and Reservoir will be the principal source of cooling water to the plants.

As a result of the Grayrocks Dam and Reservoir (and other existing and proposed projects), the streamflow of the Platte River could be reduced sufficiently to modify adversely or to destroy the critical habitat of the whooping crane (nearly 300 miles downstream).

Independent of the Endangered Species Act section 7 consultation process, parties to litigation involving the dam and reservoir (*Nebraska v. R.E.A.* and *Nebraska v. Ray*, cases No. CV 78-L-90 and No. CV 78-L-242, U.S. Dist. Ct. for the Dist. of Neb. and cases No. 78-1775 and No. 78-1778, 8th Cir. Ct. of Appeals) reached an agreement

for settlement and compromise, signed December 4, 1978. Under the settlement and compromise, the Missouri Basin Power Project agrees to:

1) Limit its maximum annual water use to 23,250 acre-feet per year. (Section 1)

2) Make certain releases of water during various periods of the year. (Section 4)

3) Replace up to 11,250 acre-feet (subject to adjustments) withdrawn by Corn Creek Irrigation District. (Sections 5, 6, and 7)

4) Establish a trust fund of $7.5 million for the maintenance and enhancement of the whooping cranes' critical habitat along the Platte River. (Section 10 and Exhibit B)

5) Otherwise restrict operations of the project. (Sections 2, 3, 8, 9, and 11)

BASIS FOR DECISION:

Acting pursuant to the Endangered Species Act Amendments of 1978, the Endangered Species Committee proceeded to consider an exemption for the Grayrocks Dam and Reservoir on December 8, 1978, and on January 23, 1979, decided to grant the exemption.

The decision to grant the exemption was based on a unanimous vote of the eight Committee members (with the members representing the states of Wyoming and Nebraska each casting one-half vote) voting in person at a public meeting in the auditorium of the Department of the Interior in Washington, D.C., on January 23, 1979.

The decision was made on a record composed of testimony taken at hearings in Cheyenne, Wyoming and Washington, D.C. on January 8, 1979, and on other evidence submitted to the Committee and placed in the record on or before

January 10, 1979. It is based on a determination by the Committee that:

(i) There are no reasonable and prudent alternatives to the agency action, and

(ii) The benefits of the proposed agency action clearly outweigh the benefits of alternative courses of action which are consistent with conserving the whooping crane or its critical habitat, and

(iii) The proposed action is in the public interest.

That determination is based on findings made on the record and summarized below:

I. *Alternatives.* Alternatives to the agency action which were submitted to the Committee for consideration were: (1) Replacement of the water consumed through purchase from other sources; (2) Maintenance of the crane's critical habitat by mechanical means; (3) Replacement of the wet cooling system to conserve water; and (4) Noncompletion of the dam. (See Chapter 2 of the Staff Report.)

II. *Analysis of Alternatives.* None of the alternatives are reasonable and prudent. (See Chapter 2 of the Staff Report.)

III. *Comparison Costs and Benefits.* Benefits of the proposed agency action include supplying cooling water to the Laramie River Power Station, irrigating some farmland, and providing some reservoir recreation. The benefits of the proposed agency action clearly outweigh the benefits of the alternatives which are consistent with conserving the whooping crane or its critical habitat. (See Chapters 1 and 2 of the Staff Report.)

IV. *Public Interest.* The proposed agency action is in the public interest. (See Chapter 3 of the Staff Report.)

The Committee also established that the requirements set out in Sections 1 to 9 and 11 and in Exhibit 8 of the

Agreement of Settlement and Compromise, referred to above, are reasonable mitigation and enhancement measures which are necessary and appropriate to minimize the adverse effects of the project on the whooping crane or its critical habitat.

ORDER

On the basis of the findings stated above, the Committee grants an exemption for the Grayrocks Dam and Reservoir from the requirements of the Endangered Species Act, provided that the mitigation and enhancement measures listed above are funded concurrently with other project features, paid for by the Missouri Basin Power Project and otherwise carried out in compliance with the Endangered Species Act Amendments of 1978. These mitigation and enhancement measures are to be carried out without regard to the final disposition of the Agreement of Settlement and Compromise signed by the litigating parties.

Signed on behalf of the Endangered Species Committee:

/s/ CECIL D. ANDRUS — 2-7-79
CECIL D. ANDRUS, Chairman — Date

THE STATE [Seal] OF WYOMING ED HERSCHLER
Governor
In reply refer to: JOHN J. ROONEY
ATTORNEY GENERAL

ATTORNEY GENERAL
CHEYENNE, WYOMING 82002

December 28, 1978

Mr. Ed Weinberg
Duncan, Brown, Weinberg & Palmer, P.C.
Suite 200
1775 Pennsylvania Avenue Northwest
Washington, D.C. 20006

Dear Mr. Weinberg:

I am leaving the office of Attorney General on January 1, 1979 to become a Justice of our Supreme Court.

I have been meaning to comment to you on the Grayrocks agreement, but wanted to wait until all federal actions re approval were cleared.

The State of Wyoming may not cooperate with the priorities set forth in paragraph No. 2, since their issued permits already set forth priorities whereby the well water will be the last to be utilized. Of course, we reserve the right to establish measurement stations on our waterways—actually I think the ones referred to in the agreement are already established. Finally, we have authorized the various appropriations to Missouri Basin for the industrial use of the project. Any effort to change this to downstream use by others will not be authorized.

Wanted you to have these few thoughts before I left office.

Very truly yours,

/s/ JOHN J. ROONEY
Attorney General

JJR:rb

THE STATE [seal] OF WYOMING **ED HERSCHLER**
Governor

BOARD OF CONTROL

511 West 27th Street April 2, 1986 Torrington, WY 82240

Mr. Dallas Wade
Plant Manger
Laramie River Station
Box 1346
Wheatland, WY 82201-1346

Dear Mr. Wade:

This letter will acknowledge receipt of requests for regulation of the Laramie River to supply the various permits owned by Basin Electric.

This letter will serve to reaffirm the State's previous position that we cannot justify denying water to any Wyoming Water User in order to honor Basin Electric's permits so long as water (which has been available to fill these rights) is being released from Grayrocks Reservoir to meet out of state commitments, which are not recognized by Wyoming.

Runoff forecasts would indicate that hopefully there will be on adequate supply of water for these rights without regulation.

Sincerely,

/s/ EARL MICHAEL
EARL MICHAEL, Supt.
Water Division No. 1

EM/dh
cc: James Pugh
Dave Buyok
George Christopulos, c/o H. Taylor

MOTION FILED
APR 15 1987

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

JOINT MOTION OF NEBRASKA PUBLIC POWER DISTRICT AND THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS,

JOINT COMPLAINT IN INTERVENTION,

AND

BRIEF IN SUPPORT OF JOINT MOTION FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

Of Counsel:

GENE D. WATSON
JOHN C. MCCLURE
Nebraska Public Power District
1414 15th Street
Columbus, Nebraska 68601
(402) 563-5773

BRUCE A. PETERSON
ANDERSON, STRASBURGER, KLEIN, PETERSON AND SWAN
The Central Nebraska Public Power and Irrigation District
4th & Lincoln Streets
Holdrege, Nebraska 68949
(308) 995-8601

TOM WATSON
(Counsel of Record)
JEFFREY J. DAVIDSON
MARK A. WARNQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Intervenors/Plaintiffs

Nebraska Public Power District
The Central Nebraska Public Power and Irrigation District

April 15, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

JOINT MOTION OF NEBRASKA PUBLIC POWER DISTRICT AND THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District, by their attorneys, respectfully move the Court for leave to file a Joint Complaint in Intervention and for leave to intervene as Plaintiffs in this action pursuant to Rule 9.3 of the Rules of the Supreme Court of the United States for the reasons set forth in the accompanying brief.

Respectfully submitted this 15th day of April, 1987.

Of Counsel:

GENE D. WATSON
JOHN C. MCCLURE
Nebraska Public Power District
1414 15th Street
Columbus, Nebraska 68601
(402) 563-5773

BRUCE A. PETERSON
ANDERSON, STRASBURGER, KLEIN, PETERSON AND SWAN
The Central Nebraska Public Power and Irrigation District
4th & Lincoln Streets
Holdrege, Nebraska 68949
(308) 995-8601

April 15, 1987

TOM WATSON
(Counsel of Record)
JEFFREY J. DAVIDSON
MARK A. WARNQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Intervenors/Plaintiffs

Nebraska Public Power District
The Central Nebraska Public Power and Irrigation District

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

JOINT COMPLAINT IN INTERVENTION

Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District ("the Districts") hereby jointly complain as follows:

Jurisdiction

1. The Court has jurisdiction over this action pursuant to Article III, Section 2 of the United States Constitution, as implemented by the Judiciary Act, 28 U.S.C. § 1251. The Court has retained jurisdiction over this action following its assumption of jurisdiction in *Nebraska v. Wyoming*, 325 U.S. 589, 665, 671-72 ¶ XIII.

Parties

2. Plaintiff, the State of Nebraska, and defendants, the State of Wyoming and the State of Colorado, are sovereign States of the United States of America.

3. The United States was granted leave to intervene as a party. *Nebraska v. Wyoming*, 304 U.S. 545 (1938).

4. Nebraska Public Power District ("NPPD") is the owner and operator of Federal Energy Regulatory Commission ("FERC") licensed Project 1835, a water resource project serving multiple public purposes, including generation of hydropower, provision of cooling water supplies for the Gerald Gentleman Station coal-fired power plant, and recreational benefits. Project 1835 consists of a network of diversion dams, canals, storage reservoirs and hydroelectric facilities located on the North Platte and South Platte Rivers upstream of the "Big Bend" Reach of the Platte River in Nebraska.

5. The Central Nebraska Public Power and Irrigation District ("Central District") is the owner and operator of FERC licensed Project 1417, a multiple use water resources project providing irrigation, hydropower, thermal cooling and recreational benefits. The Project consists of Lake McConaughy, Kingsley Dam and Kingsley Hydro on the North Platte River, the Tri-County Diversion Dam on the Platte River, and a network of storage reservoirs, canals and hydroelectric facilities offstream of the Platte River. Project 1417 is located immediately upstream of the Big Bend Reach of the Platte River in Nebraska.

6. The Platte River Whooping Crane Critical Habitat Maintenance Trust ("Trust") and the National Audubon Society ("Audubon") has moved to intervene in this action. Those motions are pending before the Court.

Claims For Relief

7. The Trust and Audubon seek intervention for the sole purpose of modifying and expanding the Court's Decree to change the uses of North Platte River water, the timing of those uses, and the geographic location of those uses.

8. The Districts rely upon the North Platte River water supply as it is apportioned in the existing Decree to operate their Projects in a manner that is best adapted to serve the public interest. The Districts support the State of Nebraska's action to enforce the terms of the existing Decree without modification.

9. Regulation of the North Platte River to provide instream flows in the Big Bend Reach of the Platte River would directly and substantially affect the Districts' Projects.

10. If the intervention motions of the Trust and Audubon are granted and issues relating to instream flows in the Big Bend Reach of the Platte River are considered, the Districts would have compelling interests in the Court's disposition of the case which could not adequately be represented by any other party to this action.

11. If the issues before the Court in this action are limited to those set forth in Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief (and are not otherwise expanded to include consideration of instream flows in the Big Bend Reach) and the motions of the Trust and Audubon for leave to intervene are denied, the interests of the Districts could be represented by the State of Nebraska.

Wherefore, the Districts pray that the Court issue an order:

1. That the issues to be considered in this action be limited to those issues set forth in the State of Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief;

2. That the motions of the Trust and Audubon for Leave to Intervene be denied;

3. That the Joint Motion for Intervention of the Districts be granted if the Court is to consider issues of instream flows in the Big Bend Reach of the Platte River;

4. That such other relief as is proper, necessary, and equitable be provided.

Respectfully submitted this 15th day of April, 1987.

Of Counsel:

GENE D. WATSON
JOHN C. MCCLURE
Nebraska Public Power District
1414 15th Street
Columbus, Nebraska 68601
(402) 563-5773

BRUCE A. PETERSON
ANDERSON, STRASBURGER, KLEIN, PETERSON AND SWAN
The Central Nebraska Public Power and Irrigation District
4th & Lincoln Streets
Holdrege, Nebraska 68949
(308) 995-8601

April 15, 1987

TOM WATSON
(Counsel of Record)
JEFFREY J. DAVIDSON
MARK A. WARNQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Intervenors/Plaintiffs

Nebraska Public Power District
The Central Nebraska Public Power and Irrigation District

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ix

BRIEF IN SUPPORT OF JOINT MOTION 1

STATEMENT OF THE CASE 1

JURISDICTION 6

ARGUMENT 6

I. INTERVENTION BY THE DISTRICTS IS ESSENTIAL IF THE ISSUE BEFORE THE COURT IS THE EQUITABLE APPORTIONMENT OF THE WATERS OF THE NORTH PLATTE RIVER FOR USES IN THE BIG BEND REACH OF THE PLATTE RIVER BECAUSE SUCH A NEW APPORTIONMENT WOULD IMPAIR THE DISTRICTS' ABILITY TO OPERATE ITS FEDERALLY LICENSED PROJECTS 6

A. The Districts Have A Compelling Interest in The Court's Disposition Of This Case Because The Trust And Audubon Seek A New Apportionment Of North Platte River Waters That Would Directly And Substantially Affect The Property Rights Of The Districts 8

B. The Districts' Ability To Protect Their Interests Would Be Substantially Impaired Unless The Districts Are Granted Intervention Because This Action Will Adjudicate The Districts' Rights Granted Under The Federal Power Act 14

C. The Districts' Interests Would Not Be Represented Adequately By The Existing Parties Because No Other Party Has The Same Federally Imposed License Obligations Or Project Operation Experience 16

TABLE OF CONTENTS—Continued

Page

II. THE TRUST AND AUDUBON SHOULD BE DENIED INTERVENTION BECAUSE THEY SEEK TO LITIGATE CLAIMS THAT ARE NOT PROPERLY BEFORE THE COURT AND HAVE NOT OTHERWISE PRESENTED COMPELLING REASONS TO JUSTIFY A NEW APPORTIONMENT OF NORTH PLATTE RIVER WATERS 19

A. The Motions Of The Trust And Audubon For Leave To Intervene Should Be Denied Because Their Claims Are Outside The Scope Of The Controversy Between The States Of Nebraska And Wyoming 20

B. The Motions Of The Trust And Audubon For Leave To Intervene Should Be Denied Because The Facts Alleged Do Not Establish Such A Real And Substantial Injury As To Warrant A New Apportionment Of North Platte River Waters 22

CONCLUSION 24

TABLE OF AUTHORITIES

CASES — Page

California v. Texas, 457 U.S. 164 (1982) 22
City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 17
Ex parte Texas, 314 U.S. 582 (1941) 18
Idaho ex rel. Evans v. Oregon, 462 U.S. 1017 (1983) 22
Illinois v. Indiana, 322 U.S. 714 (1944) 18
Maryland v. Louisiana, 451 U.S. 725 (1981) ..10, 17-18, 22
Mo-Kan Pipeline Co. v. United States, 312 U.S. 502 (1941) 8
Nebraska v. Wyoming, 325 U.S. 589, 665 (1945), *modified and supplemented*, 345 U.S. 981 (1953) .. 1, 6
Nebraska v. Wyoming, 296 U.S. 548 (1935) 8
New Jersey v. New York, 345 U.S. 369 (1953) 18
Oklahoma v. Texas, 258 U.S. 574 (1922) 10, 15, 18
South Dakota v. Nebraska, 434 U.S. 948 (1977) 10
Texas v. Louisiana, 416 U.S. 965 (1974) 10, 18
Texas v. New Jersey, 379 U.S. 674 (1965) 15
Trbovich v. United Mine Workers, 404 U.S. 528 (1970) 17
United States v. Alaska, 465 U.S. 1018 (1984) 17
Utah v. United States, 394 U.S. 89 (1969) 20, 21

CONSTITUTIONAL PROVISIONS

U.S. Const., art. III, § 2 ..... 6, 20

STATUTES

Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986) 10, 15
Federal Power Act, 16 U.S.C. §§ 807-808 (1982) 10
Judiciary Act, 28 U.S.C. § 1251(a) (1982) 6, 20
Neb. Rev. Stat. 70-602 (Reissue 1981) 4

ADMINISTRATIVE REGULATIONS

52 Fed. Reg. 2,240 (1987) 22-23
U.S. Fish and Wildlife Service Migratory Bird Hunting Regulations, 50 C.F.R. § 20.106 (1986) 23

TABLE OF AUTHORITIES—Continued

OTHER

Page

EA Engineering, Science and Technology, Inc., *Migration Dynamics of the Whooping Crane with Emphasis on Use of the Platte River in Nebraska* (Dec. 1985) 23

Ecological Analysts, Inc., *An Evaluation of Historical Flow Conditions in the Platte River as Related to Vegetation Growth and Habitat Use by the Endangered Whooping Crane and Bald Eagle and the Threatened Interior Least Tern* (Sep. 1983) 23

H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 25 (1986) 15

Letter from John G. VanDerwalker, Executive Director, Platte River Trust, to Raymond J. O'Connor, Then Chairman, FERC (Oct. 15, 1984) 13, 15

M.A. Howe, *Habitat Use by Migratory Whooping Cranes In The Aransas-Wood Buffalo Corridor* (1985) (U.S. Fish and Wildlife Service, unpublished manuscript) 23

Omaha World Herald, Mar. 23, 1987 ..... 13, 15

Omaha World Herald, June 21, 1985 15

U.S. Bureau of Reclamation, *Water Use and Management in Upper Platte River Basin* (Aug. 1982) 13-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

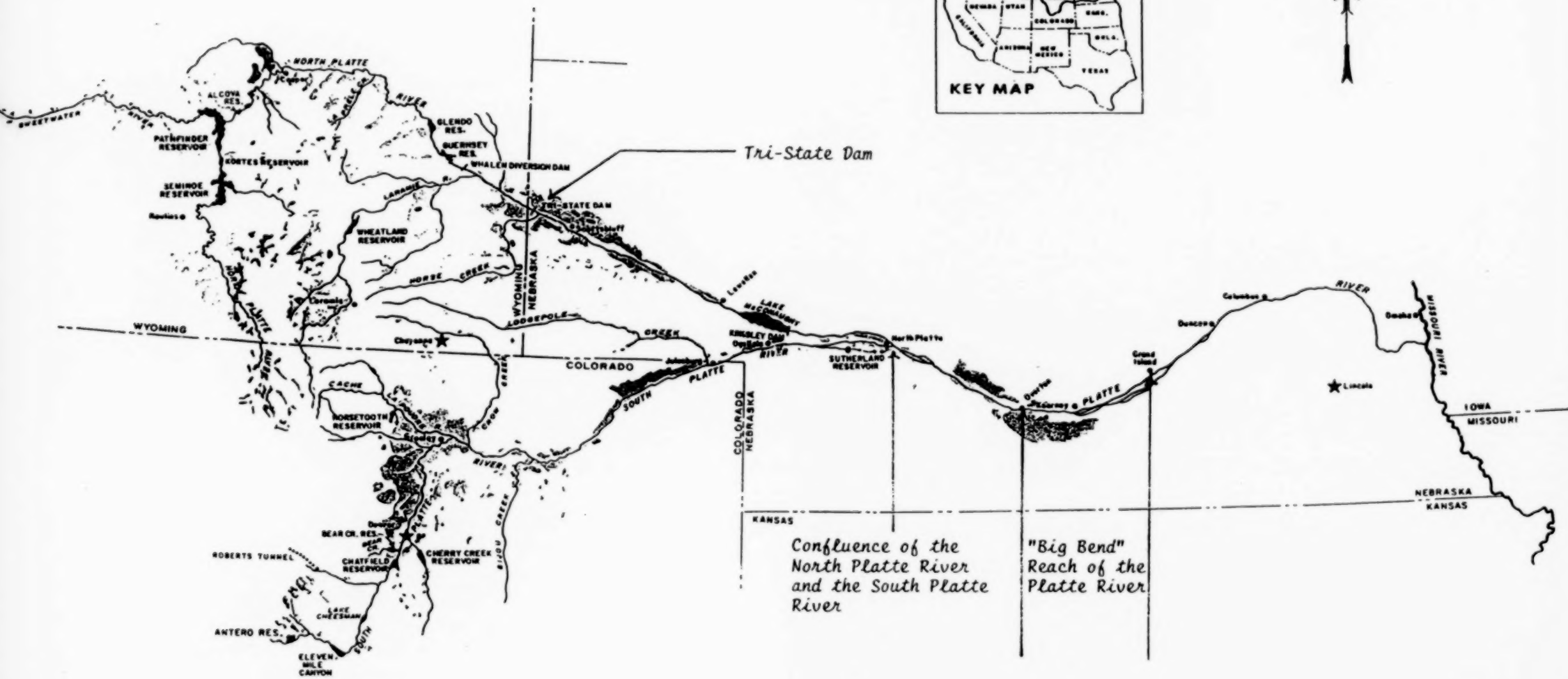
Defendant

BRIEF IN SUPPORT OF THE JOINT MOTION OF NEBRASKA PUBLIC POWER DISTRICT AND THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

STATEMENT OF THE CASE

The State of Nebraska brought this action to enforce the Court's equitable apportionment of the waters of the North Platte River between the States of Wyoming and Nebraska. *See Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified and supplemented*, 345 U.S. 981 (1953) [hereinafter referred to as the "Decree"]. The Court's Decree apportions the natural flow of the North Platte River only for irrigation uses and only within the North Platte River Basin. The eastern boundary of the Court's natural flow apportionment is over 200 miles upstream of the Big Bend Reach of the Platte River. (Refer to Map of Platte River Basin Study Area on page 2 [hereinafter referred to as "Basin Map"].) Nebraska and





IRRIGATED LANDS

Adapted from:

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
LOWER MISSOURI REGION

PICK-SLOAN MISSOURI BASIN PROGRAM

PLATTE RIVER BASIN STUDY AREA

COLORADO-WYOMING-NEBRASKA

DWG. NO. 1358-700-1 DEC. 1981

20 0 20 40 60

SCALE OF MILES

Wyoming ask only that the Court enforce the Decree according to its existing terms. The States have not petitioned the Court to modify the Decree to provide for other than irrigation uses of water, or to extend the geographic scope of the Decree, or to otherwise alter the States' equitable apportionment in any respect. *See* Nebraska Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition at 2; Wyoming Memorandum in Opposition to Intervention at 3.

Notwithstanding the limited scope of the Court's Decree and the intentions of Nebraska and Wyoming not to alter the Court's previous equitable apportionment, intervention is sought by the Platte River Whooping Crane Critical Habitat Maintenance Trust ("Trust") and the National Audubon Society ("Audubon").

The States of Nebraska, Wyoming and Colorado oppose intervention by the Trust and Audubon because their intervention is inappropriate and unnecessary to resolve the dispute between Nebraska and Wyoming. Nebraska Memorandum in Opposition to Intervention by the Trust at 2-4; Nebraska Memorandum in Opposition to Intervention by Audubon at 2; Wyoming Memorandum in Opposition to Intervention at 2-3, 5-7, 9-11; Colorado Response to Trust and Audubon Motions at 1. The States also object because the Trust and Audubon seek to modify the Decree and raise extraneous issues that would unduly complicate and prolong the Court's resolution of this case. Nebraska Memorandum in Opposition to Intervention by the Trust at 3-4; Nebraska Memorandum in Opposition to Intervention by Audubon at 2; Wyoming Memorandum in Opposition to Intervention at 3-6, 15-16, 21.

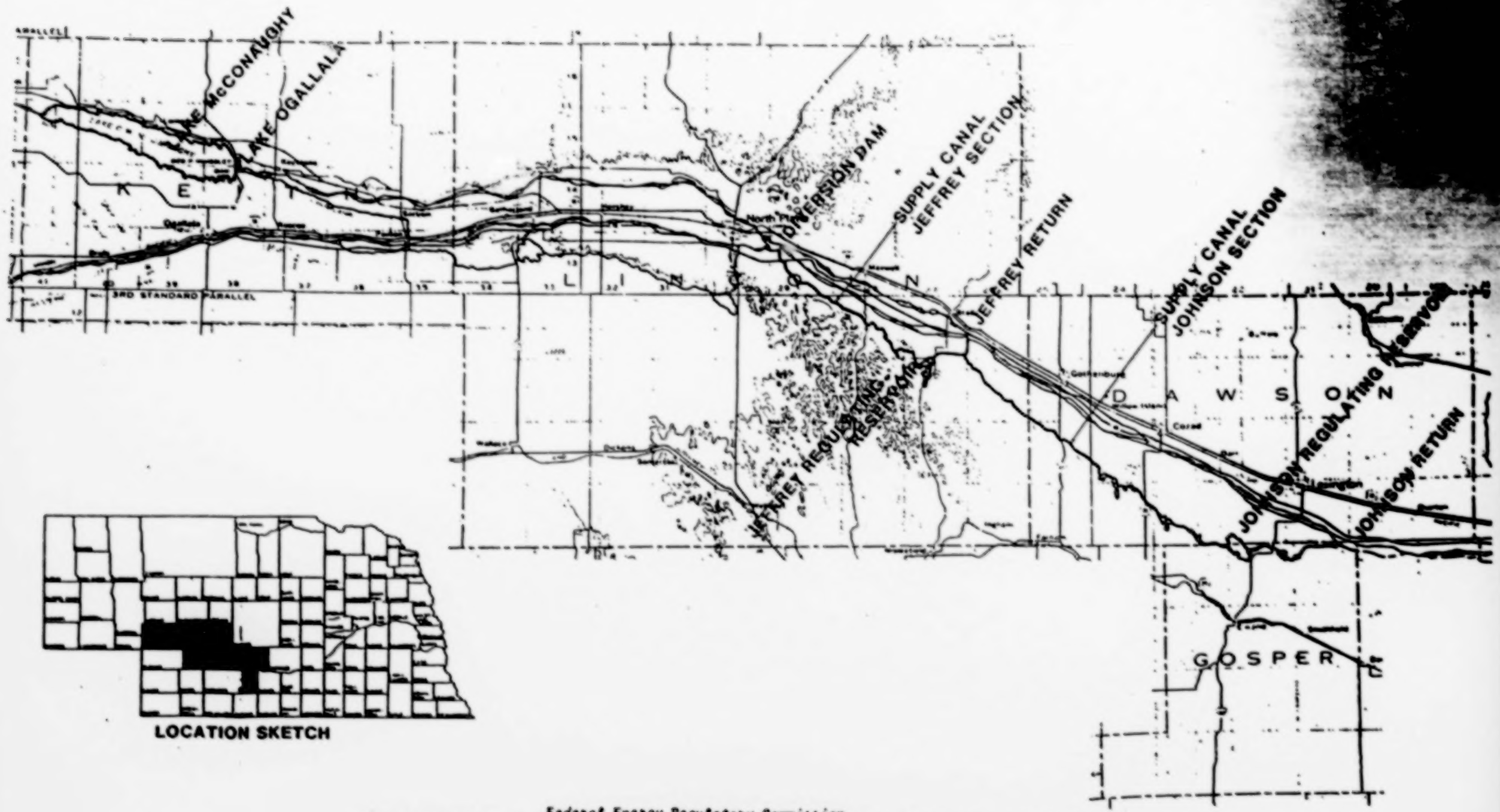
The Central Nebraska Public Power and Irrigation District ("the Central District") and Nebraska Public Power District ("NPPD") [hereinafter collectively referred to as "the Districts"] own and operate Federal

Energy Regulatory Commission ("FERC") Projects 1417 and 1835, respectively. Projects 1417 and 1835 are situated on the North Platte River, the South Platte River, and the Platte River between the Tri-State Dam and the Big Bend Reach of the Platte River.

The Districts, under Nebraska law, are public corporations and political subdivisions of the State of Nebraska. Neb. Rev. Stat. § 70-602 (Reissue 1981). The Districts operate as not-for-profit entities. The Central District is the largest irrigation district in Nebraska, providing irrigation water directly or indirectly to over 500,000 acres of land in central Nebraska. NPPD is Nebraska's largest electric utility, providing electric service directly or indirectly to more than 760,000 customers and serving 85 of the 93 counties in the State. Policies for the Districts are not set by the State government but by Boards of Directors who are independently elected from the geographic areas in Nebraska that are served by the utilities. Revenues for the Districts are derived from the sale of services to their customers. The Districts separately issue bonds for financing major capital investments and for other reasons. Neither the Central District nor NPPD has authority to levy taxes under Nebraska law, nor are the Districts supported by tax revenues.

The Central District's FERC Project 1417 includes Lake McConaughy on the North Platte River, the largest reservoir in the Platte River Basin. (Refer to Map of the General Project Area for Project 1417 on page 5 [hereinafter referred to as "Project 1417 Map"].) Other Project works include a network of dams, storage reservoirs, hydroelectric facilities and canals designed and operated principally for irrigation delivery and hydropower generation.

NPPD's FERC Project 1835 is located between Lake McConaughy and the Central District's diversion from



Federal Energy Regulatory Commission
From Application for New License for Major Project - Existing Dam Project No. 1417 (June 1984)

FIGURE 1. GENERAL PROJECT AREA

the Platte River. (Refer to Map of the General Project Area for Project 1835 on page 7 [hereinafter referred to as "Project 1835 Map"].) Project 1835 is designed and operated to divert water from the North Platte and South Platte Rivers for multiple public purposes, such as hydropower generation and the provision of cooling water for Gerald Gentleman Station, the largest electric generating facility in Nebraska. The Project facilities, which include a network of diversion dams, storage reservoirs, a hydroelectric facility and canals for the conveyance of water, also provide significant recreational benefits.

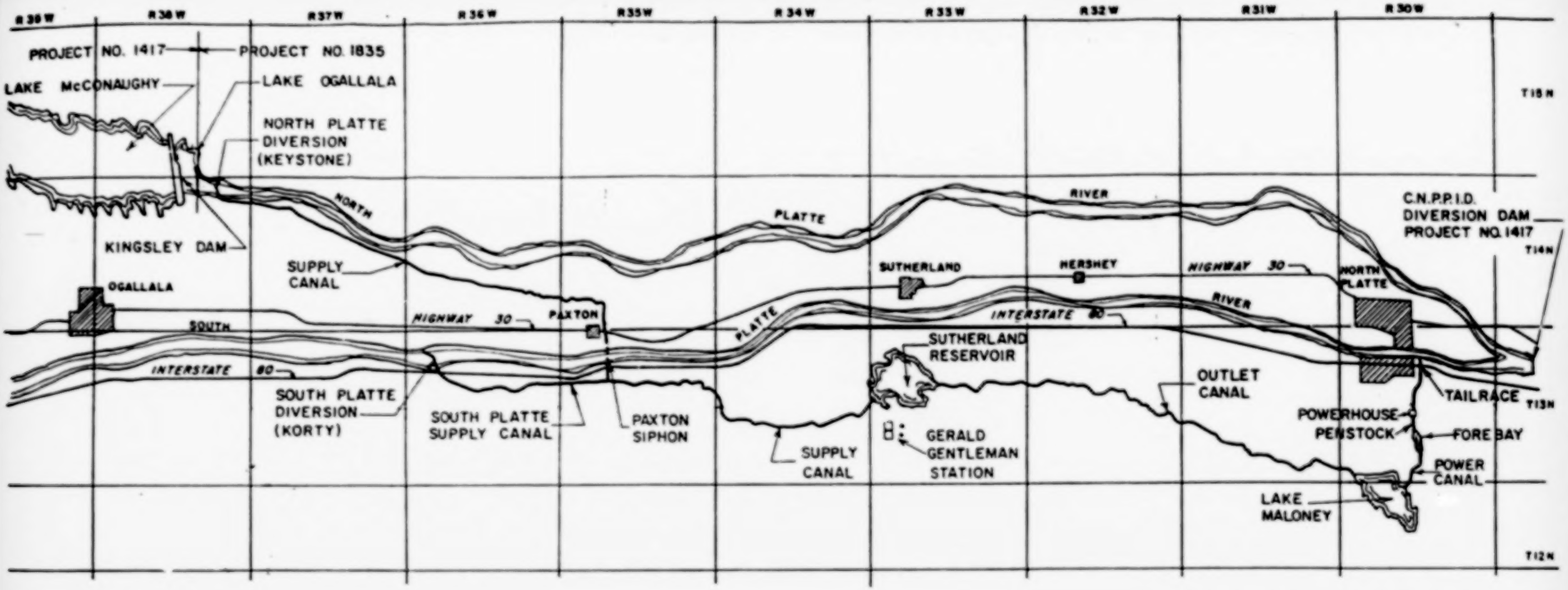
JURISDICTION

The Court's original and exclusive jurisdiction has been invoked by the State of Nebraska pursuant to Article III, Section 2 of the United States Constitution as implemented by the Judiciary Act, 28 U.S.C. § 1251(a) (1982). The Court has retained jurisdiction over this action pursuant to Paragraph XIII of the Decree, 325 U.S. at 671 ¶ XIII.

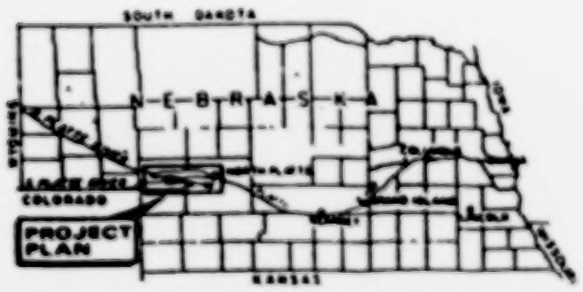
ARGUMENT

I. INTERVENTION BY THE DISTRICTS IS ESSENTIAL IF THE ISSUE BEFORE THE COURT IS THE EQUITABLE APPORTIONMENT OF THE WATERS OF THE NORTH PLATTE RIVER FOR USES IN THE BIG BEND REACH OF THE PLATTE RIVER BECAUSE SUCH A NEW APPORTIONMENT WOULD IMPAIR THE DISTRICTS' ABILITY TO OPERATE ITS FEDERALLY LICENSED PROJECTS

The sole reason that the Districts request intervention is because the Trust and Audubon have asserted new and different claims to North Platte River waters that would dramatically change the purpose and scope of the existing Decree and directly and substantially affect the Districts' Projects. In the event that the Court decides







VICINITY MAP

Federal Energy Regulatory Commission
From Application for New License for Major Project - Existing Dam Project No. 1835 (June 1984)

FIGURE 1. GENERAL PROJECT AREA

to address the issues presented by the Trust and Audubon, intervention by the Districts would be essential to enable the Districts to protect their interests.[1]

A. The Districts Have A Compelling Interest In The Court's Disposition Of This Case Because The Trust And Audubon Seek A New Apportionment Of North Platte River Waters That Would Directly And Substantially Affect The Property Rights Of The Districts

The Districts' FERC Projects 1417 and 1835 are designed and operated to maximize beneficial public uses of the waters of the North Platte, South Platte and Platte Rivers. The Projects are operated to provide irrigation water to a large segment of central Nebraska. In addition, the Projects are designed to use available water supplies to generate hydropower, provide cooling water supplies for the thermal generation of electricity at Gerald Gentleman Station and the Canaday steam electric plant, and to provide extensive recreational opportunities.

Lake McConaughy is the most important component of the Districts' Projects. It is located over 100 miles downstream from the Tri-State Dam on the North Platte

---

[1] In 1935, the Platte Valley Public Power and Irrigation District ("Platte Valley"), NPPD's predecessor in interest, sought to intervene in the original dispute between the States of Nebraska and Wyoming. Platte Valley sought intervention because it feared that the Court's apportionment might deplete the water supply of the North Platte River such that Platte Valley could not feasibly operate Project 1835 and otherwise liquidate its outstanding financial obligations. Platte Valley Brief in Support of Motion to Intervention at 2-3 (Nov. 11, 1935). Platte Valley's request for intervention was denied by the Court. *Nebraska v. Wyoming*, 296 U.S. 548 (1935). As explained above, the instream flow apportionment issues posed by the Trust and Audubon, and the Districts' interests affected by a resolution of those issues, make this case legally and factually different from the 1935 action. *See, e.g., Mo-Kan Pipeline Co. v. United States*, 312 U.S. 502 (1941).

River and has a maximum storage capacity of approximately 1.9 million acre-feet. (Refer to Project 1417 Map for location of Lake McConaughy.) The Districts rely upon the storage water reserves in Lake McConaughy for the irrigation, hydropower generation and cooling water functions of the Projects.

Lake McConaughy is formed by Kingsley Dam. Water released from Kingsley Dam passes through Kingsley Hydro to generate hydropower. Kingsley Hydro became commercially operable in November, 1984, and represents an investment of approximately $49 million.

Immediately downstream of Kingsley Dam, NPPD diverts North Platte River water at the Keystone Diversion Dam. (Refer to Project 1835 Map for location of NPPD's facilities.) NPPD also diverts water from the South Platte River at the Korty Diversion Dam. The water diverted by NPPD is conveyed through a canal system to Sutherland Reservoir, where it is used for thermal cooling of the Gerald Gentleman Station power plant. FERC approved the use of Project 1835 facilities, particularly Sutherland Reservoir, for this purpose in 1976. The construction of Gerald Gentleman Station was completed by NPPD in 1981 at a cost of approximately $644 million. Releases from Sutherland Reservoir are conveyed to Lake Maloney, which serves as a regulating reservoir for the generation of hydropower at NPPD's North Platte Hydro and is a major recreation facility.

The Central District operates a diversion dam at the confluence of the North Platte and South Platte Rivers to divert water into its Supply Canal. (Refer to Project 1417 Map for location of the Central District's facilities.) The water diverted at the confluence is conveyed to a series of reservoirs where hydropower is generated by three hydroelectric facilities. During the irrigation season, the water diverted by the Central District also is delivered to three irrigation canals. In addition, Project

1417 provides cooling water for the Canady steam electric plant. At the far eastern end of the Central District's Project 1417, water is returned to the Platte River immediately upstream of the Big Bend Reach.

As the owners and operators of FERC Projects 1417 and 1835, the Districts have a vital interest in how the Projects are operated. The Districts have invested substantial sums in the Projects and derive revenues from the irrigation service, hydropower generation and thermal power generation functions of the Projects. The Districts clearly have a vested property interest in the facilities of Projects 1417 and 1835, the right to operate the facilities in a manner consistent with its license terms and conditions, and the revenues derived from Project operations. Indeed, these property interests are protected by the Federal Power Act which guarantees the Districts compensation in the event that the license to own and operate the Projects is transferred. *See* 16 U.S.C. §§ 807-808 (1982), *as amended by* the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243, 1245-48 (1986).

This Court has long recognized that intervention in original actions is appropriate where the intervenor has a direct property interest at stake. *South Dakota v. Nebraska*, 434 U.S. 948 (1977) (intervention granted to landowner with interest in property); *Texas v. Louisiana*, 416 U.S. 965 (1974) (intervention granted to municipality with interest in property dispute); *Oklahoma v. Texas*, 258 U.S. 574 (1922) (intervention granted to private party with interest in property dispute). The Court has also permitted intervention where the Court's disposition of the case would directly affect a party's interest in its revenues. *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n.21 (1981) (intervention granted to gas pipeline companies subject to a tax being challenged). The Districts clearly meet these standards for intervention in this action.

Currently, the Court's equitable apportionment Decree does not restrict the District's storage or use of South Platte or Platte River waters for irrigation, hydropower generation or the provision of cooling water. Nor does the Decree impose constraints on the operations of Kingsley Dam or Kingsley Hydro or otherwise affect the Districts' right to store water in Lake McConaughy. The right to store and use water, consistent with State law, is central to the Districts' ability to operate the Projects for irrigation, hydropower, thermal cooling, and recreational purposes.

These rights would be lost, in whole or in part, if the Court adopts the Trust's and Audubon's requests. Both organizations claim that they seek to regulate North Platte River flows for uses in the Big Bend Reach of the Platte River. Although the precise methodology of achieving their goals is less than clear,[2] what is clear is that the Trust's and Audubon's objective to regulate North Platte River flows could not be accomplished without *de facto* regulating the Districts' Projects.

The Districts' Projects are the major water storage facilities between the Nebraska-Wyoming State line and the Big Bend Reach of the Platte River. Given the Projects' location and the fact that under most hydrologic conditions Kingsley Dam affects the flow of the North Platte River downstream to the confluence, it is physically impossible to regulate water from upstream sources (*e.g.*, sources in Wyoming or Colorado) for uses in the Big Bend Reach without passing this water through the Projects and altering the Projects' current operating regimes.

---

[2] Audubon states candidly that they "cannot describe precisely" their role, but that they do want minimum water flows and release schedules. Audubon Brief in Support of Intervention at 10, n.10. The Trust requests a 365-day flow regime in the Big Bend Reach without suggesting how this would be accomplished. Trust Memorandum in Support of Intervention at 18-19.

Such regulation would necessitate costly changes in the mode of operating Kingsley Hydro resulting from modifications to Lake McConaughy reservoir release schedules to accommodate Big Bend Reach uses. In addition, the regulation of water for Big Bend Reach uses would impose substantial constraints on the Districts' use of North Platte River waters. If the Districts were required to bypass water released from upstream sources to assure delivery of the water in the Big Bend Reach, this water could not be stored in Lake McConaughy or other Project reservoirs. Bypassing water that would otherwise be stored by the Districts would greatly diminish the Districts' ability to maintain sufficient storage water reserves to satisfy irrigation demands, and would cause the Districts to suffer substantial reductions in the revenues derived from the generation of hydropower. Preventing the Districts' use of North Platte River waters could also jeopardize the cooling water supplies needed to operate Gerald Gentleman Station, possibly rendering Nebraska's largest electric generating facility inoperable for an extended period of time. In addition, bypassing water would affect the reservoir elevations in Lake McConaughy which are essential for maintaining the reservoir's extensive recreational opportunities.

Moreover, the Districts submit that the Trust is not merely seeking to regulate North Platte River flows, including the regulation of water through the Districts' Projects, but instead is requesting a huge increase in the volume of streamflow in the Big Bend Reach. *See* Trust Memorandum in Support of Intervention at 19 (profile of annual regulated streamflow in the Big Bend Reach sought by the Trust). The Districts' preliminary calculations show that the annual volume of flow sought by the Trust ranges from 1,000,000 to 2,400,000 acre-feet. By comparison, the average annual flow in the Big Bend Reach for the period 1935-1970 was only approximately 850,000 acre-feet.

Given the vast quantity of water sought by the Trust, it is inconceivable that the Districts' Projects would not be directly implicated if the issue of Big Bend Reach instream flows is addressed by the Court. In that context, the question immediately becomes one of apportioning the burden to supplement streamflow in the Big Bend Reach. Both the Trust and Audubon have already made clear their intentions to seek to require the Districts to provide instream flows for the Big Bend Reach.[3] In fact, Wyoming has already expressed its intention to seek instream flow releases from Lake McConaughy *in this action* if Big Bend Reach instream flow issues are to be considered. Wyoming Memorandum in Opposition to Intervention by the Trust and Audubon at 5-6 ("[e]quity also would require the Court to consider whether operation of . . . Lake McConaughy (Kingsley Dam) should be modified to assure delivery of regulated flows for migratory bird habitat").

The U.S. Bureau of Reclamation in 1982 conducted a study to evaluate the impacts on Lake McConaughy storage water reserves if the reservoir was operated to provide Big Bend Reach instream flows. U.S. Bureau of Reclamation, *Water Uses and Management in the Upper Platte River Basin* (Aug. 1982). The instream flows considered by the Bureau of Reclamation were considerably less than the flows sought by the Trust, yet the study concluded that:

> Impacts on existing uses of Lake McConaughy waters would be very substantial. For example, with this mid-May to mid-August demand at Overton for the 1941-1977 period, Lake McConaughy would be

---

[3] *See, e.g.*, Letter from John G. VanDerwalker, Executive Director, Platte River Trust, to Raymond J. O'Connor, Then Chairman, FERC (Oct. 15, 1984) (the operation criteria for Kingsley Dam must meet the needs of the Big Bend Reach); Omaha World Herald, Mar. 23, 1987 (Audubon will seek to intervene in the FERC relicensing proceedings for the Districts' Projects to request instream flow releases from Kingsley Dam).

> *severely depleted*, and a shortage of water for irrigation and power generation would occur. The simulation run shows that the lake would be *empty for 11 months* in the study period and end-of-month contents would average more than 33 percent below the present condition.
>
> By meeting these flow demands, the recreation use of the lake would be *severely curtailed*.

Id. at 63 (emphasis added).

The Districts thus have a most direct stake in any action that would affect the operations of the Projects. The regulation of the North Platte River sought by the Trust and Audubon in this action would have direct and substantial, if not severe, impact on Project operations and the Districts' revenues. If the interests of either the Trust or Audubon in Big Bend Reach instream flows are sufficient to warrant intervention, certainly the Districts' property interests in its Project facilities are equally, if not more, compelling.

B. The Districts' Ability To Protect Their Interests Would Be Substantially Impaired Unless The Districts Are Granted Intervention Because This Action Will Adjudicate The Districts' Rights Granted Under The Federal Power Act

The Districts' licenses to operate FERC Projects 1417 and 1835 expire in July and June 1987, respectively. At the present time, the Districts are seeking new licenses for the Projects in administrative relicensing proceedings before FERC. Pursuant to the comments received by the Districts from Federal and State wildlife agencies on the Districts' Applications for New License(s), an important issue before FERC will concern the instream flow requests for the Big Bend Reach of the Platte River.

Both the Trust and Audubon have stated publicly that they intend to intervene in the upcoming FERC proceed-

ing to relicense the Districts' Projects.[4] The Trust, in fact, has filed a letter with FERC stating the Trust's view that FERC should require instream flow releases from Kingsley Dam as a term or condition of the Districts' new licenses for the Projects. *See* Letter from John G. VanDerwalker, Executive Director, Platte River Trust, to Raymond J. O'Connor, Then Chairman, FERC (Oct. 15, 1984).

In enacting the Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986), the Congress directly addressed the issue of operating the Projects for instream flow uses. The Congress explained, with respect to fish and wildlife agency recommendations to FERC, that any such instream flow requirement in the Districts' new licenses would be "expected by the conferees to be of a kind that will not significantly impair any of the existing projects' principal developmental purposes." H.R. Conf. Rep. No. 934, 99th Cong., 2d Sess. 25 (1986). To protect the Congressionally recognized developmental purposes of the Projects, the Districts need to be parties to this action if the Court decides to address Big Bend Reach instream flow issues.

This Court has granted intervention in original actions where the Court's disposition of the case would impair or impede the intervenor's ability to protect its interests. *See Texas v. New Jersey*, 379 U.S. 674, 677 (1965) (intervention granted to a State claiming the right to escheat property); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (intervention granted to landowners whose rights to property would be directly affected by the Court's ruling). In this case, any ruling by the

---

[4] Omaha World Herald, Mar. 23, 1987 (Audubon will seek to intervene in the FERC relicensing proceedings for the Districts' Projects to request instream flow releases from Kingsley Dam); Omaha World Herald, June 21, 1985 (Trust will seek to intervene in the FERC relicensing proceedings for the Districts' Projects to request instream flow releases from Kingsley Dam).

Court on the issue of instream flows for the Big Bend Reach would be certain to have a direct bearing upon FERC's consideration of this same issue in the relicensing proceedings for the Districts' Projects. The Districts have a vital interest in FERC's resolution of this issue because it will dictate the terms and conditions of the Districts' new licenses, which under current FERC policy would run for a term of thirty to fifty years. The Districts' ability to protect its interests before FERC will be substantially impaired unless the Districts are permitted to participate and protect those interests should they be litigated, directly or indirectly, in this action.

C. The Districts' Interests Would Not Be Represented Adequately By The Existing Parties Because No Other Party Has The Same Federally Imposed License Obligations Or Project Operation Experience

As the Federal licensees of FERC Projects 1417 and 1835, the Districts alone are authorized to operate the Projects and are charged with the obligation to operate the Projects in compliance with the terms and conditions of their FERC licenses. The Districts have an independent obligation to their customers to maintain the integrity of Project operations, which cannot be performed or safeguarded effectively by other parties. In addition, the Districts have over 45 years of experience in operating the Projects and are in the best position to explain to the Court the full range of impacts on Project operations that would result from the regulation of North Platte River flows for Big Bend Reach uses.

In this action, the Districts clearly could not be represented by the States of Wyoming or Colorado because both States have already taken a position that is adverse to the Districts' interests. *See* Wyoming Memorandum in Opposition to Intervention at 5-6 (claiming that

equity would require the Court to consider regulating the Projects to provide instream flows); Colorado Response to Trust and Audubon Motions (adopting the position of Wyoming). Nor could the United States simultaneously represent the Districts' interests in this action and regulate the Districts' Projects through FERC because of an inherent conflict of interest.

Finally, the State of Nebraska could not adequately represent the Districts' interests because the State is not licensed to operate the Districts' Projects, does not have an obligation to ensure that the Projects are operated in compliance with the terms and conditions of the Projects' current and future FERC licenses, and cannot represent the Districts in the FERC relicensing proceedings where the same instream flow issues will be addressed. In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 338-39 (1958), this Court noted that a licensee's obligations under the Federal Power Act are distinct from, and in some instances may supercede, the public interests of a State. It follows, therefore, that a State cannot properly represent a licensee whose Federal Power Act obligations may require the licensee to take a position that conflicts with the State. Nor can the State of Nebraska adequately assure the Districts that the positions adopted by the State in this action will fully protect the Districts' interests in the FERC relicensing proceedings. *See, e.g., Trbovich v. United Mine Workers*, 404 U.S. 528, 538-39 (1970) (private party granted intervention because the United States could not adequately represent both the general public interest and the private party's specific interests).

The Court has granted intervention to enable parties with substantial interests in original actions to intervene and speak for themselves even when the intervenor's State is already a party. *United States v. Alaska*, 465 U.S. 1018 (1984) (Eskimo tribe granted intervention); *Maryland v. Louisiana*, 451 U.S. 725, 745-46, n.21

(1981) (pipeline companies granted intervention); *Texas v. Louisiana*, 416 U.S. 965 (1974) (municipality granted intervention); *Illinois v. Indiana*, 322 U.S. 714 (1944) (private company granted intervention); *Ex Parte Texas*, 314 U.S. 582 (1941) (private gas company granted intervention); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (private landowners granted intervention).

In *New Jersey v. New York*, 345 U.S. 369 (1953), the Court denied intervention by the City of Philadelphia because the City had not shown that its interests were not adequately represented by the State of Pennsylvania, a party in the case. *Id.* at 372-74. At issue in the case were the respective rights of the States of New York, New Jersey and Pennsylvania to waters of the Delaware River. The City of Philadelphia's purported interest was to ensure that sufficient quantities of water were available for the City's municipal uses. Philadelphia Motion to Intervene at 3-4 (Dec. 10, 1951). The City's interest, however, was identical to and adequately represented by the State because the State was interested in obtaining the maximum possible apportionment for all of its citizens, including those citizens served by the City. 345 U.S. at 373-74.

If the Court in this case decides to take up the new issues raised by the Trust and Audubon, the ruling in *New Jersey v. New York* would be inapposite. Unlike the Districts, the City of Philadelphia did not have independent Federal license responsibilities. Unlike this action, in *New Jersey v. New York* there was no attempt to regulate the flow of water through the City of Philadelphia's facilities. Nor was any consideration given to imposing constraints on the operations of the City's facilities.

Here, in contrast, the expansion of the Court's Decree sought by the Trust and Audubon would bring the Dis-

tricts' Projects within the scope of the Decree. Regulating North Platte River flows for Big Bend Reach uses would amount to a *de facto* regulation of the Projects and would have a direct and substantial, if not severe, impact on the operations of the Projects and the existing services provided to the Districts' customers.

In conclusion, the Districts have a compelling interest in the Court's disposition of the claims raised by the Trust and Audubon. The Districts' intervention is consistent with the Court's standards and rulings regarding intervention in original actions. The Districts' interests could not be adequately represented by the State of Nebraska or other parties in this action. The Districts should be permitted to speak for themselves and protect their own interests if the Trust and Audubon are granted leave to intervene or the Court decides to address Big Bend Reach instream flow issues.

II. THE TRUST AND AUDUBON SHOULD BE DENIED INTERVENTION BECAUSE THEY SEEK TO LITIGATE CLAIMS THAT ARE NOT PROPERLY BEFORE THE COURT AND HAVE NOT OTHERWISE PRESENTED COMPELLING REASONS TO JUSTIFY A NEW APPORTIONMENT OF NORTH PLATTE RIVER WATERS

The Districts concur with the States of Nebraska, Wyoming and Colorado that the intervention requests of the Trust and Audubon should be denied. The Trust and Audubon seek intervention to litigate new and different issues that are far beyond the scope of the Court's Decree and have no bearing on the actual dispute between Nebraska and Wyoming. The Court's rulings on such requests stand as precedent against such an attempt to expand the jurisdictional controversy between two sovereign States. Moreover, no compelling reason has been offered by the Trust or Audubon for departing from that precedent.

A. The Motions Of The Trust And Audubon For Leave To Intervene Should Be Denied Because Their Claims Are Outside The Scope Of The Controversy Between The States Of Nebraska And Wyoming

This Court has original and exclusive jurisdiction of "controversies between two or more States." 28 U.S.C. § 1251(a) (1982) (implementing Article III, Section 2 of the United States Constitution). The jurisdictional controversy between the States in this action is the dispute between Nebraska and Wyoming. That dispute is over the States' respective rights to use North Platte River waters for irrigation uses under the existing terms of the Court's Decree. The Decree does not address the subject of instream flows in the Big Bend Reach of the Platte River. The responses of Nebraska and Wyoming to the intervention motions of the Trust and Audubon state plainly that the issue of Big Bend Reach instream flows is not in dispute between the States.

In *Utah v. United States*, 394 U.S. 89 (1969), the Court denied intervention to a private party because it sought to "introduce new issues which have not been raised by the sovereigns directly concerned." *Id.* at 96. In this action, the Trust and Audubon seek intervention not to assist the Court in resolving the narrow dispute between Nebraska and Wyoming, but rather to assert on their own behalf new claims pertaining to a different use of water, during different times of the year, in a different river. The obvious purposes of their intervention are to:

- *modify the geographic scope of the Court's Decree* to acquire river flows for the Big Bend Reach of the Platte River, which is over 200 miles downstream from the Tri-State Dam, the easternmost boundary of the Court's apportionment of North Platte River natural flow waters. Trust Motion to Intervene at 1; Trust Memorandum in Support of

Motion to Intervene at 1, 10, 13, 15-20; Trust Complaint in Intervention at 5-7; Audubon Brief in Support of Motion to Intervene at 10, n.10.

- *modify the purpose of the Decree* by requesting an apportionment of water that is not intended for irrigation uses, but for "instream" uses in the Big Bend Reach of the Platte River. Generally, instream use means the presence of water, generally in certain quantities at specified times, in a particular reach of a river or stream for fish, wildlife, or recreational purposes. Trust Motion to Intervene at 1; Trust Memorandum in Support of Motion to Intervene at 1, 10, 15; Audubon Brief in Support of Motion to Intervene at 10.

- *modify the timing of the Decree's apportionment* by expanding the May 1-September 30 irrigation season of North Platte River natural flow waters into a full, 365-day flow regime. Trust Memorandum in Support of Motion to Intervene at 19.

Indeed, the changes in the nature of the use, the volumes of water involved, the timing of the use, and the location of the use of the water sought by the Trust and Audubon demonstrate that they are asking the Court *for a wholly new apportionment of interstate water.*

The *Utah* holding applies here. The Trust and Audubon seek to create a controversy that does not exist between Nebraska and Wyoming and then invoke the Court's original and exclusive jurisdiction to resolve that controversy at the expense of the States' sovereign interests. The intervention motions of the Trust and Audubon should be denied.

B. The Motions Of The Trust And Audubon For Leave To Intervene Should Be Denied Because The Facts Alleged Do Not Establish Such A Real And Substantial Injury As To Warrant A New Apportionment Of North Platte River Waters

The Court has recognized the importance of imposing prudential limitations on the exercise of its original and exclusive jurisdiction. *See California v. Texas*, 457 U.S. 164, 168-69 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981). In equitable apportionment actions, the Court requires the plaintiff State to "prove by clear and convincing evidence some real and substantial injury or damage" before the Court will act on the State's request for a new apportionment. *Idaho Ex Rel. Evans v. Oregon*, 462 U.S. 1017, 1027 (1983).

The Trust's and Audubon's claims for relief would change the very purpose and scope of the Court's Decree and are the equivalent of a request for a new apportionment. These private entities, of course, lack any authority to request a new apportionment of the North Platte River. *See* Argument II.A, *supra*. But even if they had the requisite authority, the Trust and Aubudon failed to allege facts to warrant modification of the Decree and the establishment of a new apportionment scheme.

The Trust and Audubon seek to leave the impression that there is an undisputed environmental crisis of such proportions that compels intercession by this Court. The Trust, for example, claims that current Platte River conditions are "disastrous" for migratory birds. Trust Memorandum in Support of Intervention at 17. It also argues that the only effective way to preserve migratory bird habitat is to ensure that the flow of the Platte River follows its "natural pattern," presumably meaning without human influence. *Id.* at 18.

The Trust does not note that bald eagles, a new species to the Platte River area, are recovering so well that the U.S. Fish and Wildlife Service stated that "'[t]here is agreement everywhere that the eagle is not only recover-

ing, but that it could possibly reach at least the 'threatened' level nationwide in a few years." *See* 52 Fed. Reg. 2,240 (1987) (proposed January 21, 1987). In addition, the Trust does not refer to data showing that Interior least tern populations have apparently increased in Nebraska during the period 1975-1982. *See* Ecological Analysts, Inc., *An Evaluation of Historical Flow Conditions in the Platte River as Related to Vegetation Growth and Use by the Endangered Whooping Crane and Bald Eagle and the Threatened Interior Least Tern* 5-5, 5-6 (Sep. 1983). The Trust also does not mention that the sandhill cranes that stage on the Platte River are so abundant that hunting seasons for the cranes have been established in the Central Flyway by the U.S. Fish and Wildlife Service. *See* U.S. Fish and Wildlife Service Migratory Bird Hunting Regulations, 50 C.F.R. § 20.106 (1986). Nor does the Trust explain to the Court that there has been a consistent and dramatic increase in the whooping crane's population over the past 46 years despite the alleged "disastrous" changes in Platte River channels. *See* EA Engineering, Science and Technology, Inc., *Migration Dynamics of the Whooping Crane with Emphasis on Use of the Platte River in Nebraska*, viii, 316 (Dec. 1985). In fact, the Trust does not explain that whooping cranes rarely use the Platte River as habitat, preferring instead to use the many thousands of acres of wetland and riverine habitat available throughout the Central Flyway. *Id.* at 3-18; M. A. Howe, *Habitat Use by Migrating Whooping Cranes in the Aransas-Wood Buffalo Corridor* (1985) (U.S. Fish and Wildlife Service unpublished manuscript). There simply is no compelling reason offered by the Trust or Audubon to justify an entirely new apportionment of the North Platte River among the States of Nebraska, Wyoming and Colorado.

More troubling, however, is the Trust's presentation, without qualification, of its streamflow profile which it asserts reflects the "annual regulated flows needed to avoid jeopardizing migratory bird habitat in the Big Bend Reach of the Platte River." Trust Memorandum in

Support of Intervention at 19. The Trust suggests that its streamflow profile is an accepted scientific fact. It is not. Except for the Trust itself, the Trust's streamflow profile has not been accepted by any party, Federal agency, State agency, or court of law.

The Trust and Audubon seek extraordinary relief when no relief is necessary. They would have the Court intercede to reapportion an interstate river between two States against the very wishes of those States. The Trust's and Audubon's requests for intervention should be denied.

CONCLUSION

The scope of the issues to be decided in this action should be limited to those identified by Nebraska in its Petition For An Order Enforcing Decree And Injunctive Relief. The presence of the Trust and Audubon is unnecessary to resolve the controversy between Nebraska and Wyoming. Therefore, the motions for leave to intervene filed by the Trust and Audubon should be denied. If the Court decides, however, to consider instream flow issues for the Big Bend Reach of the Platte River, the Districts respectfully request that they be granted intervention.

Of Counsel:

GENE D. WATSON
JOHN C. MCCLURE
Nebraska Public Power District
1414 15th Street
Columbus, Nebraska 68601
(402) 563-5773

BRUCE A. PETERSON
ANDERSON, STRASBURGER, KLEIN, PETERSON AND SWAN
The Central Nebraska Public Power and Irrigation District
4th & Lincoln Streets
Holdrege, Nebraska 68949
(308) 995-8601

TOM WATSON
(Counsel of Record)
JEFFREY J. DAVIDSON
MARK A. WARNQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Intervenors/Plaintiffs
Nebraska Public Power District
The Central Nebraska Public Power and Irrigation District

April 15, 1987

Supreme Court, U.S.
FILED
APR 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO BASIN ELECTRIC POWER COOPERATIVE MOTION FOR LEAVE TO INTERVENE

JOSEPH B. MEYER
Attorney General
of Wyoming

DENNIS C. COOK
Senior Assistant
Attorney General
Counsel of Record

JENNIFER HAGER
Assistant
Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder, Colorado 80302
(303) 443-8782

April 14, 1987

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES	Pages
Arkansas v. Texas, 346 U.S. 368 (1953)	4
Nebraska v. Wyoming, 295 U.S. 40 (1935)	2, 4, 5
New Jersey v. New York, 345 U.S. 369 (1953)	3, 4, 5

No. 108, Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO BASIN ELECTRIC POWER COOPERATIVE MOTION FOR LEAVE TO INTERVENE

INTRODUCTION

Basin Electric Power Cooperative ("Basin") moves to intervene as a party defendant to protect its water supply from the Laramie River for its Laramie River Station power plant. The Answer which Basin seeks leave to file asserts that "Nebraska has no right to the waters of the Laramie River", and prays for an order "affirming Basin's rights to use water from the Laramie River . . . ". Basin Answer tendered with Motion for Leave to Intervene, at 17. Wyoming opposes intervention by Basin.

ARGUMENT

Basin's intervention is inappropriate for esstentially the same reasons that intervention by the Platte River Trust and the National Audubon Society is inappropriate. (The Court's attention is directed to Wyoming's Memorandum in Opposition to their Mo-

tions for Leave to Intervene.) Wyoming's sovereign responsibility to represent its citizens *parens patriae* in equitable apportionment proceedings insures that Basin's interest as an existing appropriator of Laramie River water in Wyoming will be adequately represented. What this Court said in deciding that the Secretary of Interior was not an indispensable party to the original North Platte River equitable apportionment proceeding applies equally to Basin here: "Wyoming will stand in judgment for him as for any other appropriator in that state". *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935).

Basin's interest in this proceeding is protection of the existing water supply for its Laramie River Station. The Laramie River Station is supplied primarily by water diverted and stored from the Laramie River under Wyoming water rights held by Basin, including water rights for Grayrocks Reservoir. Nebraska's Petition here alleges that Basin's depletions of the Laramie River by its operation of Grayrocks Reservoir violate Nebraska's rights under the North Platte Decree. Wyoming contends that Nebraska has no right to the Laramie under the North Platte Decree, and that this Court's Decree apportioning the Laramie between Colorado and Wyoming entitles Wyoming's appropriators to beneficially use all water remaining in the Laramie after Colorado's apportionment has been satisfied. *See* Wyoming Brief in Opposition to Motion for Leave to File Petition, at 6-7, 14-15; and Wyoming Answer to Petition, at 2-3, 5-6.

Thus, the issue before the Court is whether the North Platte Decree entitles Nebraska to any water from the Laramie River. Basin's position on this issue is the same as Wyoming's — that Nebraska has no right

to the Laramie River under the North Platte Decree. Basin is only one of many appropriators from the Laramie River in Wyoming. It requests the Court essentially to readjudicate its individual right to divert and store water. The proper role of the Court in this case is not to undertake such an intrastate adjudication, but only to determine the respective rights of Nebraska and Wyoming to the Laramie River. Basin's interests are adequately represented here by Wyoming *parens patriae*, as are the interests of all other Wyoming appropriators in the Laramie River and North Platte River basins.

Basin asserts that as the owner of water rights from the Laramie River and as a party to the Agreement of Settlement and Compromise limiting its use of those water rights to supply the Laramie River Station, it has a "compelling interest" entitling it to intervene. Its interest in its water supply certainly is no more compelling than Philadelphia's was in *New Jersey v. New York*, 345 U.S. 369 (1953). There, Philadelphia's intervention was denied because its interest in its water supply from the Delaware River was represented by Pennsylvania *parens patriae*. Here, Nebraska apparently does not even seek relief which would adversely affect Basin's water supply. Nebraska's concern appears to be about potential depletions by Wyoming appropriators other than Basin. Nebraska acknowledges that it is bound by the settlement agreement and apparently concedes that Basin's operation of the reservoir in compliance with the agreement does not violate the rights Nebraska claims. Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition, at 11-12.

Moreover, the agreement settling the litigation

between Nebraska, Basin and other parties is not relevant to the suit here, except to the extent that it precludes Nebraska from claiming that operation of the Laramie River Station or Grayrocks Reservoir in accordance with its terms violates Nebraska's rights. Wyoming is not a party to the settlement agreement. Wyoming's only obligation to Basin is to administer its water rights and other Wyoming water rights in accordance with Wyoming law. The agreement does not supersede Wyoming law. Any dispute relating to the agreement is not a controversy between Nebraska and Wyoming, and therefore does not lie within this Court's original jurisdiction.

To the extent that there might be a dispute between Basin and Wyoming over the administration of Basin's water rights, that involves solely questions of state law which can and should be decided by the Wyoming courts. *Arkansas v. Texas*, 346 U.S. 368 (1953). Similarly, to the extent that there might be a dispute between Nebraska and Basin regarding enforcement of the settlement agreement, this Court's exclusive original jurisdiction is not the proper forum for resolution of that dispute. The stipulation of the parties and the orders dismissing the suits to which the settlement agreement related provided for retention of jurisdiction by the U.S. District Court in Nebraska for purposes of enforcement and interpretation of the agreement. Appendix to Wyoming Brief in Opposition to Motion for Leave to File Petition, A-22, A-34 - A-35. For sound reasons, this Court has declined to extend its original jurisdiction in equitable apportionment cases to the kind of intramural dispute that would result from Basin's intervention. *New Jersey v. New York*, 345 U.S. 369 (1953); *Nebraska v. Wyoming*, 295 U.S. 40 (1935).

Nebraska acknowledges that Wyoming has no obligation under the settlement agreement, but asserts that Nebraska's rights **under the North Platte Decree**, independent of its rights against Basin under the settlement agreement, preclude Wyoming appropriators from further depleting the flows of the Laramie. Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition, at 12. Nebraska argues, in effect, that although it cannot enforce the settlement agreement against Wyoming, it can reach the same result by enforcing its rights under the North Platte Decree.

The point is that the controversy between Nebraska and Wyoming here regarding the Laramie River relates only to their respective rights under the North Platte Decree. This is a suit for enforcement of the North Platte Decree, not enforcement of the settlement agreement. In litigating the conflicting claims of the two sovereign states to the Laramie River, Wyoming will stand in judgment for all of its appropriators, including Basin, just as Nebraska will stand in judgment for its. *Nebraska v. Wyoming*, *id.*; *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953).

CONCLUSION

For the foregoing reasons, and those set forth in Wyoming's Memorandum in Opposition to Platte River Trust and National Audubon Society Motions for Leave to Intervene, the Motion for Leave to Intervene of Basin Electric Power Cooperative should be denied.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

JENNIFER HAGER
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

No. 108, Original

Supreme Court, U.S.
FILED
APR 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S REPLY MEMORANDUM TO WYOMING'S MEMORANDUM IN OPPOSITION TO BASIN'S MOTION FOR LEAVE TO INTERVENE

EDWARD WEINBERG
(Counsel of Record)
FREDERICK L. MILLER, JR.
DUNCAN, WEINBERG & MILLER, PC
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

April 24, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS*

	Page
I. INTRODUCTION	1
II. ARGUMENT	1
A. Wyoming Lacks an Essential Element of *Parens Patriae*	1
B. The History of *Nebraska v. Wyoming* Supports Basin's Intervention	2
III. CONCLUSION	5

* List of affiliates required by Rule 29.1 filed April 13 with Basin's Motion for Leave to Intervene

TABLE OF AUTHORITIES

CASES:	Page
Nebraska v. Wyoming, 293 U.S. 523 (1934)	3
Nebraska v. Wyoming, 295 U.S. 40 (1935)	1,2,3
Nebraska v. Wyoming, 296 U.S. 542 (1935)	4
Nebraska v. Wyoming, 304 U.S. 545 (1938)	5
Nebraska v. Wyoming, 325 U.S. 589 (1945)	4,5
New Jersey v. New York, 345 U.S. 369 (1953)	1,2
STATUTES:	
Reclamation Act of June 17, 1902, 43 U.S.C. § 383 *et seq.* (1902)	3
MISCELLANEOUS:	
Basin Memorandum in Support of its Motion for Leave to Intervene	2,5
Memorandum on Behalf of the United States to Intervene and Petition for Intervention, filed March 31, 1938, *Nebraska v. Wyoming*, No. 9 Original, October Term, 1937	4
Objections of Wyoming filed April 21, 1938, Objections of Nebraska and Colorado filed April 22, 1938, *Nebraska v. Wyoming*, No. 9 Original, October Term, 1937	4
Wyoming's Memorandum in Opposition to Basin's Motion for Leave to Intervene	1,3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S REPLY MEMORANDUM TO WYOMING'S MEMORANDUM IN OPPOSITION TO BASIN'S MOTION FOR LEAVE TO INTERVENE

INTRODUCTION

In its April 14 Memorandum in Opposition to Basin's Motion for Leave to Intervene, Wyoming relies solely on *parens patriae* grounds, citing in support *New Jersey* v. *New York*, 345 U.S. 369 (1953) and *Nebraska* v. *Wyoming*, 295 U.S. 40 (1935).

ARGUMENT

A. Wyoming Lacks an Essential Element of *Parens Patriae*

In the circumstances of this case invocation of *parens patriae* avails Wyoming naught. In *New Jersey*

v. *New York*, *supra*, this Court recognized that *parens patriae* considerations would not prevail if the applicant for intervention met the burden of showing "a compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." 345 U.S. at 372-73.

The correspondence reproduced at Appendix A-8 through A-10 of Basin's Memorandum In Support of Its Motion to Intervene shows on its face that Wyoming denies Basin's right to utilize its Wyoming water rights in discharge of its obligation under the Grayrocks Settlement Agreement. Surely there can be nothing more compelling than Wyoming's own statements.

It seems obvious that, given Nebraska's complaint and Wyoming's expressed objections to Grayrocks' operation in accordance with the Settlement Agreement, this litigation directly impacts Basin's interests. A resolution resulting in a "clarification" of the North Platte Decree which compels a different mode of operation of Grayrocks than that provided for in the Grayrocks Settlement Agreement would, as a practical matter, impair or impede Basin's ability to protect its property interests in the Missouri Basin Power Project, particularly in Grayrocks Dam and Reservoir and the Laramie River Station. It is clear, therefore, that *parens patriae* considerations are inapposite here.

B. The History of *Nebraska* v. *Wyoming* Supports Basin's Intervention.

Nor is Wyoming's objection to this Court's permitting Basin to intervene supported by its invocation of *Nebraska* v. *Wyoming*, 295 U.S. 40 (1935).

That case chronicles the opening skirmish between Nebraska and Wyoming over the waters of the North Platte River. At the time, this Court had but recently granted Nebraska's motion for leave to file its complaint seeking an equitable apportionment of the North Platte's waters. *Nebraska v. Wyoming*, 293 U.S. 523 (1934). The 1935 decision was precipitated by Wyoming's motion to dismiss Nebraska's complaint. *See Nebraska v. Wyoming*, 295 U.S. 40 at 43 (1935). It is the disposition of that motion upon which Wyoming relies. One of the grounds of Wyoming's motion to dismiss was that the Secretary of the Interior was an indispensible party because of the Secretary's responsibility for the North Platte Federal reclamation project under the Reclamation Act of June 17, 1902, 32 Stat. 390, 43 U.S.C. § 383 *et seq. Id.*

It is, of course, true that this ground of Wyoming's motion was denied for the very reason Wyoming now cites in support of its opposition to Basin's intervention, to wit, that "Wyoming will stand in judgment [for the Secretary] as for any other appropriator in that state." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935) (quoted in Wyoming's Memorandum in Opposition to Basin's Motion for Leave to Intervene, at 2.) However, neither the United States nor the Secretary of the Interior were parties to this Court's proceedings on disposition of that Wyoming motion.[1]

The Court's decision was rendered April 1, 1935. Three years later, on March 31, 1938, and after the proceedings before this Court's Special Master had

[1] Nor did the Court make anything of the fact that Wyoming's grounds referred not to a claimed indispensibility of the United States but simply to a claimed indispensibility of the Secretary.

been underway for almost two years,[6] the United States moved to intervene. Among other grounds for intervention, the United States, "assuming that all [of its] rights to appropriate the waters of the North Platte River are derived from and are subject to the laws of Wyoming or the other litigant States,"[7] asserted as an independent ground for intervention that the rights of the United States were not being properly protected by either Nebraska or Wyoming. *See* Memorandum on Behalf of the United States to Intervene and Petition for Intervention (filed March 31, 1938) *Nebraska v. Wyoming*, No. 9 Original, October Term, 1937, at ¶ 10. As a further ground, the United States alleged that even if the United States were in exactly the same position legally as a private appropriator, the government's investment in the North Platte and Kendrick Projects (approximately $45,200,000 in irrigation and power facilities when completed) and the number of people (unspecified) dependent on the government's works warranted the presence of the United States as a party. *Id.*, ¶¶ 5, 6 and 12.

Notwithstanding opposition to the government's motion by all three states (*see* objections of Wyoming, filed April 21, 1938, and of Nebraska and Colorado, each filed April 22, 1938, *Nebraska v. Wyoming*, No. 9 Original, October Term, 1937) this Court promptly

---

[6] The Special Master had been appointed in October, 1935. 296 U.S. 542. Hearings had begun in June, 1936. *See* Objections of Nebraska (filed April 22, 1938) to Intervention by the United States, *Nebraska v. Wyoming*, No. 9 Original, October Term, 1937.

[7] By this time Colorado had been impleaded as a defendant. *Nebraska v. Wyoming*, 325 U.S. 589, 596 (1945).

allowed the United States to intervene. *Nebraska v. Wyoming*, 304 U.S. 545 (1938). This Court's subsequent opinion and decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) is testimony to the active role played by the United States in the proceedings subsequent to its intervention.

Basin's situation today starkly resembles that in which the United States found itself almost half a century ago. Basin's interests in the water supply for Grayrocks Dam and Reservoir and the associated Laramie River Station, upon which it and its associates have invested over $1,300,000,000 and which constitute principal elements in a power system serving over 1,200,000 people in eight states (*see* Basin Memorandum in Support of Its Motion for Leave to Intervene at 3), are not being adequately protected by either Wyoming or Nebraska. This Court should follow its 1938 precedent in this very case and allow Basin's intervention, Wyoming's opposition notwithstanding.

CONCLUSION

For the foregoing reasons and those set forth in Basin's Memorandum in Support of its Motion to Intervene, Wyoming's objection should be overruled.

Dated: April 24, 1987 Respectfully submitted,

EDWARD WEINBERG
(Counsel of Record)
FREDERICK L. MILLER, JR.
DUNCAN, WEINBERG & MILLER, PC
1615 M Street, NW
Suite 800
Washington, D.C. 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Supreme Court, U.S.
FILED
APR 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO JOINT MOTION OF NEBRASKA PUBLIC POWER DISTRCT AND CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

JOSEPH B. MEYER
Attorney General
of Wyoming

DENNIS C. COOK
Senior Assistant
Attorney General
Counsel of Record

JENNIFER HAGER
Assistant
Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder, Colorado 80302
(303) 443-8782

April 28, 1987

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

CONCLUSION 4

TABLE OF AUTHORITIES

CASES Pages

Nebraska v. Wyoming,
295 U.S. 40 (1935) 4

Nebraska v. Wyoming,
295 U.S. 548 (1935) 3

New Jersey v. New York,
345 U.S. 369 (1953) 4

No. 108, Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING MEMORANDUM IN OPPOSITION TO JOINT MOTION OF NEBRASKA PUBLIC POWER DISTRCT AND CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

INTRODUCTION

The Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District ("Districts") nominally move to intervene as party plaintiffs. But their bottom line is that they oppose intervention by the Platte River Trust and the Audubon Society, and seek to intervene only if the Trust and Audubon are allowed to. Wyoming opposes intervention by the Districts.

ARGUMENT

Intervention by the Districts should be denied for essentially the same reasons that intervention by the Platte River Trust, Audubon and Basin Electric Power Cooperative should be denied. (The Court's attention

is directed to Wyoming's Memorandum in Opposition to the Platte River Trust and Audubon motions to intervene and Wyoming's Memorandum in Opposition to Basin's motion to intervene.)

The Districts are Nebraska water users. Their interests will be adequately represented by Nebraska *parens patriae*, to the extent that they are affected at all by this proceeding. The Districts concede that their interest will be adequately represented by Nebraska if the Trust and Audubon are not permitted to intervene to assert instream flow claims on behalf of migratory bird habitat in Nebraska, and if the issues are not otherwise expanded beyond the present suit to enforce the North Platte Decree. *See* Districts' Complaint in Intervention, at 3-4.

The Districts' real purpose in moving to intervene is to oppose intervention and expansion of the issues by the Platte River Trust and Audubon. They in fact request intervention only if the Trust and Audubon are granted leave to intervene.

The Districts observe:

> The Trust and Audubon seek intervention to litigate new and different issues that are far beyond the scope of the Court's Decree and have no bearing on the actual dispute between Nebraska and Wyoming. . . . The jurisdictional controvery between the States in this action is the dispute between Nebraska and Wyoming. That dispute is over the States' respective rights to use North Platte River waters for irrigation uses under

> the existing terms of the Court's Decree. . . . [T]he Trust and Audubon seek intervention not to assist the Court in resolving the narrow dispute between Nebraska and Wyoming, but rather to assert on their own behalf new claims pertaining to a different use of water, during different times of the year, in a different river.

Districts' Brief in Support of Joint Motion, at 19-20.

Wyoming agrees. The Trust and Audubon should not be permitted to intervene to assert new claims; nor should they be permitted to intervene even if their purpose is merely to ask the Court to "affirm the State of Nebraska's claim to North Platte River water. . . ". *See* Platte River Trust Reply Memorandum in Support of Motion for Leave to Intervene, at 10. Nebraska will represent their interests *parens patriae* to the extent those interests are affected by this proceeding. The same is true of the Districts' interests. Their motion for leave to intervene should be denied just as the motion of their predecessor, the Platte Valley Public Power and Irrigation District, to intervene in the first proceeding in *Nebraska v. Wyoming*, 295 U.S. 548 (1935), was denied.

The motions to intervene and supporting memoranda filed here by the Districts, the Platte River Trust and Audubon reveal a conflict between irrigation and hydroelectric water uses in Nebraska and instream flow uses for migratory bird habitat in Nebraska. These are conflicting claims for uses of water in Nebraska and do not involve Wyoming. Moreover, these claims apparently will be litigated in the immi-

nent proceedings before the Federal Energy Regulatory Commission upon the Districts' applications for relicensing of their projects. *See* Districts' Brief in Support of Joint Motion, at 13-14. That is a far more appropriate forum for resolution of those issues.

The point is that intervention by these parties would bring in an intrastate dispute that is not appropriate for this Court's exclusive original jurisdiction in interstate equitable apportionment cases. *New Jersey v. New York*, 345 U.S. 369 (1953); *Nebraska v. Wyoming*, 295 U.S. 40 (1935). This Court has never permitted a party other than a state or the United States to intervene in such proceedings, and should not do so here, particularly in view of the limited scope of this proceeding to enforce the existing North Platte Decree.

CONCLUSION

For the foregoing reasons, the joint motion of the Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District for leave to interevene should be denied.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

JENNIFER HAGER
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

Supreme Court, U.S.
FILED
MAY 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

REPLY OF NEBRASKA PUBLIC POWER DISTRICT AND THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT TO WYOMING MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

Of Counsel:

GENE D. WATSON
JOHN C. MCCLURE
Nebraska Public Power District
1414 15th Street
Columbus, Nebraska 68601
(402) 563-5773

BRUCE A. PETERSON
ANDERSON, STRASBURGER, KLEIN, PETERSON AND SWAN
The Central Nebraska Public Power and Irrigation District
4th & Lincoln Streets
Holdrege, Nebraska 68949
(308) 995-8601

TOM WATSON
(Counsel of Record)
JEFFREY J. DAVIDSON
MARK A. WARNQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Intervenors/Plaintiffs
Nebraska Public Power District
The Central Nebraska Public Power and Irrigation District

May 14, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

ARGUMENT 2

I. THE "REAL PURPOSE" OF THE DISTRICTS' INTERVENTION MOTION IS TO PROTECT THE DISTRICTS' PROPERTY, REVENUE, AND FEDERAL LICENSE INTERESTS IN FERC PROJECTS 1417 AND 1835 IF BIG BEND REACH INSTREAM FLOW ISSUES ARE CONSIDERED, NOT SIMPLY TO OPPOSE INTERVENTION BY THE TRUST AND AUDUBON 2

II. THE STATE OF NEBRASKA CANNOT ADEQUATELY REPRESENT THE DISTRICTS' INTERESTS IN THIS ACTION BECAUSE THE STATE DOES NOT HAVE THE DISTRICTS' FEDERAL LICENSE OBLIGATIONS OR PROJECT OPERATION EXPERIENCE 3

CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Mo-Kan Pipeline Co. v. United States, 312 U.S. 502 (1941) 5

New Jersey v. New York, 345 U.S. 369 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

REPLY OF NEBRASKA PUBLIC POWER DISTRICT AND THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT TO WYOMING MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE A JOINT COMPLAINT IN INTERVENTION AND FOR LEAVE TO INTERVENE AS PLAINTIFFS

Wyoming misconstrues the intervention motion filed by Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District (the "Districts"). The Districts have not "nominally" moved to intervene, nor is there anything "nominal" about the Districts' interest in this action. *See* Wyoming Memorandum in Opposition to Intervention at 1. The Districts have a direct and compelling interest in the Big Bend Reach "instream flow" claims that are before the Court. If instream flows claims in the Big Bend Reach of the Platte River are to be considered in this action, the Districts must intervene to protect their interests associated with Federal Energy Regulatory Commission ("FERC") Projects 1417 and 1835.

The Districts note that no other party or potential intervenor party to this action has opposed the Districts' motion for intervention.

ARGUMENT

I. THE "REAL PURPOSE" OF THE DISTRICTS' INTERVENTION MOTION IS TO PROTECT THE DISTRICTS' PROPERTY, REVENUE, AND FEDERAL LICENSE INTERESTS IN FERC PROJECTS 1417 AND 1835 IF BIG BEND REACH INSTREAM FLOW ISSUES ARE CONSIDERED, NOT SIMPLY TO OPPOSE INTERVENTION BY THE TRUST AND AUDUBON

Wyoming's response to the Districts' motion consists basically of characterizing it as "nominal" because the Districts agree that this action is properly limited to the claims raised by the State of Nebraska. The "real purpose" of the Districts' intervention motion is to protect the Districts' property, revenue, and federal license interests in Projects 1417 and 1835 because

- The Districts' property is directly implicated by the instream flow claims that were raised by the Platte River Whooping Crane Habitat Maintenance Trust ("Trust") and the National Audubon Society ("Audubon").
- The Platte River System regulation sought in this action by the Trust and Audubon would have a direct and substantial, if not severe, adverse impact on the operations of Projects 1417 and 1835.
- Such Project operation modifications would adversely affect the Districts' revenues.
- The Districts have license obligations as FERC licensees for Projects 1417 and 1835 which are separate and apart from instream flow claims.

Wyoming's response does not offer either factual or legal argument to dispute the Districts' position. Indeed,

Wyoming fails to mention that in its earlier pleadings it told the Court that if the Audubon's and Trust's Big Bend Reach instream flow issues are to be considered,

> [e]quity also would require the Court to consider whether operation of diversion and storage projects in Nebraska, such as Lake McConaughy (Kingsley Dam) [Project 1417] should be modified to assure delivery of regulated flows for migratory bird habitat.

Wyoming Memorandum in Opposition to Platte River Trust and Audubon Motions for Leave to Intervene, at 5-6.

Wyoming wants the Court to consider modification of the Districts' Project operations when and if Big Bend Reach instream flow issues are considered, but does not want the Districts to be parties to that consideration. Such a result would be patently unfair to the Districts and wholly unsupported by the principles which guide intervention decisions. Moreover, denying intervention to the Districts would deprive the Court of the Districts' experience and expertise with respect to the operation of the very Projects Wyoming states that the Court would have to consider.

II. THE STATE OF NEBRASKA CANNOT ADEQUATELY REPRESENT THE DISTRICTS' INTERESTS IN THIS ACTION BECAUSE THE STATE DOES NOT HAVE THE DISTRICTS' FEDERAL LICENSE OBLIGATIONS OR PROJECT OPERATION EXPERIENCE

Wyoming offers no basis for its bald assertion that the State of Nebraska will adequately represent the Districts' interests *parens patriae*. Wyoming Memorandum in Opposition to the Districts' Intervention at 2-3.

The instream flow claims raised by the Trust and Audubon have a direct and substantial impact on the operations of the Districts' Projects 1417 and 1835. Wyoming already has stated

> [b]ecause of its location between the Wyoming-Nebraska State line and the habitat area, *no "regulated flows"* delivered at the state line from Wyoming *could reach the habitat area without passing through Lake McConaughy* (1.9 million acre feet). (Emphasis added.)

Wyoming Memorandum in Opposition to Platte River Trust and National Audubon Society Motion for Leave to Intervene at 6, n. 4. In other words, Wyoming recognizes that the instream flow regulation sought by the Trust and Audubon amounts to a *de facto* regulation of the Districts' Projects.

In *New Jersey v. New York*, 345 U.S. 369, 373 (1953), this Court recognized that the *parens patriae* doctrine does not apply where a party has "some compelling interest in his own right, apart from his interest in a class with all citizens and creatures of the State, which interest is not properly represented by the State." The Districts have a compelling interest in the operation and regulation of their Projects. The Districts have a compelling interest in the revenues derived from Project operations. The Districts have a compelling interest in fulfilling their federal licensee obligations to operate the Projects in accordance with their licenses. These interests are unique with respect to the interests of other Nebraska water users and citizens.[1]

---

[1] Wyoming contends that the Court's denial in 1935 of the intervention request filed by the Platte Valley Public Power and Irrigation District ("Platte Valley") should govern the Districts' intervention request in this action. Wyoming Memorandum in Opposition to the Districts' Intervention at 4-5. Wyoming's position is inconsistent. The Court's 1935 decision regarding Nebraska Public Power District's predecessor in interest, Platte Valley, is dispositive only if the legal and factual issues before the Court in 1935 are the same issues currently before the Court. But Wyoming agrees that the Big Bend Reach instream flow issues are new and different issues than the issues before the Court in 1935. Wyoming Memorandum in Opposition to Districts' Intervention at 3. If the issues are different, (and Wyoming agrees that they are), the 1935 decision

The Districts recognize Wyoming's strong interest in confining the issues in this action to matters that actually are in dispute between Nebraska and Wyoming. The Districts do not disagree with Wyoming on this point. But, if Big Bend Reach instream flow issues nonetheless are to be considered in this action, the Districts must be participants. The Districts' interests in the Big Bend Reach instream flow issues could not be represented adequately by any of the existing parties. If the Court decides to address the Big Bend instream flow claims raised by the Trust and Audubon, the Districts should be permitted to speak for themselves and to protect their own interests.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Districts' Brief in Support of Intervention, Wyoming's opposition to the Districts' intervention should be rejected and the Districts should be granted leave to intervene if the Court decides to consider instream flow issues for the Big Bend Reach of the Platte River.

Respectfully submitted,

Of Counsel:

GENE D. WATSON
JOHN C. MCCLURE
Nebraska Public Power District
1414 15th Street
Columbus, Nebraska 68601
(402) 563-5773

BRUCE A. PETERSON
ANDERSON, STRASBURGER, KLEIN, PETERSON AND SWAN
The Central Nebraska Public Power and Irrigation District
4th & Lincoln Streets
Holdrege, Nebraska 68949
(308) 995-8601

TOM WATSON
(Counsel of Record)
JEFFREY J. DAVIDSON
MARK A. WARNQUIST
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 624-2500

Attorneys for Intervenors/Plaintiffs
Nebraska Public Power District
The Central Nebraska Public Power and Irrigation District

May 14, 1987

---

is not relevant to the Court's current consideration of the Districts' intervention motion. *See, e.g., Mo-Kan Pipeline Co. v. United States*, 312 U.S. 502 (1941).

Supreme Court, U.S.
FILED
JUN 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S ANSWER TO WYOMING'S COUNTERCLAIM

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General

RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

June 19, 1987

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S ANSWER TO WYOMING'S COUNTERCLAIM

Pursuant to the Court's order of April 29, 1987, the State of Nebraska answers the State of Wyoming's counterclaim as follows:

1. The allegation of paragraph 1 is admitted.

2. The allegations that Nebraska has intentionally circumvented and violated the Decree, and continues to do so, is denied. Specifically, Nebraska denies:

a. That it has demanded natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the present beneficial use requirements of lands entitled to water from said canals;

b. That it has demanded natural flow and storage water from sources above Tri-State Dam and by-passed or diverted it for uses below Tri-State Dam that are not recognized or authorized by the Decree;

c. That it has used or is using its share of Glendo Reservoir water outside the basin of the North Platte River in western Nebraska, that it has or is using Glendo water for uses other than irrigation, and that Glendo water has or is being used as a substitute for storage water previously available under permanent arrangements.

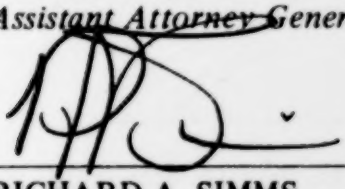
3. Each allegation of paragraph 3 is denied.

4. Each allegation of paragraph 4 is denied.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of Nebraska's Answer to Wyoming's Counterclaim were served on each of the following parties required to be served, in accordance with U.S. Supreme Court Rule 28, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 19th day of June, 1987 to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

Andrew F. Walch
Land & Natural Resources Division
United States Department of Justice
Post Office Box 7415
Washington, D.C. 20004

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Wyoming Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Duane Woodard
Colorado Attorney General
Department of Law
1525 Sherman Street, Third Floor
Denver, Colorado 80203

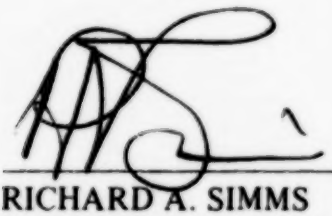
Charles N. Woodruff
Moses, Wittemyer, Harrison
and Woodruff, P.C.
102 Walnut Street, Suite 300
Boulder, Colorado 80302

Abbe David Lowell
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Joseph N. Onek
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037

Tom Watson
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Edward Weinberg
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W., Suite 800
Washington, D.C. 20036



RICHARD A. SIMMS
Special Assistant Attorney General
Counsel of Record

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF, AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF DECREE, AND BRIEF IN SUPPORT OF MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS,
Assistant Attorney General

RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General
HINKLE, COX, EATON, COFFIELD & HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

January 11, 1988

VERGARA PRINTING CO · SANTA FE, NEW MEXICO

TABLE OF CONTENTS

MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF DECREE

BRIEF IN SUPPORT OF MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

CERTIFICATE OF SERVICE

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

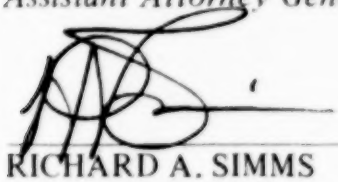
MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

The State of Nebraska hereby moves for leave to file its amended petition for an order enforcing the Court's Decree of October 8, 1945, as modified on June 15, 1953, for injunctive relief, and for modification of the Decree.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS,
Assistant Attorney General



RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General
HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF DECREE

The State of Nebraska hereby petitions the Court for an order enforcing the provisions of its Decree of October 8, 1945, as amended on June 15, 1953, granting injunctive relief, construing the Decree, and, if necessary, modifying the Decree, and in support hereof states:

1. The Court's Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska.

The Decree was modified and supplemented in 1953 based on the Court's approval of a stipulation among the parties. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

2. The Court expressly retained jurisdiction in this action for enforcement, supplementation, or modification of the Decree in Article XIII, 325 U.S. at 671, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or granting of further relief necessary or appropriate.

3. The 1945 Decree is premised on the recognition that Pathfinder and Guernsey Reservoirs in Wyoming are operated primarily for the benefit of lands in Nebraska. Consequently, the Decree limits storage of water in those reservoirs to protect water users in Nebraska. As modified in 1953, the Decree provides for the construction and operation of Glendo Reservoir in Wyoming, allocates the reservoir's yield between Wyoming and Nebraska pursuant to contracts with the Bureau of Reclamation, and provides that "[t]he regimen of the

North Platte River below Pathfinder Dam shall not be changed . . ." Paragraph XVII(b).

4. The Decree established an equitable balance of the benefits of the North Platte River and its tributaries by expressly apportioning the irrigation uses of the river above Tri-State Dam and by implicitly establishing a regimen of stream flow for uses below Tri-State Dam, including, but not limited to, uses of the river in Nebraska which were consistent with the irrigation apportionment and which were necessary to maintain and preserve critical wildlife habitat along the North Platte and Platte Rivers in Nebraska.

5. The State of Wyoming is presently violating and threatening to violate the State of Nebraska's equitable apportionment established in the Decree by:

A. Allowing depletion of the flows of the North Platte River through current and proposed state administration of water rights on the Laramie River, a tributary of the North Platte River, in a manner inconsistent with the apportionment in the Decree and the provisions of the Endangered Species Act, Pub. L. 93-205, 87 Stat. 889, 16 U.S.C. §§ 1531-1543.

B. Allowing depletion of the flows of the North Platte River by the proposed construction or authorization of additional pumping, diversion, and storage facilities at the confluence of the Laramie and North Platte Rivers;

C. Allowing depletion of the flows of the North Platte River by the proposed construction of new storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

D. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion

of North Platte River waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

6. The current and imminent actions of the State of Wyoming are inconsistent with and will directly reduce and interfere with existing water uses in Nebraska for irrigation and for maintenance of critical wildlife habitat and thereby disturb and violate the equitable balance of the North Platte River and its tributaries established in the Decree.

7. In addition to enforcing the Decree's apportionment for irrigation uses in Nebraska, the State of Nebraska seeks to have the Court construe the Decree as apportioning waters of the North Platte River to the State of Colorado, the State of Wyoming, and to the State of Nebraska for maintenance of critical wildlife habitat, and, in addition, to construe the Decree as placing restrictions on the State of Colorado's and the State of Wyoming's authority to approve new appropriations of North Platte River waters and restrictions on Colorado's and Wyoming's and the United States' authority to approve construction of new storage projects and their operation of existing storage projects for the purpose of impounding the waters of the North Platte River and its tributaries to the extent that such uses in Colorado or Wyoming would reduce the flows of the river into Nebraska and would thereby reduce the amount of water historically used in Nebraska for irrigation purposes and to maintain and preserve critical wildlife habitat.

8. Alternatively, in addition to enforcing the Decree's apportionment for irrigation uses in Nebraska, the State of Nebraska seeks to have the Court modify the Decree to recognize and provide for changes in the conditions of the North Platte River resulting from or that would result from the State of Colorado's or the State of Wyoming's authorization of new appropriations of the waters of the North Platte River

and its tributaries and the State of Colorado's, the State of Wyoming's, and the United States' authorization of new storage projects and their operation of existing storage projects on the North Platte River and its tributaries and to modify the Decree to recognize and provide for changes in federal and state legislation that recognize the need for the regulation of the flows and storage of the North Platte River and its tributaries for the continued protection of critical wildlife habitat. The proposed modification of the Decree should protect existing critical wildlife habitat in Nebraska by placing restrictions on the State of Colorado's and the State of Wyoming's authority to approve new appropriations of North Platte River waters and restrictions on Colorado's and Wyoming's and the United States' authorization of new storage projects and their operation of existing storage projects on the North Platte River and its tributaries to the extent that such uses in Colorado or Wyoming would reduce the flow of waters passing into Nebraska and would thereby reduce, adversely affect, or eliminate existing critical wildlife habitat in Nebraska.

9. Despite the State of Nebraska's efforts to resolve these matters, no resolution has been reached and no alternative forum exists in which to enforce the apportionment of the North Platte River and its tributaries for irrigation and the protection of critical wildlife habitat or, alternatively, to enforce the apportionment of the North Platte River and its tributaries for irrigation and to apportion the North Platte River and its tributaries in order to protect critical wildlife habitat.

10. Present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

11. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Colorado, the State of Wyoming, and the United States of America. Injunctive

relief is necessary to enforce the Decree and to restrain further violations of the Decree.

WHEREFORE, the State of Nebraska prays that the Court enter its order enforcing and modifying the Decree to:

(1) Require the State of Colorado, the State of Wyoming, and the United States and their agencies to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953 in this action;

(2) Enjoin the State of Wyoming and its agencies from authorizing additional depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree;

(3) Explicitly recognize the apportionment of North Platte River waters to the State of Colorado, the State of Wyoming, and to the State of Nebraska for maintenance of critical wildlife habitat;

(4) Enjoin the State of Colorado and the State of Wyoming and their agencies from approving new appropriations of the waters of the North Platte River and its tributaries, and to enjoin the State of Colorado, the State of Wyoming, and the United States and their agencies from authorizing or sanctioning construction of new storage projects on the North Platte River and its tributaries which would reduce the flows of the river into Nebraska and would thereby reduce the amount of water historically used in Nebraska to maintain and preserve critical wildlife habitat; and

(5) Provide such other and further relief as the Court shall deem proper, necessary and equitable in the circumstances.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS,
Assistant Attorney General

RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General
HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS,
Assistant Attorney General

RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General
HINKLE, COX, EATON, COFFIELD & HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

January 11, 1988

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

INDEX OF AUTHORITIES

CASES: Page

Colorado v. New Mexico,
459 U.S. 176 (1982) 3

Froman v. Davis,
371 U.S. 178 (1962) 3

Idaho ex rel. Evans v. Oregon,
462 U.S. 1017 (1982) 3

Utah v. United States,
394 U.S. 89 (1969) 3

STATUTES:

Electric Consumers Protection Act of 1986,
Pub.L. 99-495, 100 Stat. 1243 (1986) 2

Endangered Species Act, 16 U.S.C. §§ 1531-1541
(1982 & 1985 Supp.) 2

Fish and Wildlife Conservation Act,
16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.) 2

Fish and Wildlife Coordination Act, 16 U.S.C.
§§ 661-667 (1982 & 1985 Supp.) 2

National Environmental Policy Act,
42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.) 2

RULES:

Federal Rule of Civil Procedure 15 (a) 3

Supreme Court Rule 9.2 3

OTHER:

3 Moore, Moore's Federal Practice
Para. 15.08[3] (2nd ed. 1987) 3

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

STATEMENT OF THE CASE

This is an action to enforce the equitable apportionment made to the State of Nebraska pursuant to the Court's Decree of October 8, 1945, as amended on June 15, 1953, and for injunctive relief against the State of Wyoming for present and threatened depletions of the flows of the North Platte River and its tributaries.

On January 20, 1987, the Court granted Nebraska's motion for leave to file its petition. Wyoming answered the petition on March 18, 1987, counterclaimed against Nebraska, and sought injunctive relief for alleged violations of the Decree.

When originally litigated, the object of the suit was to equitably apportion the waters of the North Platte River and its tributaries among the States of Colorado, Wyoming, and Nebraska for irrigation purposes. Accordingly, certain restrictions were placed on diversions and storage of water in each of the three states. While the Decree does not expressly apportion the waters of the North Platte and its tributaries for purposes other than irrigation, the apportionment has resulted in a certain regimen of stream flow in the three states that has been used for non-irrigation purposes. Encouraged and sanctioned by the passage of federal and state legislation since the entry of the Decree in 1945, the principal instream use of the waters of the North Platte and its tributaries has been for the development and protection of critical wildlife habitat.

STATEMENT OF FACTS

Since the entry of the Court's Decree in 1945 and its modification in 1953, increased scientific knowledge and concern have been focused on the ecological effects of water development for irrigation, industrial, municipal and domestic purposes. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531-1541 (1982 & 1985 Supp.); National Environmental Policy Act, 42 U.S.C. §§ 4331-4370 (1982 & 1985 Supp.); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (1982 & 1985 Supp.) Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911 (1982 & 1985 Supp.); Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986). In the North Platte and Platte River valleys, this legislation has been directed, in part, to some 230 species of migratory birds which inhabit the area, six of which are endangered or threatened.

POINTS OF LAW

The preservation and regulation of flows of the North Platte and its tributaries for the protection of critical wildlife habitat presents a basin-wide problem, necessitating affirmative action not simply by the State of Nebraska, but also by the states of Wyoming and Colorado and the United States. Equity requires that the apportionment of the waters of the North Platte River and its tributaries recognize the need to protect critical wildlife habitat in the respective states and that the responsibility of doing so should not be shouldered by any one of the states. The multi-state, federal nature of the problem also requires the participation and cooperation of the United States in the operation of the various federal projects which divert and impound the flows of the North Platte and its tributaries.

The Court has recognized that equitable apportionment embraces more than the quantitative division of an interstate water supply. *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017 (1982). In the North Platte River and Platte River basins, it is clear that the equitable burdens and benefits of maintaining critical wildlife habitat are interstate in nature and must be subject to the apportionment necessary to protect the ecological balance in the basins.

Pursuant to Supreme Court Rule 9.2 and Federal Rule of Civil Procedure 15(a), leave to amend a pleading "shall be freely given when justice so requires." The object is to promote the exposition of pertinent facts and to avoid piecemeal adjudication of interstate disputes. *See Utah v. United States*, 394 U.S. 89 (1969); *Froman v. Davis*, 371 U.S. 178 (1962). The purpose of Nebraska's amended petition is to assure that all issues relevant to the Court's construction or modification of the Decree are litigated in this proceeding. *See* 3 J. Moore, Moore's Federal Practice Para. 15.08[3], at 15-55 (2nd ed.

1987) ("The clearest cases for leave to amend are correction of an insufficient claim or defense and amplification of previously alleged claims or defenses.")

CONCLUSION

Congress and the Court have repeatedly recognized that the protection of environmental values, including critical wildlife habitat, are national in character. In apportioning the benefits of the flows of the North Platte River, equity requires that the Court take cognizance of the post-Decree laws designed to further environmental interests and to spread the burden of protecting critical wildlife habitat throughout the North Platte River Basin. Accordingly, the State of Nebraska respectfully requests that the Court grant leave to file its amended petition.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS,
Assistant Attorney General

RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General
HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of the foregoing Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree, and brief in support thereof were served on each of the following parties required to be served, in accordance with United States Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 11th day of January, 1988 to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

Andrew F. Walch
Land & Natural Resources Division
United States Department of Justice
Post Office Box 7415
Washington, D.C. 20004

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Wyoming Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

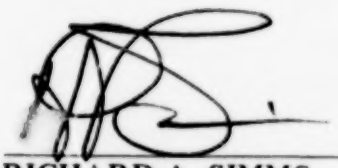
Charles N. Woodruff
Moses, Wittemyer, Harrison & Woodruff, P.C.
102 Walnut Street, Suite 300
Boulder, Colorado 80302

Abbe David Lowell
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Joseph N. Onek
Onek, Klein and Farr
2550 M Street, N.W.
Washington, D.C. 20037

Tom Watson
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Edward Weinberg
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W., Suite 800
Washington, D.C. 20036



RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General
HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

(18)

No. 108, Original

RECEIVED
FEB 12 1988

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Acting Assistant Attorney General
ANDREW F. WALCH
JOHN LINDSKOLD
LEE M. KOLKER
PATRICIA L. WEISS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

MEMORANDUM FOR THE UNITED STATES

On October 7, 1986, Nebraska sought leave from this Court to file a petition for an order enforcing this Court's decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), which established an interstate apportionment of the flow of the North Platte River. This Court granted Nebraska leave to file the petition on January 20, 1987, and instructed the parties to file answers. On June 22, 1987, the Court referred the case to a Special Master. Nebraska now requests this Court's leave to amend its petition to seek additional relief, including modification of the existing decree. Nebraska's motion, if granted, would greatly expand the scope, character, and complexity of this suit. The United States therefore suggests that Nebraska's motion be referred to the Special Master for his recommendation.

1. This Court's decision in *Nebraska* v. *Wyoming*, *supra*, resulted in the formulation of a decree apportioning the waters of the North Platte River among the States

of Nebraska, Wyoming, and Colorado.[1] Nebraska's 1986 petition contended that "Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree" (1986 Pet. para. 3). Nebraska specifically alleged that Wyoming was unlawfully restricting the flow of the North Platte River by its operation of the Greyrocks Reservoir on the Laramie River; by its proposed construction of additional river pumping, diversion and storage facilities at the confluence of the Laramie and North Platte rivers; by its proposed construction of storage capacity on certain tributaries entering the North Platte River; and by its attempts to "prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska" (*ibid.*). The 1986 petition did not specify the water uses in Nebraska adversely affected by the alleged violations; it merely stated that "Wyoming's violations are causing and will cause irreparable injury to the State of Nebraska and its citizens" (*id.* para. 6).

Nebraska's proposed amended petition repeats the allegations that Wyoming is unlawfully restricting the North Platte's flow. See Amended Pet. paras. 3-6. The amended petition contends, in addition, that the existing decree should be construed or modified to recognize an obligation to maintain stream flows necessary for critical wildlife habitat along the Platte River and to apportion this obligation among the States of Colorado, Wyoming, and Nebraska. See *id.* paras. 4, 7-8. The petition alleges that the 1945 decree established a regimen of stream flows

---

[1] The original decree is set forth at 325 U.S. 665-672. The decree has since been modified and supplemented upon joint request of the parties. See 345 U.S. 981 (1953).

for uses "consistent with the irrigation apportionment and which were necessary to maintain and preserve critical wildlife habitat along the North Platte and Platte Rivers in Nebraska" (*id.* para. 4). The amended petition also contends that Wyoming's "current and imminent actions" will "interfere with existing water uses in Nebraska for irrigation and for maintenance of critical wildlife habitat and thereby disturb and violate the equitable balance * * * established by the Decree" (*id.* para. 6).

As a practical matter, Nebraska's proposed amended petition seeks to restrain Wyoming, Colorado, and the United States from taking actions that would, in Nebraska's opinion, reduce stream flows necessary for either irrigation or wildlife purposes. Nebraska specifically seeks to restrict Colorado's and Wyoming's authority to approve new water appropriations on the North Platte to the extent they would "reduce the amount of water historically used in Nebraska for irrigation purposes and to maintain and preserve critical wildlife habitat," and seeks to restrict the authority of these states and the United States to approve construction of new projects and operate existing projects that would similarly diminish flows (*id.* paras. 7, 8).

2. Nebraska's motion to amend its petition, if granted, would greatly expand the scope, character, and complexity of the present suit. The original petition purported to seek enforcement of an existing decree. The amended petition would reopen the existing apportionment of the North Platte's waters to adjust the "delicate balance of the river" (*Nebraska* v. *Wyoming*, 325 U.S. at 625). This Court has, of course, undoubted power to provide such relief in appropriate circumstances; indeed, the Court expressly retained jurisdiction "for the purpose of any order, direction, or modification of the decree, or any other supplementary decree, that may at any time be deemed proper

in relation to the subject matter in controversy" (*id.* at 671). But the Court should exercise that power cautiously in light of the need for certainty and stability in the administration of water rights and in light of the legitimate expectation of the parties to the decree. Cf. *Arizona* v. *California*, 460 U.S. 605, 615-628 (1983).

Circumspection is particularly appropriate in this case because Nebraska's proposed amended petition raises novel and controversial issues that deserve careful consideration. For example, the proposed petition raises issues of first impression concerning the grounds upon which a state may seek modifications to an existing decree, the uses for which the waters of the North Platte River may be apportioned by decree, and the source of any water that would be made available for newly recognized uses. Furthermore, the legal theories underlying some of Nebraska's contentions, such as its allegations that Wyoming is violating the existing decree by actions on the Laramie River "inconsistent with the * * * provisions of the Endangered Species Act" (Amended Pet. para. 5A), are far from clear. Finally, the proposed amended petition may raise federal sovereign immunity issues by, for example, seeking to restrict the United States' authority to approve the construction of new projects or the operation of existing projects that would reduce the flow of the North Platte River into Nebraska.

3. In sum, Nebraska's motion presents numerous issues of far-reaching consequence. We therefore submit that this Court should refer the motion to the Special Master for his consideration. This course of action will allow the parties to brief the issues in detail and will permit the Special Master to prepare a recommendation for this Court. The Special Master is presently considering motions, filed by the Basin Electric Power Cooperative, the Platte River Trust, the National Audubon Society, and the

Nebraska Public Power District, for leave to intervene. A further reference of Nebraska's motion will enable the Special Master to prepare a consolidated recommendation, addressing all of these motions, that will provide concrete direction on the proper parties and issues in this litigation.

Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Acting Assistant Attorney General
ANDREW F. WALCH
JOHN LINDSKOLD
LEE M. KOLKER
PATRICIA L. WEISS
Attorneys

FEBRUARY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60281

No. 108

Supreme Court, U.S.
FILED
FEB 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

COLORADO'S BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

LOIS G. WITTE
Deputy Attorney General
Natural Resources Section
Counsel of Record

WENDY C. WEISS
First Assistant Attorney General
Natural Resources Section

Attorneys for State of Colorado

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

February 12, 1988

No. 108

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

COLORADO'S BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	1
ARGUMENT	7
I. THE PROPOSED AMENDED PETITION FAILS TO PRESENT A JUSTICIABLE CASE OR CONTROVERSY.	7
A. Nebraska's Amended Petition presents only hypothetical questions as to Colorado, which questions are beyond the Court's judicial power.	8
B. The ripeness doctrine similarly precludes judicial redress because Nebraska has suffered no injury, nor has she alleged injury sufficient to invoke this Court's original jurisdiction.	9
C. Nebraska's allegations against Colorado are too vague and ill-defined to admit to judicial determination.	11
D. Principles of finality and repose militate against reopening and modifying the Decree.	13
E. Nebraska's failure to seek accommodation with Colorado before filing her Motion to Amend demonstrates the absence of a justiciable case or controversy.	16
II. BECAUSE NEBRASKA'S PROPOSED AMENDED PETITION FAILS TO PRESENT A JUSTICIABLE CASE OR CONTROVERSY, LEAVE TO AMEND SHOULD BE DENIED.	17

Page

CONCLUSION 19

AFFIDAVITS 21

Affidavit of Roy Romer, Governor of the State of Colorado 21

Affidavit of Duane Woodard, Attorney General for the State of Colorado 23

Affidavit of Hamlet J. Barry III, Executive Director, Colorado Department of Natural Resources 26

Affidavit of Jeris A. Danielson, State Engineer for the State of Colorado 29

Affidavit of J. William McDonald, Director, Colorado Water Conservation Board 31

PROOF OF SERVICE 34

TABLE OF AUTHORITIES

Page

CASES:

Aetna Life Insurance Company of Hartford, Connecticut v. Haworth, 300 U.S. 227 (1937) 8

Arizona v. California, 460 U.S. 605 (1983) 13,16

California v. Texas, 437 U.S. 601 (1978) 9

Colorado v. Kansas, 320 U.S. 383 (1943) 10

Colorado v. New Mexico, 459 U.S. 176 (1982) 9

Connecticut v. Massachusetts, 282 U.S. 660 (1931)... 9

Flast v. Cohen, 392 U.S. 83 (1968) 7,8,13

Foman v. Davis, 371 U.S. 178 (1962) 17,18,19

In re Applications 15145, 15146, 15147, and 15148 Assigned to the Catherland Reclamation District, appeal filed, No. 86-692 (Neb. 1986) 11

Kansas v. Colorado, 206 U.S 46 (1907) 9,10

Louisiana v. Texas, 176 U.S. 1 (1900) 16,17

Minnesota v. Wisconsin, 252 U.S. 273 (1920) 17

Missouri v. Illinois, 200 U.S. 496 (1906) 9

Nebraska v. Rural Electrification Administration, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. Oct. 2, 1978), *dismissed and vacated upon stipulation*, 594 F.2d 870 (8th Cir. 1979) 8,12

Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, *Nebraska v. Wyoming*, 345 U.S. 981 (1953) 1,2,5, 15,17

New York v. New Jersey, 256 U.S. 296 (1921) 9,10,17

Ohio v. Kentucky, 410 U.S. 641 (1973) 17,18

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 7

Pennsylvania v. New Jersey, 426 U.S. 660 (1976) 9,10,11

	Page
Riverside Irrigation District v. Andrews, 758 F.2d 508 (10th Cir. 1985)	8,12
Texas v. New Mexico, 462 U.S. 554 (1983)	7,17
United States v. Nevada, 412 U.S. 534 (1973)	7
United States v. West Virginia, 295 U.S. 463 (1935)	9,11
Utah v. United States, 394 U.S. 89 (1969)	7
Vermont v. New York, 417 U.S. 270 (1974)	17
Washington v. Oregon, 214 U.S. 205 (1909)	17
Wyoming v. Colorado, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *vacated and new decree entered upon joint motion of the parties*, 353 U.S. 953 (1957)	1
STATUTES	
Act of March 8, 1926, ch. 46, 44 Stat. 195	2
Pub. L. 99-495, 100 Stat. 1243 (1986)	12
Section 404 of the Clean Water Act, 33 U.S.C. sec. 1344 (1980)	8
16 U.S.C. secs. 661-667 (1982 & Supp. 1985)	12
16 U.S.C. secs. 1531-1543 (1982 & Supp. 1985)	3,8,12
16 U.S.C. secs. 2901-2911 (1982 & Supp. 1985)	12
42 U.S.C. secs. 4331-4370 (1982 & Supp. 1985)	12
RULES	
Fed. R. Civ. P. 15	17,18
Supreme Court Rule 9.2	17
OTHER AUTHORITIES	
12 J. Moore, H. Bendix & B. Ringle, Moore's Federal Practice para. 350.02[2] (2d ed. 1982)	7

INTRODUCTION

The issue before the Court on Nebraska's Motion to Amend Petition is whether Nebraska's proposed Amended Petition for an Order Enforcing Decree, for Injunctive Relief and for Modification of Decree, which asks the Court to reopen and modify its equitable apportionment of the North Platte River in response to federal environmental regulation, presents a justiciable case or controversy.

Colorado urges the Court to deny Nebraska's Motion to Amend because Nebraska's new allegations do not present a justiciable question.

STATEMENT OF THE CASE

The North Platte Decree, entered October 8, 1945, and modified and supplemented by agreement of the parties on June 15, 1953, apportions among Colorado, Wyoming, and Nebraska, the right to withdraw for purposes of irrigation natural flow water[1] from the North Platte River and its tributaries. *Nebraska v. Wyoming,* 325 U.S. 589 (1945) (the Decree appears at 325 U.S. 665), *modified, Nebraska v. Wyoming,* 345 U.S. 981 (1953) (hereinafter the Decree as modified will be referred to as the North Platte Decree or the Decree). The Court's equitable distribution extends from the North Platte River's headwaters in Colorado, through Wyoming, to Bridgeport, Nebraska, some 60 miles east of the Wyoming-Nebraska state line. *Nebraska v. Wyoming,* 325 U.S. at 607. The Decree expressly excludes the waters of the Laramie River, apportioned separately by this Court in *Wyoming v. Colorado,* 259 U.S. 419 (1922), *modified,* 260 U.S. 1 (1922), *vacated and new decree entered upon joint motion of the parties,* 353 U.S. 953 (1957), as well as the waters of the South Platte

---

[1]The Decree expressly defines "natural flow water" as "all water in the stream except storage water." *Nebraska v. Wyoming,* 325 U.S. 665, 670 (1945).

River, apportioned separately by congressionally ratified compact. Act of March 8, 1926, ch. 46, 44 Stat. 195. *See Nebraska v. Wyoming,* 325 U.S. at 671.

Nebraska commenced this action against Wyoming on October 6, 1986, to enforce her equitable apportionment of the waters of the North Platte River and its tributaries under the North Platte Decree. Nebraska's initial Petition for an Order Enforcing Decree and for Injunctive Relief sought to enjoin Wyoming from increasing the depletion of the natural flows of the North Platte River, particularly with respect to the operation of the Grayrocks Dam and Reservoir, the proposed construction of the Corn Creek Irrigation Project, the proposed construction of the Deer Creek Project, and the filing of a lawsuit by Wyoming against the United States Bureau of Reclamation, to require the Bureau to obtain Wyoming permits and otherwise comply with state law in connection with the storage and diversion of water for the Inland Lakes component of the Bureau's North Platte Project. Nebraska did not seek any relief whatsoever against Colorado.

The Court granted Nebraska leave to file its Petition on January 20, 1987. On March 18, 1987, Wyoming answered the Petition and counterclaimed against Nebraska, seeking injunctive relief for alleged violations of the Decree.

As Nebraska's original Petition sought relief only against Wyoming, Colorado did not respond to Nebraska's motion for leave to file the petition, nor did Colorado file an answer. However, by letter dated March 25, 1987 to Francis J. Lorson, Chief Deputy Clerk of the United States Supreme Court, Colorado reserved the right to participate in this case in the event any party subsequently raised an issue affecting Colorado's interests.

On March 20, 1987, the Platte River Whooping Crane Critical Habitat Maintenance Trust (Platte River Trust) moved to intervene in the proceedings to request the Court to enforce and modify its earlier Decree to require a regulated flow of the

North Platte River for purposes of protecting migratory bird habitat. The National Audubon Society sought intervention on March 23, 1987, for purposes of advocating compliance with the Endangered Species Act, 16 U.S.C. secs. 1531-1543 (1982 & Supp. 1985).

Nebraska opposed intervention on the grounds that the Platte River Trust and National Audubon Society did not propose to intervene in the ordinary sense, but rather "to try a new and different case." Nebraska complained that they would "enlarge the issues" and "alter the nature of the proceedings." Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 3 (Apr. 3, 1987); Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or to Participate as Litigating Amicus Curiae at 2 (Apr. 3, 1987).

Nebraska protested that the Platte River Trust wanted to go beyond the existing apportionment and modify the Decree:

> Notwithstanding that the upstream reservoirs in Wyoming and Nebraska are used pursuant to the present decree for irrigation and power purposes, the Trust wants the Court to enter a new decree compelling regulation for a distinctly different purpose, namely to provide certain minimum instream flows between Overton and Grand Island, Nebraska, some 120 miles downstream from the Wyoming Nebraska stateline.

Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 2 (Apr. 3, 1987) (footnote omitted).

Nebraska vigorously objected to bringing in issues such as federal environmental legislation and developments in the field of ecology. Nebraska admonished that she sought only to "enforce the existing apportionment of the waters of the North

Platte River and to prevent Wyoming from violating the Court's decree . . . ." *Id.*

Wyoming and Colorado likewise strenuously opposed intervention by the Platte River Trust and National Audubon Society. Wyoming Memorandum in Opposition to Platte River Trust and National Audubon Society Motions for Leave to Intervene (Apr. 3, 1987); Colorado Response to Platte River Trust and National Audubon Society Motions for Leave to Intervene (Apr. 3, 1987).

In an abrupt departure from her initial Petition and her course of conduct throughout this proceeding, Nebraska now seeks to amend the Petition to request modification of the Decree. Nebraska requests an entirely new apportionment of the North Platte waters to provide for uses other than irrigation. Moreover, Nebraska seeks to greatly expand the geographic scope of the Decree to include the North Platte and Platte River Basins. Nebraska's Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief at 3 (Jan. 11, 1988).

Also, for the first time in this action, Nebraska demands relief against Colorado. Nebraska seeks to modify the Decree to provide for the maintenance of critical wildlife habitat; to restrict Colorado's authority to approve new appropriations of North Platte River waters; to restrict Colorado's authority

to approve or sanction the construction of new storage projects; and to restrict Colorado's operation of existing storage projects.[2]

While Nebraska's prayer for relief is drafted more narrowly than the corresponding paragraphs 7 and 8 of the Amended Petition, which are in turn drafted more narrowly than the corresponding description of the relief sought contained in Nebraska's Brief in Support of Motion to Amend Petition, there can be no doubt that Nebraska is requesting an extraordinary remedy: Nothing short of a new allocation of interstate waters, allegedly to protect and maintain ecological balance in the North Platte and Platte River Basins. Nebraska's Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief at 3 (Jan. 11, 1988).

Yet Nebraska's Amended Petition does not allege any action or threatened action by Colorado in violation of the Decree. Nor does Nebraska allege any injury or threatened

---

[2]It is disingenuous for Nebraska to claim that she is only seeking to enforce the existing Decree against Colorado or to construe the Decree to impose additional restrictions on Colorado. The Decree imposes specific numeric limitations on Colorado's use of the North Platte River and its tributaries: irrigation of no more than a total of 145,000 acres of land in Jackson County, Colorado, during any one irrigation season (Decree, para. I(a), 345 U.S. at 981); storage of no more than a total amount of 17,000 acre feet of water for irrigation purposes in Jackson County, Colorado, between October 1 of any year and September 30 of the following year (Decree, para. I(b), 325 U.S. at 665); and export out of basin of no more than 60,000 acre feet of water in any period of 10 consecutive years reckoned in continuing progressive series beginning with October 1, 1945 (Decree, para. I(c), 325 U.S. at 665). Since Nebraska does not allege that Colorado has exceeded any of those limitations, or threatens to do so (*see also* Affidavits of Roy Romer, Governor of Colorado; Duane Woodard, Attorney General for Colorado; Hamlet J. Barry III, Executive Director, Colorado Department of Natural Resources; Jeris A. Danielson, State Engineer; and J. William McDonald, Director, Colorado Water Conservation Board), the inescapable conclusion is that Nebraska desires to reopen the Decree to increase her apportionment at Colorado's expense.

injury caused by Colorado. Further, while Nebraska alleges that she has made "efforts to resolve these matters" (Amended Petition, para. 9), Nebraska has never apprised Colorado of the existence of any problem with the Decree, nor of any action or threatened action by Colorado in violation of the Decree, nor of any injury to Nebraska resulting from Colorado's administration of her apportionment under the Decree. *See* Affidavits of Roy Romer, Governor of Colorado; Duane Woodard, Attorney General for Colorado; Hamlet J. Barry III, Executive Director, Colorado Department of Natural Resources; Jeris A. Danielson, State Engineer for Colorado; and J. William McDonald, Director, Colorado Water Conservation Board.

ARGUMENT

I. THE PROPOSED AMENDED PETITION FAILS TO PRESENT A JUSTICIABLE CASE OR CONTROVERSY.

The doctrine of justiciability limits the court's judicial power, both original and appellate, to "cases" and "controversies." *Flast v. Cohen,* 392 U.S. 83, 94-97 (1968).

> [The doctrine of justiciability] takes on an added dimension in the context of the Court's original jurisdiction. Because original cases require the Court to sit as a trial court, without the benefit of a lower court's fact-finding and clarification of the issues, and because of the time which the action demands of the Court, the Court jealously guards its original docket.

12 J. Moore, H. Bendix & B. Ringle, *Moore's Federal Practice* para. 350.02[02] at 3-15 (2d ed. 1982) (footnotes omitted). The exercise of original jurisdiction, particularly in interstate environmental cases which pose complex and novel issues, intrudes on the Court's "paramount role as the supreme federal appellate court," and can be justified "only by the strictest necessity." *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493, 505 (1971); *see id.* at 498, 504-505.

Thus, the Court exercises its original jurisdiction sparingly, *United States v. Nevada,* 412 U.S. 534, 538 (1973) (per curiam); *Utah v. United States,* 394 U.S. 89, 95 (1969) (per curiam), with "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Texas v. New Mexico,* 462 U.S. 554, 570 (1983). The Court exercises "that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system." *Id.*

A. Nebraska's Amended Petition presents only hypothetical questions as to Colorado, which questions are beyond the Court's judicial power.

Nebraska's Amended Petition presents the Court with the hypothetical question of whether an increased scientific understanding of the ecological effects of water development, coupled with the enactment of federal and state environmental legislation, requires modification of a longstanding equitable apportionment of interstate waters.

The Amended Petition would embroil the Court in exceedingly complex water resource planning and policy issues, when these issues have not been framed in an adversarial context.

The Court's judicial power does not extend to a case that presents hypothetical questions. "Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." *Flast v. Cohen,* 392 U.S. 83, 97 (1968).

The hypothetical problems to which Nebraska alludes may never present a justiciable controversy. Application of the Endangered Species Act, 16 U.S.C. secs. 1531-1543 (1982 & Supp. 1985) and Section 404 of the Clean Water Act, 33 U.S.C. sec. 1344 (1980), just two of a host of federal laws which affect water development, may well resolve any wildlife habitat concerns in an alternate forum. *See e.g., Riverside Irrigation District v. Andrews,* 758 F.2d 508 (10th Cir. 1985); *Nebraska v. Rural Electrification Administration,* 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. Oct. 2, 1978), *dismissed and vacated upon stipulation,* 594 F.2d 870 (8th Cir. 1979).

Aetna Life Insurance Company of Hartford, Connecticut v. Haworth, 300 U.S. 227, 240-41 (1937), requires that a justiciable controversy

> be definite and concrete, touching the legal relations of the parties having adverse legal interests . . . . It must

> be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised . . . .

Nebraska does not allege that Colorado has violated or threatens to violate the North Platte Decree. Nebraska does not allege that Colorado has taken or threatens to take any action injurious to Nebraska. Nebraska therefore has failed to present an actual and substantial controversy capable of judicial redress. *Colorado v. New Mexico,* 459 U.S. 176, 187 n.13 (1982); *United States v. West Virginia,* 295 U.S. 463, 474 (1935); *Connecticut v. Massachusetts,* 282 U.S. 660, 669 (1931); *New York v. New Jersey,* 256 U.S. 296, 309 (1921); *Missouri v. Illinois,* 200 U.S. 496, 521 (1906).

B. The ripeness doctrine similarly precludes judicial redress because Nebraska has suffered no injury, nor has she alleged injury sufficient to invoke this Court's original jurisdiction.

This Court exercises its original jurisdiction to remedy real and substantial injury inflicted on one state by another. *California v. Texas,* 437 U.S. 601, 614 (1978) (per curiam) (Stewart, J., concurring); *Pennsylvania v. New Jersey,* 426 U.S. 660, 663 (1976) (per curiam); *New York v. New Jersey,* 256 U.S. 296, 309 (1921)

For example, in *Kansas v. Colorado,* 206 U.S. 46 (1907), upstream appropriations in Colorado, which brought about the reclamation of large areas in Colorado, caused perceptible injury to limited areas of the Arkansas Valley in Kansas. The Court found that Kansas had not made a sufficient showing that she was entitled to a decree. The Court observed that

there might come a time when a material increase in the depletion of the Arkansas River by Colorado would injure the substantial interests of Kansas to the extent of destroying the equitable division of benefits between the two states resulting from the flow of the river, and that Kansas would be free to institute new proceedings at that time. *Id.* at 117-18.

Many years later, the equitable apportionment of the Arkansas River again came before the Court. And, once again, in *Colorado v. Kansas,* 320 U.S. 383 (1943), the Court found that Kansas had "not sustained her allegations that Colorado's use has materially increased, and that the increase has worked a serious detriment to the substantial interests of Kansas." *Id.* at 400. The Court concluded, "Whatever may be said of the practices of Colorado since 1905, Kansas is not entitled to relief unless she shows they clearly have entailed serious damage to her substantial interests and those of her citizens." *Id.* at 398.

New York v. New Jersey, 256 U.S. 296, 309 (1921), prescribes the standard Nebraska must meet to engage this Court's original jurisdiction:

> Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence.

With respect to the requirement that actual and substantial injury be shown, the Court wrote in *Pennsylvania v. New Jersey,* 426 U.S. 660, 663 (1976) (per curiam), "It has long been the rule that in order to engage this Court's original jurisdiction, a plaintiff State must first demonstrate that the injury for which it seeks redress was directly caused by the actions of another State." In that case, the Court found that the defendent state had not inflicted any injury on the plaintiff state. Rather, the plaintiff state's injuries were self-inflicted. Denying

Pennsylvania leave to file an original action, the Court held, "No State can be heard to complain about damage inflicted by its own hand." 426 U.S. at 664.

The case of *Pennsylvania v. New Jersey* is particularly apposite. In the first place, Nebraska has failed to allege any injury directly caused by the actions of Colorado. Second, to the extent Nebraska complains about the burdens of the Endangered Species Act, those burdens may well be self-inflicted. For example, Nebraska recently approved a water rights application for the Catherland Reclamation Project which will divert 125,000 acre-feet of water per year just upstream of the Big Bend reach of the Platte River, the reach designated as critical habitat for the whooping crane. *In re Applications 15145, 15146, 15147, and 15148 Assigned to the Catherland Reclamation District, appeal filed,* No. 86-692 (Neb. 1986). Nebraska's intrastate administration of water rights may well prove responsible for the magnitude of the "burdens" Nebraska bears.

In any event, since Nebraska does not even allege injury, she fails utterly to meet the threshold requirement of demonstrating that the actions of Colorado have resulted in an actual injury or threat of injury of serious magnitude. The case, therefore, is not ripe for adjudication.

C. Nebraska's allegations against Colorado are too vague and ill-defined to admit to judicial determination.

The Court has declined to exercise its original jurisdiction when a complainant raised "an issue too vauge and ill-defined to admit to judicial determination." *United States v. West Virginia,* 295 U.S. 463, 474 (1935).

In support of her Motion to Amend, Nebraska points to increased scientific knowledge and the passage of environmental legislation for the broad proposition that:

> In the North Platte River and Platte River basins, it is clear that the equitable burdens and benefits of maintaining critical wildlife habitat are interstate in nature and must be subject to the apportionment necessary to protect the ecological balance in the basins.

Nebraska's Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief at 3 (Jan. 11, 1988).

Nebraska has not and indeed can never show that the full burden of compliance with the Endangered Species Act falls on Nebraska alone. All federal actions involving water projects in Colorado and Wyoming are subject to the requirements of the Endangered Species Act. *See, e.g., Riverside Irrigation District v. Andrews,* 758 F.2d 508 (10th Cir. 1985); *Nebraska v. Rural Electrification Administration,* 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. Oct. 2, 1978), *dismissed and vacated upon stipulation,* 594 F.2d 870 (8th Cir. 1979). The burdens of compliance with federal environmental regulation fall on all three states.

Nebraska's vague and ill-defined factual allegations, presented at page 2 of Nebraska's Brief in Support of Motion to Amend — that the Endangered Species Act, the National Environmental Policy Act, 42 U.S.C. secs. 4331-4370 (1982 & Supp. 1985); the Fish and Wildlife Coordination Act, 16 U.S.C. secs. 661-667 (1982 & Supp. 1985); the Fish and Wildlife Conservation Act, 16 U.S.C. secs. 2901-2911 (1982 & Supp. 1985); and the Electric Consumers Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986), impact some 230 species of migratory birds in the North Platte and Platte River Basins — simply do not give rise to a case or controversy amenable to judicial redress. The nebulous amendments to the Petition suggested by Nebraska's motion raise questions far beyond the scope of this Court's jurisdiction. Nebraska's proposed amendments do not raise any issues whatsoever "in an adversary context and in a form historically viewed as capable

of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). Accordingly, leave to amend should be denied.

D. Principles of finality and repose militate against reopening and modifying the Decree.

The equitable apportionment which Nebraska seeks to upset has been in place since 1945, modified by stipulation of the parties in 1953.

In *Arizona v. California*, 460 U.S. 605, 620-21 (1983), the Court wrote that principles of res judicata and collateral estoppel should inform the Court's decision to adjust an equitable apportionment of interstate waters, particularly with respect to water rights in the arid west. Justice Brennan in a separate opinion wrote, "A final judgment makes a difference. It marks a formal point at which considerations of economy, certainty, reliance, and comity take on more strength than they have before the judgment." 460 U.S. at 645.

Modification of the Decree, particularly to the extent intimated in Nebraska's supporting brief — a basin-wide adjustment for the purpose of taking into account unspecified "increased scientific knowledge" and "the passage of federal and state legislation since entry of the Decree in 1945," Nebraska's Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief at 2 (Jan. 11, 1988) — would impair vested property rights, perhaps for a decade or more, before a special master's report could be submitted to the Court for final action.

What Nebraska's proposed Amended Petition leaves unsaid or understated should be of great concern, particularly in light of Nebraska's invocation of the catchall prayer for all further relief deemed proper, necessary, and equitable. Nebraska's prayer for relief in its specific requests speaks only to the North Platte River and its tributaries. Yet allegations in the Amended Petition refer directly to the Laramie River (paras.

5(A), 5(B), 5(D)), and obliquely to the South Platte River ("the North Platte and Platte Rivers," para. 4).

What commenced as four discrete issues in Nebraska's original Petition, amenable to judicial redress and now ripe for decision pursuant to Wyoming's September 11, 1987 Motion for Summary Judgment, has escalated into nothing short of a request for the Supreme Court to undertake the task of basin-wide planning for irrigation, municipal and industrial uses, domestic purposes, and environmental quality in both the North Platte and Platte River Basins. *See* Nebraska's Brief in Support of Motion to Amend Petition at 2 (Jan. 11, 1988). Furthermore, Nebraska asks the Court to restrict Colorado's intrastate administration of water rights, by limiting Colorado's "authority to approve new appropriations" and by limiting Colorado's "authorization of new storage projects" and "operation of existing storage projects," Nebraska's Amended Petition, paras. 7 and 8, without even so much as a bare allegation of injury or of violation of the existing Decree.

The North Platte Decree itself specifically excludes the Laramie and South Platte Rivers, as well as intrastate administration of water rights. Section XII of the Decree states in pertinent part:

> This decree shall not affect:
>
> (a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;
>
> . . . .
>
> (d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the Laramie River, a tributary of the North Platte River;

(3) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

Nebraska v. Wyoming, 325 U.S. 665, 671 (1945). It would be totally improper to reopen or modify the Laramie Decree or the South Platte Compact in these proceedings, and Colorado strenuously objects to any attempt by Nebraska to do so, either directly or indirectly.

The North Platte Decree itself only encompasses the stretch of the North Platte River and its tributaries, excluding the Laramie River, from the North Platte's headwaters in Colorado to Bridgeport, Nebraska, some 60 miles east of the Nebraska-Wyoming state line. *Nebraska v. Wyoming*, 325 U.S. 589, 607 (1945). Earlier in this litigation, Nebraska vigorously opposed intervention by the Platte River Trust on the grounds that the Trust wanted the Court "to enter a new decree compelling regulation for a distinctly different purpose, namely to provide certain minimum instream flows between Overton and Grand Island, Nebraska, some 120 miles downstream from the Wyoming/Nebraska state line." Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 2 (Apr. 3, 1987) (footnote omitted). Nebraska protested that the intervenors sought intrastate relief, in the form of minimum instream flows, provided for and regulated by state law. *Id.* at 2-3. The 42-year-old North Platte apportionment, Nebraska said, "is an historic fact." Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or Participate as Litigating Amicus Curiae at 2 (Apr. 3, 1987).

Nebraska would now stand the "historic fact" of the 42-year-old North Platte Decree, the 65-year-old Laramie Decree, and the 62-year-old South Platte Compact on its head. This Court must not allow Nebraska, under the rubric of "constru-

ing" the North Platte Decree, to reopen and modify these long-standing equitable apportionments.

The relief requested by Nebraska would violate all principles of finality and repose.

> Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country.

Arizona v. California, 460 U.S. 605, 621 (1983).

The grant of leave to amend on the basis of vague and ill-defined allegations, none of which accuse Colorado of injuring or threatening to injure Nebraska, would upset reasonable expectations and cause great uncertainty throughout the whole North Platte and Platte River Basins. Unless Nebraska comes forward with a justiciable case or controversy, principles of finality and repose dictate that leave to amend be denied.

E. Nebraska's failure to seek accommodation with Colorado before filing her Motion to Amend demonstrates the absence of a justiciable case or controversy.

Until filing her Motion to Amend, Nebraska had not apprised Colorado of any need or desire to modify the Decree. Please see accompanying affidavits. Nebraska's silence leads to the conclusion that a justiciable controversy has not yet emerged. As observed in *Louisiana v. Texas,* 176 U.S. 1, 18 (1900), to invoke the original jurisidiction of the Court,

> there must be a direct issue between [two states], and the subject matter must be susceptible of judicial solution. And it is difficult to conceive of a direct issue between two States in respect of a matter where no effort at accommodation has been made.

Compare id. with Nebraska v. Wyoming, 325 U.S. 589, 608 (1945) ("A genuine controversy exists. The States have not been able to settle their differences by compact.").

This Court has repeatedly admonished the states that disputes over interstate water allocations are more likely to be resolved by cooperative study and conference, and by mutual concession. *Texas v. New Mexico,* 462 U.S. 554, 575 (1983), *citing New York v. New Jersey,* 256 U.S. 296, 313 (1921); *Vermont v. New York,* 417 U.S. 270, 277-78 (1974); *Minnesota v. Wisconsin,* 252 U.S. 273, 283 (1920); *Washington v. Oregon,* 214 U.S. 205, 218 (1909).

Nebraska's complete failure to advise Colorado that Colorado's administration of her equitable apportionment of the North Platte River raises endangered species concerns, much less to commence any effort at accommodation, only underscores the absence of a justiciable controversy.

II. BECAUSE NEBRASKA'S PROPOSED AMENDED PETITION FAILS TO PRESENT A JUSTICIABLE CASE OR CONTROVERSY, LEAVE TO AMEND SHOULD BE DENIED.

Ordinarily, under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so requires." *Foman v. Davis,* 371 U.S. 178, 182 (1962), explains that when the underlying facts and circumstances relied upon by the plaintiff are "a proper subject of relief," the plaintiff ought to be afforded an opportunity to test his claim on the merits.

However, actions within the original jurisdiction of the United States Supreme Court are not ordinary civil actions. Notwithstanding Supreme Court Rule 9.2, which provides that the Federal Rules of Civil Procedure may serve as a guide in original actions, the liberal amendment policies of Civil Rule 15 do not apply with equal force to original actions. *Ohio v.*

Kentucky, 410 U.S. 641, 644 (1973). In *Ohio v. Kentucky*, the Court specifically recognized that it should treat a motion to amend a complaint invoking the Court's original jurisdiction differently, and required the plaintiff to meet a stricter standard before granting leave to amend.

In an original action, the Court applies a stricter standard to a motion to amend in order to parallel the requirements applied to a motion for leave to file an original action. The latter motion, which requires thorough briefing, allows the parties to reach and argue the merits of a controversy as soon as possible. The court may thus dispose of extraneous or nonjusticiable matters early in the litigation, narrowing the issues to be ultimately decided. *See Ohio v. Kentucky*, 410 U.S. at 644.

Thus, Nebraska may not rely upon the liberal amendment policies of Civil Rule 15, but must meet the stricter standards applicable to motions for leave to file a complaint invoking the Court's original jurisdiction. In fact, Nebraska's Motion to Amend represents the first time in this proceeding that Nebraska has sought any relief against Colorado. As to Colorado, Nebraska's Motion to Amend is effectively a motion for leave to file an original action.

Because the new questions presented by the proposed Amended Petition are nonjusticiable, the Court should deny leave to amend. Even if the Court should find the new questions justiciable, however, the Court, in exercise of its sound discretion, should deny leave to amend.

Granting the motion on basis of vague allegations, none of which complain that Colorado has violated or threatens to violate the North Platte Decree, nor that Colorado has engaged in any action which injures or threatens to injure Nebraska's interests, will result in great uncertainty in water rights administration and water resources planning in the Platte River Basin for many years to come. The hypothetical facts and circumstances relied upon by Nebraska, even under the most liberal standards of *Foman* and Civil Rule 15, are

not "a proper subject of relief." *Foman v. Davis,* 371 U.S. at 182. Until Nebraska comes forward with a concrete case or controversy, and demonstrates that Colorado's acts have caused or threaten to cause her substantial injury, leave to amend should be denied.

CONCLUSION

Colorado respectfully requests that the Court deny Nebraska's Motion to Amend Petition.

Respectfully submitted,

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

LOIS G. WITTE
Deputy Attorney General
Natural Resources Section
Counsel of Record

WENDY C. WEISS
First Assistant Attorney General
Natural Resources Section

Attorneys for State of Colorado

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AFFIDAVIT OF ROY ROMER
Governor of the State of Colorado

I, Roy Romer, being first duly sworn upon oath, state as follows:

1. I am the Governor of the State of Colorado. I was elected to office in November of 1986, and my term of service commenced in January of 1987.

2. To the best of my knowledge and information:

   a) at no time during my tenure in office has any officer, representative, or agency of the State of Nebraska advised me that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to the State of Nebraska;

b) to date, no officer, representative, or agency of the State of Nebraska has contacted me to request that the North Platte Decree be modified;

c) to date, no officer, representative, or agency of the State of Nebraska has contacted me to request that Colorado administer its apportionment under the North Platte Decree in a different manner; and

d) to my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)

ROY ROMER
Governor of the State of Colorado

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 9th day of February, 1988.

/s/ June E. Salveson

NOTARY PUBLIC

My Commission expires:
March 1, 1988

(SEAL)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AFFIDAVIT OF DUANE WOODARD
Attorney General for the State of Colorado

I, Duane Woodard, being first duly sworn upon oath, state as follows:

1. I am the Attorney General for the State of Colorado. I was elected to office in November of 1982, and my term of service commenced in January of 1983.

2. As Attorney General, I serve as legal advisor to every Department, Board, and Agency of the Colorado state government other than the Legislative Branch. I am charged in Colo. Rev. Stat. sec. 24-31-101(a) (1973) with the responsibility to appear for the State of Colorado, and prosecute and defend all actions in which the state is a party.

3. As Attorney General, I am specifically authorized by state law to provide legal assistance to the Office of the

State Engineer. Colo. Rev. Stat. sec. 37-80-116 (1973). Also, as Attorney General, I am specifically designated as legal advisor to the Colorado Water Conservation Board. Colo. Rev. Stat. sec. 37-60-114 (1973). Colo. Rev. Stat. sec. 37-60-113 (1973) directs the Colorado Water Conservation Board to cooperate with the Attorney General in all matters relating to interstate suits concerning the waters of the rivers of the State of Colorado.

4. To date, no Nebraska state official has contacted me or my office to advise me that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to Nebraska.

5. To date, no Nebraska state official has contacted me or my office to request that the North Platte Decree be modified.

6. To date, no Nebraska state official has contacted me or my office to request that Colorado administer its apportionment under the North Platte Decree in a different manner.

7. To my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)

DUANE WOODARD
Attorney General for the State of Colorado

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 9th day of February, 1988.

/s/ Prestine Mickens

NOTARY PUBLIC

My Commission expires:
June 4, 1991
13602 E. Dakota Place
Aurora, Colorado 80012

(SEAL)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AFFIDAVIT OF HAMLET J. BARRY III
Executive Director, Colorado Department of Natural Resources

I, Hamlet J. Barry III, being first duly sworn upon oath, state as follows:

1. I am the Executive Director of the Colorado Department of Natural Resources.

2. The Colorado Water Conservation Board and the Office of the State Engineer, the state agencies responsible for protecting the rights and interests of the State of Colorado and its citizens in the waters of the interstate streams which flow through this state and for administering the equitable apportionment decrees of the United States Supreme Court as well as our interstate compacts, are Divisions within the Department of Natural Resources.

3. To my knowledge, at no time has any officer, representative, or agency of the State of Nebraska apprised the Department that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to Nebraska.

4. To my knowledge, at no time has any officer, representative, or agency of the State of Nebraska contacted the Department to request that the North Platte Decree be modified.

5. To my knowledge, at no time has any officer, representative, or agency of the State of Nebraska contacted the Department to request that Colorado administer its apportionment under the North Platte Decree in a different manner.

6. To my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)

HAMLET J. BARRY III
Executive Director
Colorado Department of
Natural Resources

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 9th day of February, 1988.

/s/ Betty A. Bartlett

NOTARY PUBLIC

My Commission expires:
March 30, 1991

(SEAL)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AFFIDAVIT OF JERIS A. DANIELSON
State Engineer for the State of Colorado

I, Jeris A. Danielson, being first duly sworn upon oath, state as follows:

1. I am the State Engineer for the State of Colorado. I have held this position since December 19, 1979.

2. As State Engineer, I have general supervisory control over the public waters of the State of Colorado. Colo. Rev. Stat. sec. 37-80-102 (1973). I am also responsible for making and enforcing such regulations with respect to deliveries of water as will enable Colorado to meet its interstate compact requirements. Colo. Rev. Stat. sec. 37-80-104 (1973).

3. As State Engineer, I am charged with the responsibility of assuring that the State of Colorado meets its

obligations under the North Platte Decree, 325 U.S. 665 (1945), *modified and supplemented,* 345 U.S. 980 (1953).

4. To date, no Nebraska state official has contacted me or my office to advise me that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to Nebraska.

5. To date, no Nebraska state official has contacted me or my office to request that the North Platte Decree be modified.

6. To date, no Nebraska state official has contacted me or my office to request that Colorado administer its apportionment in a different manner.

7. To my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)

JERIS A. DANIELSON
State Engineer

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 10th day of February, 1988.

/s/ Paula J. Lacey

NOTARY PUBLIC

My Commission expires:
August 26, 1991

(SEAL)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AFFIDAVIT OF J. WILLIAM McDONALD
Director, Colorado Water Conservation Board

I, J. William McDonald, being first duly sworn upon oath, state as follows:

1. I am the Director and Secretary of the Colorado Water Conservation Board. I have held this position since September 1979.

2. The Colorado State Legislature has charged the Colorado Water Conservation Board with the duty to promote the conservation of the waters of the state in order to secure the greatest utilization of such waters and to prevent floods. Colo. Rev. Stat. sec. 37-60-106(1) (1973). Among the many powers and duties of the Board are the power and duty to confer with the officers, representatives, and agencies of other states or of the federal government for the purpose of protecting and asserting the authority, interests, and rights of the State of

Colorado and its citizens with respect to the waters of the interstate streams in Colorado. Colo. Rev. Stat. sec. 37-60-106(1)(i) (1973).

3. Also, the Colorado State Legislature has charged the Board with the responsibility to cooperate with the Attorney General in all matters relating to interstate suits concerning the waters of the rivers of Colorado, and to gather all information and other data for the Attorney General's use in such suits. Colo. Rev. Stat. sec. 37-60-113(1973).

4. To my knowledge, at no time has any official, representative, or agency of the State of Nebraska contacted me or the Board to advise the Board that Colorado has violated the North Platte Decree, that Colorado has threatened or is threatening to violate the Decree, or that Colorado's administration of its apportionment under the Decree is causing or threatening to cause injury to Nebraska.

5. To my knowledge, at no time has any officer, representative, or agency of the State of Nebraska contacted me or the Board to request that the North Platte Decree be modified.

6. To my knowledge, at no time has any official, representative, or agency of the State of Nebraska contacted me or the Board to request that Colorado administer its apportionment under the North Platte Decree in a different manner.

7. To my knowledge, the State of Colorado has not violated the North Platte Decree.

(Signed)

J. WILLIAM McDONALD
Director
Colorado Water Conservation Board

Subscribed and sworn to before me in the County of Denver, State of Colorado, this 9th day of February, 1988.

/s/ Betty A. Bartlett

NOTARY PUBLIC

My Commission expires:
March 30, 1991

(SEAL)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

PROOF OF SERVICE

I, Lois G. Witte, Deputy Attorney General, State of Colorado, counsel of record for the State of Colorado and a member of the Bar of the Supreme Court of the United States, hereby certify that three copies of Colorado's Brief in Opposition to Nebraska's Motion to Amend Petition have been served on each of the following parties by depositing said copies in a United States mailbox with first-class postage prepaid, this 12th day of February, 1988, addressed to:

Owen Olpin, Esq.
Special Master
O'Melveny and Myers
400 South Hope Street
Los Angeles, California
90071-2899

The Honorable Kay A. Orr
Governor of the
State of Nebraska
State Capitol
Lincoln, Nebraska 68509

Saone B. Crocker, Esq.
O'Melveny and Myers
555 13th Street, N.W.
Washington, DC 20004-1109

The Honorable Charles Fried
United States
Solicitor General
Jeffrey P. Minear
Office of the
Solicitor General
Constitution Avenue &
Tenth Street, N.W.
Washington, D.C. 20530

The Honorable
Robert M. Spire
Attorney General of Nebraska
LeRoy W. Sievers, Esq.
Assistant Attorney General
Department of Justice
State Capitol
Lincoln, Nebraska 68509

Richard A. Simms, Esq.
Counsel of Record for
the State of Nebraska
Hinkle, Cox, Eaton,
Coffield & Hensley
P.O. Box 2068
Santa Fe, New Mexico
87504-2068

The Honorable
Michael J. Sullivan
Governor of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable
Joseph B. Meyer
Attorney General of Wyoming
Dennis C. Cook, Esq.,
Senior Assistant
Attorney General
Jennifer Hager, Esq.,
Assistant Attorney General
123 State Capital
Cheyenne, Wyoming 82002

Raphael J. Moses, Esq.
Charles N. Woodruff, Esq.
James R. Montgomery, Esq.
Special Assistant
Attorneys General
State of Wyoming
Moses, Wittemyer, Harrison
and Woodruff, P.C.
P.O. Box 1440
Boulder, Colorado
80306-1440

Tom Watson, Esq.
Counsel of Record for
Nebraska Public Power
District and Central
Nebraska Public Power
and Irrigation District
Crowell & Moring
1001 Pennsylvania Avenue,
N.W.
Washington, D.C. 20004-2505

Andrew F. Walch, Esq.
Patricia L. Weiss, Esq.
John E. Lindskold, Esq.
U.S. Department of Justice
Land and Natural Resources
Divison
P.O. Box 663
Washington, D.C.
20044-0663

Joseph N. Onek, Esq.
Counsel of Record for The
National Audubon Society
Onek, Klein & Farr
2550 M Street, N.W.
Washington, D.C. 20037

Peter A. A. Berle, President
National Audubon Society
950 Third Avenue
New York, N.Y. 10022

Hope Babcock, Esq.
National Audubon Society
801 Pennsylvania Avenue,
S.E.
Washington, D.C. 20003

Edward Weinberg, Esq.
Counsel of Record for Basin
Electric Power Cooperative
Duncan, Weinberg &
Miller, P.C.
1615 M. Street, N.W.,
Suite 800
Washington, D.C. 20036

Michael J. Hinman, Esq.
General Counsel
Claire Olson, Esq.
Assistant General Counsel
Basin Electric Power
Cooperative
1717 East Interstate Avenue
Bismarck, North Dakota
58501

Abbe David Lowell, Esq.
Peter J. Kirsch, Esq.
Counsel of Record for
Platte River Trust
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

FOR THE ATTORNEY GENERAL

LOIS G. WITTE
Deputy Attorney General
Natural Resources Section

Attorneys for State of Colorado

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

Supreme Court, U.S.
FILED
FEB 13 1988
CLERK

No. 108, Original

In The Supreme Court
Of The United States

October Term, 1987

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

JOSEPH B. MEYER
Attorney General
of Wyoming

DENNIS C. COOK
Senior Assistant
Attorney General
Counsel of Record

JENNIFER HAGER
Assistant
Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder, Colorado 80302
(307) 443-8782

February 12, 1988

TABLE OF CONTENTS

Page

JURISDICTION 1

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF AGRUMENT 5

ARGUMENT 6

I. NEBRASKA'S CLAIM FOR A NEW AND ENLARGED APPORTIONMENT FOR INSTREAM FLOWS FOR CRITICAL WILDLIFE HABITAT IN CENTRAL NEBRASKA DOES NOT PRESENT A CASE OR CONTROVERSY BETWEEN THE STATES THAT IS APPROPRIATE FOR THIS COURT'S ORIGINAL JURISDICTION 6

A. *The Court's Historic Restraint in the Exercise of Its Original Jurisdiction Requires Denial of the Motion to Amend* 6

B. *Nebraska's Amended Petition Asks This Court to Preempt the Endangered Species Protection and Environmental Review Processes Established by Congress and to Short-Circuit Existing Opportunities for Conciliation and Accommodation* 10

C. *There is No Real and Present Controversy Among the States Over the Effect on Critical Wildlife Habitat in Nebraska of the Colorado, Wyoming and United States Actions Alleged in the Amended Petition* 15

D. Nebraska Does Not Allege Real and Substantial Injury Sufficient to Warrant This Court's Exercise of Its Original Jurisdiction Over the Claim for Modification of the Decree 18

II. AMENDMENT OF NEBRASKA'S PETITION BEFORE DETERMINATION OF WYOMING'S PENDING MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS ASSERTED IN THE EXISTING PLEADINGS WOULD CAUSE UNDUE PREJUDICE TO WYOMING 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES Pages

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 16

Arizona v. California,
298 U.S. 558 (1936) 5

Arizona v. California,
460 U.S. 605 (1983) 19, 21

Arizona v. New Mexico,
425 U.S. 794 (1976) 8

Bethlehem Steel Corp. v. U.S. Environmental Protection Agency,
536 F.2d 156 (7th Cir. 1976) 17

California v. Nevada,
447 U.S. 125 (1980) 7, 15

Carey v. Beans,
500 F. Supp. 580 (E.D. Pa. 1980) 20

Connecticut v. Massachusetts,
282 U.S. 660 (1931) 18

Far East Conference v. United States,
342 U.S. 570 (1952) 17

Foman v. Davis,
371 U.S. 178 (1962) 20

Idaho v. Oregon,
462 U.S. 1017 (1983) 18

Illinois v. Milwaukee,
406 U.S. 91 (1972) 8

Jacob Siegel Co. v. Federal Trade Com'n,
327 U.S. 608 (1946) 17

Kleppe v. Sierra Club,
427 U.S. 390 (1976) 17

Massachusetts v. Missouri,
308 U.S. 1 (1939) 8

Nebraska v. Rural Electrification Administration,
12 E.R.C. 1156 (D. Neb. 1978) 12

Nebraska v. Wyoming,
325 U.S. 589 (1945) 3, 18, 19

Nebraska v. Wyoming,
325 U.S. 665 (1945), as modified, *Nebraska v. Wyoming*, 345 U.S. 981 (1953) 1

Nevada v. United States,
463 U.S. 110 (1983) 19

New York v. Illinois,
274 U.S. 488 (1927) 18

Ohio v. Kentucky,
410 U.S. 641 (1973) 7

Ohio v. Wyandotte Chemicals Corp.,
401 U.S. 493 (1971) 8, 10

Riverside Irrigation District v. Andrews,
758 F.2d 508 (10th Cir. 1985) 12, 17

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 11

United States v. Nevada,
412 U.S. 534 (1973) 8, 15

Utah v. United States,
394 U.S. 89 (1969) 7

Verhein v. South Bend Lathe, Inc.,
598 F.2d 1061 (7th Cir. 1979) 20

Vermont v. New York,
417 U.S. 270 (1974) 14

Wales Home Remodelling Co. v. Alside Aluminum Corp.,
443 F. Supp. 908 (E.D. Wis. 1978) 3

Washington v. General Motors Corp.,
406 U.S. 109 (1972) 8

Zenith Radio Corp. v. Hazeltine Research, Inc.,
401 U.S. 321 (1971) 20

STATUTES, COURT RULES AND FEDERAL REGULATIONS

33 C.F.R. § 325.4(a) (1987) 12, 16
50 C.F.R. § 17.3 (1986) 11

Electric Consumer Protection Act of 1986,
Pub. L. 99-495, 100 Stat. 1243 (1986) 9, 12

Endangered Species Act,
16 U.S.C. § 1532(5) (1982) 4
16 U.S.C. § 1532(19) (1982) 11
16 U.S.C. § 1535(a) (1982) 11
16 U.S.C. § 1536 (1982 & Supp. 1986) 16
16 U.S.C. § 1536(a) (1982) 5, 11

16 U.S.C. § 1538(a) (1) (B) (1982) 11
16 U.S.C. § 1540(g) (1982) 11, 14
16 U.S.C. § 1540(g) (2) (1982) 11

Fed. R. Civ. P. 15 6

Federal Water Pollution Control Act,
33 U.S.C. § 1344 (1982) 11

Fish and Wildlife Coordination Act,
16 U.S.C. § 662(a) (1982) 11
16 U.S.C. § 663(a) (1982) 11

National Environmental Policy Act,
42 U.S.C. § 4332(2) (B) (1982) 11

Sup. Ct. R. 9.2 7

MISCELLANEOUS

"Endangered Species, Limited Effect of Consultation Requirements on Western Water Projects," U.S. General Accounting Office Report to the Subcommittee on Environmental Protection, Committee On Environment and Public Works, U.S. Senate (March, 1987) 16

Letter from Roger A. Weidelman, Joint Study Coordinator, U.S. Dept. of Interior, U.S. Bureau of Reclamation, to Warren White, Wyoming Office of State Planning Coordination, March 15, 1985 14

"Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin," U.S. Dept. of Interior, Fish and Wildlife Service, Region 6, Denver, Colorado (September 29, 1987) 14

Tarlock, D., *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1 (1985) 12

No. 108, Original

In The Supreme Court

Of The United States

October Term, 1987

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

JURISDICTION

Nebraska invokes the Court's retained jurisdiction under Paragraph XIII of the 1945 Decree in *Nebraska v. Wyoming*, 325 U.S. 665, 671-72 (1945), as modified by *Nebraska v. Wyoming*, 345 U.S. 981 (1953). That Decree ("North Platte Decree") apportioned the waters of the North Platte River among Nebraska, Wyoming and Colorado for irrigation purposes. The amended petition that Nebraska seeks leave to file is for enforcement of the North Platte Decree or, in the alternative, for modification of the Decree to secure a new apportionment. Wyoming questions whether Paragraph XIII of the Decree was intended to retain jurisdiction over a claim for a new apportionment beyond the scope of the existing Decree.

QUESTIONS PRESENTED

1. Whether the claim for a new and enlarged apportionment that Nebraska seeks leave to assert presents a case or controversy that is appropriate for this Court's original jurisdiction at this time.

2. Whether amendment of Nebraska's petition to assert new claims before Wyoming's pending motion for summary

judgment on the merits of Nebraska's original claims has been decided would cause prejudice to Wyoming.

STATEMENT OF THE CASE

When this case was referred to Special Master Owen Olpin on June 22, 1987, it included Nebraska's initial petition for enforcement of the North Platte Decree (filed October 6, 1986), Wyoming's answer and counterclaims for enforcement of the Decree against Nebraska, and several motions to intervene. On September 11, 1987, Wyoming filed with the Master a motion for summary judgment with supporting affidavits and brief (copy submitted herewith as Appendix), addressing the merits of each of Nebraska's pending claims. Nebraska has not yet responded to that motion, pending the Special Master's report on the motions to intervene. Briefing of the motions to intervene was completed November 16, 1987. Nebraska's Motion to Amend Petition was filed on January 11, 1988.

Nebraska's initial petition over which the Court has accepted jurisdiction is for enforcement of the existing North Platte Decree. ("Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so. We do not propose to litigate anything new, but simply to protect what the Court has already decided." Nebraska Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition at 2.) Nebraska seeks, by that petition, to have the Court construe the existing North Platte Decree to prohibit any further depletion of the North Platte River in Wyoming as a violation of Nebraska's apportionment under the Decree. Nebraska Petition at 3; Nebraska Brief in Support of Motion for Leave to File Petition at 2. Nebraska claims that such depletions will cause it substantial "ecological and environmental injuries." Nebraska Brief in Support of Motion for Leave to File Petition at 2.

Nebraska's initial petition alleges four specific violations of

the existing North Platte Decree by Wyoming. Three of the alleged violations are existing and proposed water projects in Wyoming which have caused or would cause depletions to the North Platte; the other alleged violation is Wyoming's suit to require the United States to comply with Wyoming law requiring a permit for diversion of water from the North Platte River in Wyoming to storage in the Inland Lakes in Nebraska. Nebraska Petition at 2.

Wyoming's Answer admits the actions alleged by Nebraska, but denies that they constitute violations of the existing Decree. Wyoming's Answer and Counterclaim assert, inter alia, that the existing Decree apportions natural flow water to Nebraska only for the irrigation canals diverting at and above Tri-State Dam, the Court having expressly excluded the North Platte River below Tri-State Dam from the apportionment because "local supplies . . . even during the drought period were adequate...." *Nebraska v. Wyoming*, 325 U.S. 589, 654-55 (1945). Wyoming's Motion for Summary Judgment goes to the merits of each of the claims in Nebraska's initial petition, as well as to whether Nebraska's apportionment of natural flow under the existing North Platte Decree extends to any uses below Tri-State Dam.

The amended petition that Nebraska seeks leave to file contains two alternative claims. The first, like the pending petition, seeks enforcement of the existing Decree. Amended Petition, paras. 5 and 7. It alleges essentially the same four violations of the Decree as the pending petition on which the issues have been joined.[1] Amended Petition, para. 5. The

[1] Nebraska's original petition claims that the operation of Grayrocks Reservoir on the Laramie River violates the Decree. The amended petition claims that Wyoming's administration of water rights on the Laramie River is "inconsistent with the apportionment in the Decree and the provisions of the Endangered Species Act." Amended Petition at 3. To the extent the claims are different in substance, Wyoming is entitled to a determination of its motion for judgment on the issue raised by the original claim -- whether operation of Grayrocks Reservoir in accordance with the Grayrocks Settlement Agreement violates the Decree. Nebraska cannot avoid an adverse judgment on that issue by amending now. *See, e.g., Wales Home Remodelling Co. v. Alside Aluminum Corp.*, 443 F. Supp. 908 (E.D. Wis. 1978).

amended petition requests the Court to construe the Decree as having apportioned water to Nebraska for irrigation and other uses below Tri-State Dam "by implicitly establishing a regimen of stream flow for uses below Tri-State Dam, including critical wildlife habitat along the North Platte and Platte Rivers in Nebraska."[2] *Id.* It requests an injunction against further depletions to the North Platte by Wyoming, Colorado and the United States. Amended Petition, para. 7, and prayer for relief. Each of the foregoing claims asserted in the amended petition is at issue in the existing pleadings and would be disposed of completely by the summary judgment Wyoming has requested.

In contrast to the original petition, the amended petition claims, in the alternative, a new enlarged apportionment. If the Court does not construe the existing Decree to grant the apportionment Nebraska now claims, the amended petition requests that the Decree be modified to "protect existing critical wildlife habitat in Nebraska"[3] by enjoining Wyoming, Colorado and the United States[4] from "authorizing or sanctioning" further depletions to the North Platte. Amended Petition, para. 8, prayer for relief.

[2] Nebraska apparently relies upon the 1953 stipulated modification of the Decree providing for construction and operation of Glendo Reservoir for this assertion. The language of Paragraph XVII of the Decree cited in the amended petition (para. 3) was not intended to prohibit any future Wyoming changes in the "regimen of the natural flow" as Nebraska asserts. It instead was intended only to restrict the *operation of Glendo Reservoir* to storage of natural flow within the limits specified in the stipulation.

[3] "Critical habitat" is a term used in the Endangered Species Act, 16 U.S.C. § 1532(5) (1982), to denote an area of habitat that has been designated by the U.S. Fish and Wildlife Service as critical to the survival of particular listed species. A stretch of the Platte River in central Nebraska, in the area known as the "Big Bend" reach (between Lake McConaughy and Grand Island, *see* map in Appendix at A-1), has been designated as critical habitat for the endangered whooping crane. However, it cannot be discerned from Nebraska's amended petition whether it is using the term "critical wildlife habitat" in that sense or in a broader sense to include all areas of the Platte River that are important to migratory birds and other wildlife. Wyoming uses the term in this brief in the broader sense unless indicated otherwise.

[4] The claim for injunctive relief against the United States is also new. The amended petition does not contain the requisite jurisdictional statement showing that the United States has consented to be sued on this claim. The

In summary, both the original petition and the amended petition seek to have the existing Decree construed and enforced to prohibit further depletions affecting what Nebraska now claims as its apportionment. The issues joined by the pleadings and Wyoming's Motion for Summary Judgment on the original petition would not be mooted by the amended petition. If Wyoming's pending Motion for Summary Judgment is granted, every claim in Nebraska's amended petition would be decided, except its alternative claim for modification of the Decree to enlarge its apportionment to include additional water for wildlife habitat.

SUMMARY OF ARGUMENT

The amended petition asks this Court to be the arbiter in the first instance of a complex and technical matter concerning the potential conflict between water development for beneficial use and the instream needs of critical wildlife habitat. The water development is occurring in all three states, not just in Colorado and Wyoming as Nebraska's amended petition would lead the Court to believe. There is no real and present conflict between the states and no reason for this Court to take jurisdiction over the complex problem of environmental protection that the amended petition would raise.

Congress has established processes to insure protection of threatened and endangered species of wildlife and to insure that the impacts of water development on all wildlife habitat are considered and avoided or mitigated where appropriate. Every significant water development project must go through those processes, which involve project-by-project, site-specific environmental review and permitting. Judicial review of decisions by permitting agencies is in the federal courts.

United States would appear to be an indispensable party to litigation of the claims in the amended petition because of its responsibilities under the Endangered Species Act (16 U.S.C. § 1536(a) (1982)) as owner and operator of large storage projects on the North Platte. In any event, a decree such as Nebraska seeks purporting to "apportion" responsibility for maintenance of flows for endangered species could have no finality unless the United States is a party. *See Arizona v. California*, 298 U.S. 558, 568-72 (1936).

Exercise of the Court's original jurisdiction over the amended petition at this time would preempt the adminstrative processes that will either resolve the potential conflict or more sharply focus the issues for later judicial review. It would involve the Court in an anticipated conflict that is neither a real dispute among the states nor presently ripe for judicial decision. It would cause undue prejudice to Wyoming by stalling the environmental review and permitting process on a needed municipal water project and delaying decision of the legal issues of construction and enforcement of the existing Decree that are ripe for decision now. Moreover, the amended petition on its face does not show a present threat of real injury sufficient to justify the relief requested.

Protection of critical wildlife habitat can be accomplished most effectively in the processes prescribed by Congress for that purpose. It should not be addressed in the abstract in the context of an equitable apportionment. The Court should leave for another day the resolution of any conflicts that may eventually arise between the states regarding the extent to which an upstream state must forego the beneficial consumptive use of water in favor of critical wildlife habitat far downstream in another state.

ARGUMENT

I. NEBRASKA'S CLAIM FOR A NEW AND ENLARGED APPORTIONMENT FOR INSTREAM FLOWS FOR CRITICAL WILDLIFE HABITAT IN CENTRAL NEBRASKA DOES NOT PRESENT A CASE OR CONTROVERSY BETWEEN THE STATES THAT IS APPROPRIATE FOR THIS COURT'S ORIGINAL JURISDICTION.

A. *The Court's Historic Restraint in the Exercise of Its Original Jurisdiction Requires Denial of the Motion to Amend.*

Nebraska bases its request for leave to amend on Fed. R. Civ. P. 15, which states that leave to amend should be "freely

given when justice so requires." However, in original actions, this Court has not blindly applied that rule, but has scrutinized the claims in the proposed amendment to determine whether they warrant exercise of the Court's extraordinary original jurisdiction. *Ohio v. Kentucky*, 410 U.S. 641 (1973); *California v. Nevada*, 447 U.S. 125 (1980); Sup. Ct. R. 9.2 (the Federal Rules of Civil Procedure are only a guide in original cases).

The merits of Nebraska's pending claims, which must be decided whether or not leave to amend is granted, are ready for adjudication now. Since no real conflict yet exists between Nebraska's claimed uses of water for critical wildlife habitat and proposed water projects in Wyoming, the amendment "would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky*, 410 U.S. at 644. While Nebraska apparently deems it more convenient to litigate that anticipated conflict in this forum now, convenience is not a controlling criterion. *See California v. Nevada*, 447 U.S. at 133 (the Court denied leave to amend, declining to expand its original jurisdiction over ancillary title disputes among the parties because another forum was available). Moreover, Wyoming does not agree that the original jurisdiction is a more convenient forum for adjudication of the complex factual issues raised by Nebraska's new claims, nor that such use of the original jurisdiction would promote judicial economy in any way.

Nebraska fails to cite any sound reason or authority that should move this Court to take jurisdiction over the amended petition. *Utah v. United States*, 394 U.S. 89 (1969), is the only original jurisdiction case that Nebraska cites in support of its assertion that liberal amendment should be allowed in the original jurisdiction "to avoid piecemeal adjudication of interstate disputes." Nebraska Brief in Support of Motion to Amend at 3. *Utah v. United States, id.*, does not stand for that proposition. In fact, it was a case where the Court refused to expand the scope of the action over ancillary claims of applicants for intervention, forcing those applicants to seek adjudication of their claims elsewhere.

The Court often has declined to exercise its original jurisdiction, even its exclusive original jurisdiction, particularly where the issues may be resolved in another forum. *See Arizona v. New Mexico*, 425 U.S. 794, 797 (1976); *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Washington v. General Motors Corp.*, 406 U.S. 109 (1972); *Illinois v. Milwaukee*, 406 U.S. 91, 93-94 (1972); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498-99 (1971); *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939). As is demonstrated *infra*, there are other forums that are more appropriate than this Court's original jurisdiction for resolution of the issues that would be raised by the amended petition.

Nebraska's new claim for an enlarged apportionment for critical wildlife habitat is based on the assertion that any further water depletions in Wyoming or Colorado reducing flows of the North Platte into Nebraska will "adversely affect, or eliminate existing critical wildlife habitat in Nebraska." Amended Petition, para. 8. If that assertion is true (and Wyoming notes that it is disputed even among the experts), then obviously it is equally true that any water depletions in Nebraska upstream of the habitat would have the same or greater effect.[5] It is apparent as well that the issue that Nebraska would raise is not a dispute between the states at all but simply part of the tension between water development in all three states and the need to protect critical wildlife habitat.

[5] *See* December 8, 1978, Biological Opinion of U.S. Fish and Wildlife Service on Grayrocks Dam and Reservoir Project estimating projected additional surface and groundwater depletions to the Platte River above the critical habitat due to proposed projects in Nebraska, Wyoming and Colorado at 12-16. Based on the estimates in the opinion, groundwater pumping in Nebraska would comprise 58% to 76% of total projected additional depletions to the Platte above the critical habitat by the years 2000 and 2020. *Id.* at 16. Moreover, Kingsley Dam, which forms Lake McConaughy, captures and regulates the entire flow of the North Platte River below the Wyoming/Nebraska state line and above the critical migratory bird habitat. "[I]t is physically impossible to regulate water from upstream sources (e.g., sources in Wyoming or Colorado) for uses in the Big Bend Reach without passing this water through the [Lake McConaughy] Projects and altering the Projects' current operating regimes." Nebraska Public Power District and Central Nebraska Public Power and Irrigation District Brief in Support of Joint Motion for Leave to File a Joint Complaint in Intervention at 11.

Nebraska apparently fears that its water development will be required to give way to wildlife habitat needs while Colorado's and Wyoming's would proceed without regard to wildlife habitat impacts. Nebraska Brief in Support of Motion to Amend Petition at 3. Without alleging any facts that would show that fear to be justified, Nebraska asks this Court to enjoin all new beneficial consumptive uses of water in Colorado and Wyoming.[6]

The amended petition would transform this proceeding from one to construe and enforce the existing North Platte Decree into a much more complex and technical proceeding involving the relationship between the critical wildlife habitat in central Nebraska and water uses in the entire Platte River basin upstream in the three states. That relationship involves

[6] As in the Grayrocks litigation, Nebraska's concern about protection of the critical habitat appears to be incidental to its primary objective of maximizing North Platte River flows at the state line for the benefit of future consumptive uses in Nebraska, including Lake McConaughy and the projects associated with it. The delay in permitting of Deer Creek Reservoir and other potential Wyoming projects that might result from amendment of the petition would be consistent with that objective. Again, flows at the state line can reach the critical habitat only if regulated through Lake McConaughy, the largest reservoir in the Platte River basin. Nebraska does not suggest how that would be accomplished. The Federal Energy Regulatory Commission licenses for the power projects associated with Lake McConaughy expired in 1987 and are the subject of a relicensing proceeding pending before FERC. Nebraska Public Power District and Central Nebraska Public Power and Irrigation District Brief in Support of Joint Motion for Leave to File a Joint Complaint in Intervention at 14-15. The impact of the operation of Lake McConaughy on the critical habitat will be addressed in that proceeding pursuant to the Electric Consumer Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986). That proceeding could result in new license conditions requiring modified operation of Lake McConaughy and the power projects in order to maintain flows for the critical habitat downstream. In that event, Lake McConaughy and the FERC licensed projects would directly benefit from any "apportionment" for the critical habitat that Nebraska is able to obtain by expanding its suit for enforcement of the North Platte Decree to include the critical habitat issues.

extremely complex and disputed scientific and factual issues. Trial of those issues would require many technical, factual determinations, including: the habitat needs of the various species of wildlife; the quantity and pattern of flows needed to maintain the habitat; the effect on the habitat of present and future upstream water development in the entire Platte River basin in the three states, including the operation of the federal storage projects in the North Platte basin; the availability of alternative sources of water, including groundwater; and the availability of non-flow alternatives for maintaining the habitat.

In refusing to exercise original jurisdiction over an interstate pollution case involving similarly difficult, factual issues, the Court noted "the sense of futility that has accompanied this Court's attempts to treat with the complex technical and political matters that inhere in all disputes of the kind at hand. . . ." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 502 (1971). Litigation of such issues in the original jurisdiction simply does not make sense when other more appropriate forums offering greater opportunity for conciliation and accommodation are available. *Id.*

B. *Nebraska's Amended Petition Asks This Court to Preempt the Endangered Species Protection and Environmental Review Processes Established by Congress and to Short-Circuit Existing Opportunities for Conciliation and Accommodation.*

Congress has gone to great lengths to assure that federal agencies responsible for constructing or operating water development projects or for authorizing private or local government projects fully evaluate and address the impact of those projects on fish and wildlife habitat. Congress has also assured meaningful involvement of the states and their wildlife experts in the decision making process.

The Endangered Species Act directs the Secretary of Interior to "cooperate to the maximum extent practicable with the States" in carrying out the program authorized by that act.

16 U.S.C. § 1535(a) (1982). It commands each federal agency to carry out programs for the conservation of endangered and threatened species and to insure that *any* action *authorized funded or carried out* by that agency is not likely to jeopardize the existence of such species or adversely affect their critical habitat. 16 U.S.C. § 1536(a) (1982); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The act and federal regulations also prohibit any private activity (including that of a state) that would modify habitat so as to "take" any endangered species. 16 U.S.C. §§ 1532(19), 1538(a) (1) (B) (1982); 50 C.F.R. § 17.3 (1986). Finally, citizen suits are authorized to redress any violation of the act by any person or entity, including the United States. 16 U.S.C. § 1540(g) (1982).[7]

The National Environmental Policy Act ("NEPA") directs all federal agencies to give environmental amenities and values "appropriate consideration in decisionmaking." 42 U.S.C. § 4332(2) (B) (1982). It requires preparation of a detailed and scientific study of the adverse affects on the environment prior to federal permitting of any significant water development.

The Fish and Wildlife Coordination Act requires every federal water project to provide for wildlife conservation. 16 U.S.C. § 663(a) (1982). It also requires anyone who would construct or operate a water project "under Federal permit or license" to first consult with federal and state wildlife agencies "with a view to the conservation of wildlife resources by preventing loss of and damage to such [wildlife] resources ...." 16 U.S.C. § 662(a) (1982).

Any significant water development project will require a permit under § 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1982). The Army Corps of Engineers, the permitting agency, must demonstrate compliance with NEPA, the Endangered Species Act and the Fish and Wildlife Coordina-

[7] Nebraska's amended petition is not a citizen suit under 16 U.S.C. § 1540(g) (1982) because Nebraska has not brought it in the federal district court nor complied with the conditions set out in 16 U.S.C. § 1540(g) (2) (1982).

tion Act and must condition any permit to "satisfy legal requirements (including the Endangered Species Act) or to otherwise satisfy the public interest requirement." 33 C.F.R. § 325.4(a) (1987). *See Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985) ("Wildcat Reservoir" in the South Platte basin in Colorado), and *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978) ("Grayrocks Reservoir" on the Laramie River in Wyoming), two cases demonstrating that a water project in the North or South Platte River basins cannot proceed until the proponent and the federal permitting agency have fully addressed the project's impacts on critical habitat of endangered species in Nebraska.

The Electric Consumer Protection Act of 1986, Pub. L. 99-495, 100 Stat. 1243 (1986), amended the Federal Power Act to require the Federal Energy Regulatory Commission, in deciding whether to issue any hydroelectric power project permit, to give "equal consideration" to "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)."

Nebraska cites these same statutes as the "changed conditions" that should prompt this Court to reopen the Decree to consider wildlife habitat. In reality, these statutes, without the Court's involvement, insure that no significant new water development project in Wyoming or Colorado, nor a change in operation of any existing federal project, will proceed without a full evaluation of its impacts on wildlife habitat in Nebraska. Grayrocks Reservoir and the settlement agreement that allowed its construction to proceed belie Nebraska's assertion that it has no forum other than this Court to protect wildlife habitat. Nebraska succeeded in limiting the depletions by the Grayrocks Project by persuading the federal district court in Nebraska that the federal permitting agency had failed to adequately address potential impacts of the project on the critical habitat of the endangered whooping crane. *Nebraska v. Rural Electrification Administration, id.* *See* D. Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1, 20-21 (1985) ("[the Grayrocks] litigation arose when

Nebraska discovered that downstream irrigators on the Platte River could be better protected under the wing of the endangered whooping crane than by litigating the allocation of the river under . . . the doctrine of equitable apportionment").

Wyoming recognizes that in the Platte River basin there is tension between water development and the need to protect critical wildlife habitat. However, as previously discussed, it involves water development in each of the three states and is not at this time a real controversy between the states. Wyoming believes the matter can be addressed more effectively through the mechanisms established by Congress and/or through cooperative efforts among the various interests than through litigation in this Court's original jurisdiction.

Such a cooperative effort, known as the "Platte River Management Joint Study," is already underway. It includes representatives from the federal government, the state governments of Nebraska, Wyoming and Colorado, the three states' water users associations and various environmental organizations, including the National Audubon Society and the Platte River Whooping Crane Critical Habitat Maintenance Trust, who have sought intervention in this case. The following statement of purpose was adopted by the Coordinating Committee of the study at its March 12, 1985, meeting:

> The purpose of the parties involved in Phase I of the Platte River Management Joint Study is to cooperate in discussions seeking ways to develop and implement recovery plans and programs which will enable Federal agency actions associated with water project development and depletions in the Platte River Basin to proceed in compliance with the Endangered Species Act while avoiding conflicts between the Endangered Species Act and state water rights systems and the use of water apportioned to a state pursuant to the compact and decrees concerning the waters of the Platte River and its tributaries.

Letter from Roger A. Weidelman, Joint Study Coordinator, U.S. Dept. of Interior, U.S. Bureau of Reclamation, to Warren White, Wyoming Office of State Planning Coordination, March 15, 1985.

A similar joint effort among Colorado, Wyoming, Utah and federal agencies recently resulted in an agreement to implement the "Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin," U.S. Dept. of Interior, Fish and Wildlife Service, Region 6, Denver, Colorado (September 29, 1987). The Upper Colorado River effort was the model for the Platte River Management Joint Study and has shown that the combination of the expertise and diverse interests drawn together in such an effort can achieve a cooperative resolution.

The Court should not use its original jurisdiction where, as here, there is no more than an anticipated dispute between the states and opportunity exists for a cooperative resolution before a real conflict develops. *See Vermont v. New York*, 417 U.S. 270, 277-78 (1974) (a water pollution case where the Court refused to use its original jurisdiction to implement a proposed consent decree because the "parties have available other and perhaps more appropriate means of reaching the results desired under the Proposed Court Decree" such as "[a]n interstate compact" or "a settlement . . . by agreement of the parties").

The ostensible purpose of Nebraska's attempt to expand this suit to include the Endangered Species Act issues is to achieve a final resolution of the perceived conflict between water development and protection of critical habitat. However, a final resolution probably cannot be achieved in this original action. The Endangered Species Act, including the citizen suits provision, 16 U.S.C. § 1540(g) (1982), presumably would continue to operate even if this Court re-apportioned the river to protect endangered species as Nebraska requests. Such reapportionment would not accomplish a final resolution because someone not a party to this action might still sue to

enforce the act to stop a project needed for full use of a state's apportionment. Moreover, any such apportionment decree would become obsolete whenever conditions regarding the Platte River endangered species change: e.g., when the Department of the Interior lists a new species, designates new critical habitat, changes an existing habitat designation or delists a species, or when new information about the habitat requirements of the species becomes available. Currently, there is no designated critical habitat on the North Platte in Colorado or Wyoming. Such a future designation might require modification of the decree.

Wyoming agrees with Nebraska that the "multi-state, federal nature of the problem" requires the participation and cooperation of the United States and the three states. Nebraska Brief in Support of Motion to Amend Petition at 3. That is precisely the reason that Congress has given federal agencies the responsibility to address wildlife habitat effects on their decisions. It is also the reason that those agencies have initiated the Joint Study. It is certainly no reason for the Court to accept Nebraska's amended petition and to thereby preempt the federal and interstate efforts that Congress has prescribed.

C. *There is No Real and Present Controversy Among the States Over the Effect on Critical Wildlife Habitat in Nebraska of the Colorado, Wyoming and United States Actions Alleged in the Amended Petition.*

This Court exercises its exclusive original jurisdiction sparingly and only where there is a real and present controversy between states that is ripe for determination. *United States v. Nevada*, 412 U.S. 534 (1973); *California v. Nevada*, 447 U.S. 125 (1980).

Again, no significant water development project can be undertaken in Wyoming, Colorado or Nebraska without an in-depth scrutiny of the effects of the given activity on critical wildlife habitat in Nebraska. Deer Creek Reservoir is an example. A final environmental impact statement has been

published. On July 20, 1987, the U.S. Fish and Wildlife Service issued its Biological Opinion in compliance with § 7 of the Endangered Species Act, 16 U.S.C. § 1536 (1982 & Supp. 1986). It concluded that Deer Creek Reservoir is not likely to jeopardize the existence of the endangered whooping crane or other listed species or adversely modify critical habitat if certain mitigation measures are implemented. (Affidavit of Michael Purcell attached to Wyoming Motion for Summary Judgment, App. at 29). The Army Corps of Engineers is now deciding whether to issue a permit. If granted, that permit will contain conditions necessary to satisfy any legal requirements for mitigation of adverse impacts to wildlife habitat. 33 C.F.R. § 325.4(a) (1987). The ultimate effect of Deer Creek Reservoir, if any, on wildlife habitat in Nebraska will depend in part on the conditions that are contained in the permit. Until the permitting process is complete for Deer Creek Reservoir, or any future project, there is no controversy that is ripe for judicial determination.[8]

The purpose of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). There, this Court prescribed a two-step inquiry for deciding whether an issue before a federal agency is ripe for judicial review: (1) whether the issue is more appropriate for resolution in court than before the agency (i.e., legal question or technical, factual question); (2) whether the party seeking judicial review would be unduly prejudiced if required to await the final outcome of the agency action. The new critical habitat

[8] There is reason to believe that a real conflict can be avoided. *See* U.S. General Accounting Office Report to the Subcommittee on Environmental Protection, Committee on Environment and Public Works, U.S. Senate, "Endangered Species, Limited Effect of Consultation Requirements on Western Water Projects," March, 1987, at 3, where the GAO found that potential conflicts between wildlife habitat and water development usually have been satisfactorily resolved by the federal agency.

issues raised by Nebraska's amended petition are more appropriate for agency decision in the first instance because they involve complex, technical matters, rather than purely legal questions. Furthermore, Nebraska is not prejudiced in any way by waiting until expert agencies have passed on the issue. *See Bethlehem Steel Corp. v. U.S. Environmental Protection Agency*, 536 F.2d 156, 161 (7th Cir. 1976) (court declined to undertake judicial review at a stage where it would "interfere with an ongoing administrative process").

The hypothetical conflict posed by Nebraska's amended petition need not, and should not, be decided by the courts until the federal agencies have passed on the technical issues. *See Riverside Irrigation District v. Andrews*, 758 F.2d 508, 514 (10th Cir. 1985) (court resolution of a potential conflict between the Endangered Species Act and the South Platte River Compact would be "premature" because the issue might be resolved in the permit application process). The court in *Riverside Irrigation District* also noted that "accommodation" of competing state interests in allocating water and federal interest in protecting the environment "are best reached in the individual permit process." *Id.* at 513.

Moreover, this Court has recognized that it is improper for any federal court to exercise its jurisdiction in the first instance over matters that Congress has given a federal agency responsibility to decide. *Far East Conference v. United States*, 342 U.S. 570, 574 (1952) (" in cases raising issues of fact not within the conventional expertise of judges . . . agencies created by Congress for regulating the subject matter should not be passed over"). The impacts of future water development on wildlife habitat should be addressed first by the environmental experts in the U.S. Fish and Wildlife Service and the federal permitting agencies (in consultation with state agencies as required by NEPA, the Endangered Species Act and the Fish and Wildlife Coordination Act, *supra*). Their determinations in matters within their expertise are entitled to great weight. *Jacob Siegel Co. v. Federal Trade Com'n*, 327 U.S. 608, 613-14 (1946); *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (a court should not

substitute its judgment for that of the agency as to the environnmental consequences of the agency's actions). This Court will neither have the benefit of the agencies' expertise, nor be able to afford that expertise the weight it deserves, if it assumes jurisdiction over the issues in the amended petition before they are ripe.

D. *Nebraska Does Not Allege Real and Substantial Injury Sufficient to Warrant This Court's Exercise of Its Original Jurisdiction Over the Claim for Modification of the Decree.*

In the North Platte apportionment proceeding concluded in 1945, the Court considered and denied Nebraska's claim for an apportionment of water for uses below Tri-State Dam:

> We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State.

Nebraska v. Wyoming, 325 U.S. 589, 628 (1945). Today, Nebraska again seeks an equitable apportionment for uses below Tri-State Dam -- this time primarily for critical wildlife habitat uses.

If Nebraska were seeking to apportion the North Platte River among the states for the first time, it would be required to show, by clear and convincing evidence, an imminent threat of serious injury to move this Court to exercise its equitable powers against Wyoming and Colorado. *Idaho v. Oregon*, 462 U.S. 1017 (1983); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931). A showing of possible, future injury is insufficient. *Connecticut v. Massachusetts, id.* at 673; *New York v. Illinois*, 274 U.S. 488 (1927). Here, Nebraska should have an even greater burden to allege and show serious injury, because the new apportionment that Nebraska seeks would reverse the Court's previous determination that Nebraska has no equitable right to demand water from Wyoming for uses below Tri-State Dam. That previous

determination has been a key element of the division of North Platte River water among the states for over 40 years.

Nebraska apparently believes that it need not make the threshold showing of serious injury because the Court retained jurisdiction pursuant to Paragraph XIII of the North Platte Decree. Paragraph XIII was not intended to give the parties access carte blanche to this Court's jurisdiction to seek a new apportionment beyond the scope of the subject matter of the original Decree. The Court should look to the Special Master's Report in construing Paragraph XIII of the North Platte Decree. *Arizona v. California*, 460 U.S. 605, 624 n.17 (1983). The Special Master recommended that the Court retain jurisdiction "to amend the decree upon a showing of such change of conditions as might render the operation of the decree inequitable." Report of Special Master at 10, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The Court adopted that recommendation. *Id.* at 655. Further, it is evident from the Report of the Special Master that the principal changed condition he contemplated in proposing Paragraph XIII was the possible increase in water supply that would warrant relaxation or removal of the Decree's restrictions on Colorado's and Wyoming's irrigation uses. Report of Special Master at 10-11, *id.*

There could never be any finality or certainty regarding the rights of the three states to use water in the North Platte basin if Nebraska's interpretation of Paragraph XIII of the North Platte Decree prevails. In *Arizona v. California*, 460 U.S. 605 (1983), the Court construed a retained jurisdiction provision almost identical to that contained in Paragraph XIII of the North Platte Decree. The Court refused to reopen the Decree to hear the Indian tribes' claims for adjustment of the amount of their federal reserved water rights. The Court recognized that "certainty of rights is particularly important with respect to water rights in the western United States" and that "this Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made." *Id.* at 620, 623-24. *See also Nevada v. United States*, 463 U.S. 110, 129-30 (1983), recognizing the important

need for finality and certainty in the adjudication of water rights. For the same reasons, the Court should refuse to readjudicate, on the basis of Nebraska's amended petition, its previous determination that Nebraska has no claim under equitable apportionment to water originating in Wyoming for uses below Tri-State Dam.

Nebraska's amended petition is ambiguous. If, as Wyoming reads it, the new apportionment that Nebraska seeks by modification of the Decree is for protection of instream uses for wildlife habitat, then the issues are neither ripe nor appropriate for adjudication in this Court. If, on the other hand, Nebraska seeks such a new apportionment for other uses, its amended petition neither identifies those uses nor alleges any imminent threat of substantial injury to them. Either way, the amended petition demonstrates no basis for exercise of the Court's original jurisdiction.

II. AMENDMENT OF NEBRASKA'S PETITION BEFORE DETERMINATION OF WYOMING'S PENDING MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS ASSERTED IN THE EXISTING PLEADINGS WOULD CAUSE UNDUE PREJUDICE TO WYOMING.

Even under the liberal amendment policy of Fed.R.Civ.P. 15, the Court should not grant leave to amend where prejudice will result to another party. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Federal courts have recognized that the likelihood of prejudice to the other parties is much greater where a party seeks leave to amend while a summary judgment motion is pending. *Cf. Carey v. Beans*, 500 F. Supp. 580 (E.D. Pa. 1980); *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061 (7th Cir. 1979).

Wyoming has spent three years and spent or committed to spend more than $1.3 million addressing the impacts of Deer Creek Reservoir in the Section 404 permit review process. Part of that process has included development of, and commitment

to, mitigation measures to offset the impacts of Deer Creek Reservoir on critical wildlife habitat in Nebraska. Wyoming will certainly be prejudiced if Nebraska is able to derail that process and convince this Court to substitute its judgment for that of the federal permitting agency even before that agency has reached a final decision.

Nebraska's original petition asserts that certain actions in Wyoming, particularly Deer Creek Reservoir, threaten to violate the Decree and should be enjoined. Those assertions cause great uncertainty to Wyoming in the development and use of its water resources. That uncertainty in turn is detrimental to Wyoming's economic development which, as with other arid western states, depends on the availability of adequate water supplies. *Arizona v. California*, 460 U.S. 605, 620 (1983). Wyoming and the City of Casper, the primary beneficiary of Deer Creek Reservoir, need and are entitled to an expeditious determination of Nebraska's assertion that Deer Creek Reservoir would violate the Decree. That question is ripe for determination by the Special Master on Wyoming's pending Motion for Summary Judgment.

If this Court takes jurisdiction over the amended petition, it will prolong the uncertainty, causing serious prejudice to Wyoming. The decision on Wyoming's Motion for Summary Judgment would be delayed and the environmental review process for Deer Creek Reservoir could be stalled. On the other hand, no prejudice would result to Nebraska by denying leave to amend.

CONCLUSION

For the foregoing reasons, the motion for leave to amend should be denied.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

JENNIFER HAGER
Assistant Attorney General

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

APPENDIX TO WYOMING BRIEF IN OPPOSITION TO MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF.

Supreme Court, U.S.
FILED
FEB 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original (21)

In The Supreme Court
Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

MOTION OF THE STATE OF WYOMING FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT OF MOTION

JOSEPH B. MEYER
Attorney General
of Wyoming

DENNIS C. COOK
Senior Assistant
Attorney General
Counsel of Record

JENNIFER HAGER
Assistant
Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant
Attorneys General

MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder, Colorado 80302
(303) 443-8782

September 11, 1987

170 pp

TABLE OF CONTENTS

Page

MOTION FOR SUMMARY JUDGMENT 1

Affidavit of Gordon W. Fassett 7
Affidavit of Michael K. Purcell 26
Affidavit of Stanley K. Hathaway 31
Affidavit of Dorothy W. Fritz 35

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT 67

QUESTIONS PRESENTED 67

PARTIES INVOLVED 68

JURISDICTION 68

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 69

STATEMENT OF THE CASE 69

Grayrocks Reservoir 72
Proposed Diversions and Storage Facilities Near the Confluence of the Laramie and Platte Rivers (Corn Creek Project) 74
Proposed Storage Facilities on Tributaries Between Pathfinder Reservoir and Guernsey Reservoir (Deer Creek Project) 76
Inland Lakes 78
Counterclaim 78

SUMMARY OF ARGUMENT 79

ARGUMENT 81

Page

I. THE MATERIAL FACTS CONTROLLING THE QUESTIONS OF LAW ARE UNDISPUTED, AND WYOMING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON NEBRASKA'S CLAIMS FOR ENFORCEMENT OF THE DECREE 81

A. *Neither Grayrocks Reservoir Nor the Proposed Corn Creek Project Violates the Decree Because the Decree Does Not Restrict the Use of Laramie River Water in Wyoming* 82

1. *The Court has already determined in this case that Nebraska has no right to waters of the Laramie River* 82

2. *Even if Nebraska had an equitable right to Laramie River water, it is estopped to assert that operation of Grayrocks Reservoir violates that right* 86

3. *Nebraska is bound by a prior judicial determination that it has no right to Laramie River water that would be affected by the Corn Creek Project* 88

B. *Municipal Water Development on the Tributaries Entering the North Platte River Between Pathfinder Reservoir and Guernsey Reservoir, Such as the Proposed Deer Creek Reservoir, Does Not Violate the Decree* 90

1. *The Decree does not restrict Wyoming's use of water for any purpose from tributaries entering the North Platte River below Pathfinder Reservoir* 92

2. *Wyoming's apportionment under the Decree in-*

Page

cludes the right to build and operate projects such as Deer Creek Reservoir for ordinary and usual municipal uses 93

C. *Wyoming's Suit to Require the United States Bureau of Reclamation to Obtain Wyoming Permits for Storage in the Inland Lakes Does Not Violate the Decree* 98

II. NEBRASKA'S RIGHTS UNDER THE APPORTIONMENT PROVIDED BY THE DECREE ARE LIMITED TO WATER SUPPLIES FOR LANDS IRRIGATED BY CANALS DIVERTING AT OR UPSTREAM OF TRI-STATE DAM..... 103

CONCLUSION 108

APPENDIX

Map of North Platte River Basin A-1

Decree, *Nebraska v. Wyoming*, 325 U.S. 665 (1945) A-3

Order Modifying Decree, *Nebraska v. Wyoming*, 345 U.S. 981 (1953) A-12

Stipulation, *Nebraska v. Basin Electric Power Cooperative*, Case No. 78-1775; *Nebraska v. Rural Electrification Administration*, Case No. 78-1778, U.S. Court of Appeals for the Eighth Circuit (February 20, 1979) A-19

Agreement of Settlement and Compromise, *Nebraska v. Basin Electric Power Cooperative*, Case No. 78-1775; *Nebraska v. Rural Electrification Administration*, Case No. 78-1778, U.S. Court of Appeals for

Page

the Eighth Circuit (December 4, 1978) A-23
Order, *Nebraska v. Basin Electric Power Cooperative*, Case No. 78-1775; *Nebraska v. Rural Electrification Administration*, Case No. 78-1778, U.S. Court of Appeals for the Eighth Circuit (February 27, 1979) A-32

Order of Dismissal, *Nebraska v. Rural Electrification Administration*, Case No. CV76-L-242, U.S. District Court for the District of Nebraska (March 23, 1979) A-34

Order of Dismissal, *Nebraska v. Ray*, Case No. CV78-L-90, U.S. District Court for the District of Nebraska (March 23, 1979) A-35

Complaint, *Wyoming ex rel. Christopulos v. United States*, Docket No. 23-13, District Court, Eighth Judicial District, Goshen County, Wyoming (October 3, 1986) (removed to U.S. District Court for the District of Wyoming, Case No. C86-0370-B) A-36

Order Staying Proceedings, *Wyoming ex rel. Christopulos v. United States*, Case No. C86-0370-B, U.S. District Court for the District of Wyoming (March 27, 1987) A-45

TABLE OF AUTHORITIES

Pages

CASES

Anderson v. Liberty Lobby, Inc.,
106 S.Ct. 2505 (1986) 81, 91

Arizona v. California,
460 U.S. 605 (1983) 86, 107

Arizona v. Maypenny,
451 U.S. 232 (1981) 100

Arkansas v. Texas,
346 U.S. 368 (1953) 100

California v. United States,
438 U.S. 645 (1978) 99

California ex rel. State Land Commission v. United States,
457 U.S. 273 (1982) 82

City and County of Denver v. Sheriff,
105 Colo. 193, 96 P.2d 836 (1939) 95

Connecticut v. Massachusetts,
282 U.S. 660 (1931) 96

Dickerson v. Colgrove,
100 U.S. 578 (1879) 87

Edwards v. Aetna Life Insurance Co.,
69 F.2d 595 (6th Cir. 1982) 99

Erie Railroad Co. v. Tompkins,
304 U.S. 64 (1938) 100

Pages

Glus v. Brooklyn Eastern District Terminal,
359 U.S. 231 (1959) 87
Hinderlider v. La Plata River and Cherry Creek Ditch Co.,
304 U.S. 92 (1938) 101, 102

Holt v. City of Cheyenne,
22 Wyo. 212, 137 P. 876 (1914) 95

Illinois v. Michigan,
409 U.S. 36 (1972) 89

In Re the Corn Creek Irrigation District
Civil Action No. 19-460 (Wyo. Dist. Ct. 1978) .. 4, 75

In Re Washakie Needles Irrigation District,
52 Wyo. 518, 76 P.2d 617 (1938) 89

Metropolitan Utilities District of Omaha v.
Meritt Beach Co.,
179 Neb. 783, 140 N.W.2d 626 (1966) 95

Montana v. United States,
440 U.S. 147 (1979) 89

Nebraska v. Rural Electrification Administration,
12 E.R.C. 1156 (D. Neb. 1978) 73

Nebraska v. Wyoming,
295 U.S. 40 (1935) 99

Nebraska v. Wyoming,
325 U.S. 589 (1945) ..... passim

Nebraska v. Wyoming,
325 U.S. 665 (1945) ..... passim

Pages

Nebraska v. Wyoming,
345 U.S. 981 (1953) ..... passim
Nevada v. United States,
463 U.S. 110 (1983) 101, 107

Olson v. City of Wahoo,
124 Neb. 802, 248 N.W. 304 (1933) 95

Parklane Hosiery Co. v. Shore,
439 U.S. 322 (1979) 89

United States v. California,
332 U.S. 19 (1947) 82, 104, 105

Wyoming v. Colorado,
259 U.S. 419 (1922),
modified, 260 U.S. 1 (1922) 82, 83

Wyoming v. Colorado,
298 U.S. 573 (1936) 83

Wyoming ex rel. Christopulos v. United States,
Docket No. 23-13 (Wyo. Dist. Ct., filed October 3, 1986) (removed to U.S. District Court for the District of Wyoming, Case No. C86-0370-B) 78

CONSITITUTIONS

U.S. CONST. art. III, § 2, cl. 2 ..... 68, 69

COLO. CONST. art. XVI, § 6 96

NEB. CONST. art. XV, § 6 96

Pages

STATUTES AND COURT RULES

Endangered Species Act,
16 U.S.C. §§ 1531-1542 (1982) 29, 73

FED. R. CIV. P. 56 ..... 1, 3, 81, 105

Federal Reclamation Act of 1902, § 8,
43 U.S.C. § 383 (1982) 99

Federal Water Pollution Control Act,
33 U.S.C. § 1344 (1982) 28, 77

Judiciary Act,
28 U.S.C. §1251(a) (1982) 68, 69

National Environmental Policy Act,
42 U.S.C. §§ 4321-4361 (1982) 73

1982 Wyo. Sess. Laws ch. 60; 1984 Wyo. Sess.
Laws ch. 52; 1985 Wyo. Sess. Laws ch. 89 76

NEB. REV. STAT. §§ 46-204, 46-613, 46-648
(Reissue 1984) 96

NEB. REV. STAT. § 46-241 (1943, Reissue 1984) 95

SUP. CT. R. 9.2 ..... 1, 3, 81

WYO. STAT. § 41-2-117 (1987 Cum. Supp.) 26

WYO. STAT. § 41-3-102 (1977) 96

WYO. STAT. § 41-3-301 (1977) 8

WYO. STAT. §§ 41-7-201, to -210 (1977) 31, 33,
74, 89

Pages

MISCELLANEOUS

Advisory Committee Notes Accompanying 1946 Amendment to FED. R. CIV. P. 56 105

1 R. Clark & C. Martz, *Waters and Water Rights* § 54.3 (1967) 95

2 C. Kinney, *Law of Irrigation and Water Rights* 1200 (2d ed. 1912) 94



No. 108, Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.

v.

STATE OF WYOMING,
Defendant.

WYOMING MOTION FOR SUMMARY JUDGMENT

Defendant, State of Wyoming, hereby moves the Court pursuant to SUP. CT. R. 9.2 and FED. R. CIV. P. 56 to enter judgment for Wyoming and against Nebraska on all of the claims in Nebraska's Petition for Order Enforcing Decree and for Injunctive Relief and on part of Wyoming's counterclaim. The grounds for this motion are:

1. This is an action brought by the State of Nebraska against the State of Wyoming for enforcement of the decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), modified, 345 U.S. 981 (1953) ("the Decree"). Nebraska alleges that Wyoming has taken and plans to take certain actions that have violated and threaten to violate the Decree. Wyoming has filed a counterclaim alleging Nebraska violations of the Decree.

2. The pleadings herein, together with the affidavits appended to this motion, show that no genuine issue of material fact exists with respect to Nebraska's claims, and that Wyoming is entitled as a matter of law to judgment denying Nebraska's Petition for an Order

Enforcing Decree and for Injunctive Relief.

3. The following facts as to the actions and proposed actions in Wyoming alleged in Nebraska's petition are the controlling facts upon which Nebraska's claims are based, and are not in dispute:

a. The operation of Grayrocks Reservoir on the Laramie River depletes the natural flow of the North Platte River. Nebraska Petition, para. 3.a.; Wyoming Answer, para. 3(a); Affidavit of Gordon W. Fassett.

b. The construction and operation of additional river pumping, diversion and storage facilities at the confluence of the Laramie and North Platte Rivers, such as the proposed Corn Creek Project, would deplete the natural flow of the North Platte River. Nebraska Petition, para. 3.b.; Wyoming Answer, para. 3(b); Affidavit of Gordon W. Fassett.

c. The construction and operation of storage reservoirs on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, such as the proposed Deer Creek Reservoir, would deplete the natural flow of the North Platte River. Nebraska Petition, para. 3.c.; Wyoming Answer, para. 3(c); Affidavit of Gordon W. Fassett.

d. Wyoming has brought an action against the United States Bureau of Reclamation to require the Bureau to obtain Wyoming permits for diversion of North Platte waters in Wyoming to storage in the Inland Lakes in Nebras-

ka. Nebraska Petition, para. 3.d.; Wyoming Answer, para. 3(d).

4. The question whether the actions and proposed actions in Wyoming alleged in Nebraska's petition and admitted by Wyoming in its answer violate or threaten to violate the Decree is a question of law that should be decided on summary judgment.

5. The actions and proposed actions in Wyoming alleged by Nebraska do not violate or threaten to violate the Decree, as a matter of law. Wyoming therefore is entitled to a judgment determining that such actions do not violate or threaten to violate the Decree, and denying Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief.

6. There may be disputed issues of material fact with respect to the Nebraska violations of the Decree alleged in Wyoming's counterclaim. However, the central issue of interpretation of the Decree involves no genuine issues of material fact and may be determined as a matter of law. Wyoming requests the Court pursuant to SUP. CT. R. 9.2 and FED. R. CIV. P. 56(d) to enter summary judgment for Wyoming determining that the Decree affords Nebraska no right to North Platte River water except for irrigation of lands served by canals specified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal). A ruling on that pure question of law will simplify the case and narrow the issues for trial. For example, if as Wyoming contends, Nebraska's rights under the Decree are limited to those canals diverting at or above Tri-State Dam, there will be no need for the parties to undertake discovery and technical studies of the water resources and the uses of water in the lower

North Platte and Platte River basins in Nebraska.

Wyoming therefore requests the Court to enter judgment for Wyoming on each of the claims in Nebraska's petition and on the legal issue raised by Wyoming's counterclaim. Wyoming requests the Court to enter judgment specifically determining as follows:

a. The Decree does not restrict Wyoming's use of water from the Laramie River.

b. This Court's previous ruling that Wyoming's use of water from the Laramie River is not restricted is *res judicata*. Therefore, Nebraska has no right to water from the Laramie River under the Decree or otherwise, and is barred from asserting any claim to the Laramie River here.

c. Nebraska is estopped, by reason of the Agreement of Settlement and Compromise among Nebraska, Basin Electric Power Cooperative and others, to assert that construction or operation of Grayrocks Reservoir in accordance with that agreement violates the Decree or any rights claimed by Nebraska to the Laramie River.

d. Nebraska is estopped, by reason of the ruling of the Goshen County, Wyoming, District Court in *In Re Corn Creek Irrigation District*, Civil Action No. 19-460 (Jan. 20, 1978), to assert that construction or operation of the Corn Creek Project would violate the Decree or any rights claimed by Nebraska to the Laramie River.

e. Since the Decree does not restrict Wyoming's

use of water from the tributaries of the North Platte River below Pathfinder Dam, the construction and operation of Deer Creek Reservoir would not violate the Decree.

f. The Decree affirmatively exempts ordinary and usual municipal uses from any restriction. The proposed Deer Creek Reservoir would supply water for ordinary and usual municipal uses. Therefore, the construction and operation of Deer Creek Reservoir would not violate the Decree or Nebraska's apportionment provided by the Decree.

g. Wyoming's suit pending in the federal district court to require the United States Bureau of Reclamation to obtain Wyoming permits for storage of water from sources in Wyoming in the Inland Lakes in Nebraska does not violate the Decree.

h. Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief is denied.

i. Nebraska's rights under the apportionment provided by the Decree are limited to the water supplies for Nebraska lands irrigated by the canals identified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal).

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

JENNIFER HAGER
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street
Suite 300
Boulder Colorado 80302
(303) 443-8782

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defandant.

AFFIDAVIT OF GORDON W. FASSETT

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

GORDON W. FASSETT, being first duly sworn upon oath, states as follows:

1. I am the State Engineer of the State of Wyoming. As State Engineer, I have general supervision of the waters of the State of Wyoming and of the officers connected with its distribution. Official records of water supply, water development construction permits and applications for such permits, water rights, and diversions of water for beneficial use are kept under my supervision. I became State Engineer on March 16, 1987. From March 26, 1984 through March 15, 1987, I served as Deputy State Engineer and *ex officio* secretary of the Wyoming State Board of Control. Throughout my tenure as Deputy State Engineer and State Engineer, I have had access to and familiarity with the records of the State Engineer's Office and the State Board of Control. I am familiar with the decree of

the U.S. Supreme Court apportioning the natural flows of the North Platte River in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953) ("the North Platte Decree") and am familiar with the administration of water rights on the North Platte River under that decree.

2. A permit pursuant to Wyo. Stat. § 41-3-301 (1977) was issued on March 13, 1987, for an appropriation of surface water for Deer Creek Reservoir. Deer Creek Reservoir will be administered in priority pursuant to Wyoming law, and therefore will store primarily during surplus water years. Deer Creek Reservoir is the only significant water development project permitted for future construction on tributaries of the North Platte River between Pathfinder and Guernsey Reservoirs.

3. The United States Bureau of Reclamation obtained permits for construction of certain features of the North Platte Project pursuant to Wyoming law. Those permits do not provide for the diversion of the natural flow of the North Platte River in Wyoming to storage in the four Inland Lakes in Nebraska.

4. No permit for storage of water from sources in Wyoming in the Inland Lakes exists in the records of my office. Those records, upon examination, further show that neither the United States Bureau of Reclamation nor any other person or entity has ever applied for a permit for such storage in the Inland Lakes.

5. To this date, Wyoming has not prevented the storage of water from sources in Wyoming in the Inland Lakes. The only actions by the State of Wyoming or its officers to prevent storage in the Inland

Lakes without a Wyoming permit are the filing of the lawsuit against the United States Bureau of Reclamation and others in the District Court in Goshen County, Wyoming (Civil Action No. 23-13), and discussions and correspondence with the Bureau of Reclamation leading up to that lawsuit. That lawsuit was brought at the request of my predecessor as State Engineer, George L. Christopulos. Wyoming threatens no action to disturb the status quo with respect to storage in the Inland Lakes pending the outcome of this litigation. Attached hereto as Exhibit A is a certified copy of the "North Platte River Ownership and Natural Flow Accounting Procedures", bearing my signature, agreed to by Wyoming, Nebraska and the Bureau of Reclamation allowing storage of natural flow in the Inland Lakes as part of the agreed administration of the North Platte Decree for water year 1987. With respect to the Inland Lakes, the 1987 Accounting Procedures in Exhibit A incorporate the excerpt from the 1985 Accounting Procedures reproduced in Exhibit B.

6. The diversion of water in Wyoming for storage in the Inland Lakes cannot properly be administered by Wyoming water officials unless and until the Bureau of Reclamation and/or the irrigators who use water from the Inland Lakes obtain permits and water rights under Wyoming law for such diversion. A primary purpose of the permit procedure established nearly 100 years ago under Wyoming law is to define the parameters of a water right, such as the amount, priority, place of use, type of use and time of use, in order that the water right can be assimilated into the system of administration of all water rights on the river. The information provided by the permit is essential to the orderly

administration of water rights.

7. Attached hereto as Exhibit C is the 1982 certificate adjudicating the storage right for Grayrocks Reservoir on the Laramie River. That certificate does not provide for use of water to maintain minimum stream flows or for purposes other than industrial uses associated with operation of the Laramie River Station electric generating plant and incidental recreational uses of the reservoir.

8. Neither the State of Wyoming nor its water officials operate Grayrocks Reservoir. The operator of the reservoir is Basin Electric Power Cooperative, an association of consumer-owned electric utilities. Wyoming water officials have administered, and will in the future administer, the water rights for Grayrocks Reservoir according to its certificate and Wyoming law.

9. Permit applications for the Corn Creek Irrigation Project were submitted to my office on January 16, 1974, by the Corn Creek Reservoir Association. The current permit applicant is the Corn Creek Irrigation District. According to the permit applications, the supply of water for the Corn Creek Project would be primarily from storage water delivered from Glendo Reservoir on the North Platte River and Grayrocks Reservoir on the Laramie River. In addition, the permit applications request the right to divert water directly from the Laramie River near its mouth. No action has been taken by my office on the permit applications for the Corn Creek Project.

10. The water supply for the Corn Creek Project from Glendo Reservoir, if the Corn Creek Irrigation

District successfully negotiates a contract with the Bureau of Reclamation for delivery of such water, would be part of Wyoming's allocation from Glendo Reservoir under the 1953 modification of the North Platte Decree, *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

11. The Corn Creek Project is the only significant water development project proposed to be developed in the vicinity of the confluence of the Laramie and North Platte Rivers. No such proposed project has been permitted.

(Signed)
Gordon W. Fassett
Wyoming State Engineer

Subscribed and sworn to me this 2nd day of September, 1987.

/s/ Leanna L. Clawson
Notary Public

My commission expires September 30, 1989.

SEAL

CERTIFICATE

THE STATE OF WYOMING)
COUNTY OF LARAMIE) SS
STATE ENGINEER)

I, Gordon W. Fassett, State Engineer of the STATE OF WYOMING, do hereby certify that the following document, which is attached, is a full, true, and correct copy of the original document as the same appears of record or is on file in the State Engineer's Office and of which I have the legal custody, namely:

North Platte River Ownership and Natural Flow
Accounting Procedures 1987

IN WITNESS WHEREOF, I hereunto set my hand at Cheyenne, Wyoming, this 2nd day of September 1987.

(Signed)
Gordon W. Fassett

Subscribed and sworn to before me this 2nd day of September 1987.

/s/ Francis A. Carr
Notary Public

My commission expires March 14th, 1991.

Exhibit A to Affidavit of
Gordon W. Fassett

NORTH PLATTE RIVER OWNERSHIP AND NATURAL FLOW ACCOUNTING PROCEDURES

PART A.
STORAGE OWNERSHIP ACCOUNTING PROCEDURE

The parties to this criteria agree that administration and operation under this agreement are to conform with Wyoming and Nebraska State Laws, the U.S. Reclamation Law, and the U.S. Supreme Court Decree of 1945 and the 1952 Stipulation, as appropriate.

The North Platte system storage ownership shall equal the total storage in Seminoe, Kortes, Pathfinder, Alcova, Gray Reef, Glendo and Guernsey Reservoirs, except for water held in storage under separate contract for other entities by the Bureau of Reclamation or waters held in temporary storage.

All storage ownerships are to be filled in order of priority as provided in Paragraph III of the 1952 Modification of the U.S. Supreme Court Decree of 1945, Wyoming State Law and as water becomes available. Any water bypassed or spilled is to be charged to that ownership which may not then be refilled until all other appropriations from the river have been satisfied. No storage ownership delivery or evaporation charges will be assessed when water is being spilled from the system.

A one (1) day time lag will be used in computing the evaporation chargeable to each ownership. Evaporation chargeable today is considered to be equal to yesterday's total actual evaporation.

A. Pathfinder - 1,016,507 A.F. (current capacity)
Priority Date - 12/06/04

1. All river gains upstream of Pathfinder Reservoir for the October 1 through April 30 period are to accrue to this ownership until filled. Gains May 1 through September 30 in excess of natural flow demands may accrue to Pathfinder ownership until filled.

2. Any Pathfinder ownership in Guernsey Reservoir on September 30 will remain in Pathfinder ownership after October 1. This water will not transfer to Guernsey ownership, but will remain in Pathfinder ownership and may be transferred upstream as Guernsey ownership or the Inland Lakes accrue water. Pathfinder ownership transferred to the Inland Lakes will remain in Pathfinder ownership.

3. The Pathfinder evaporation charge is computed as though all Pathfinder ownership is in Pathfinder Reservoir except for that portion which may be in Guernsey Reservoir which shall be computed at the same rate as that of Guernsey Reservoir.

B. Inland Lakes

No agreement was reached as to storage in or for the account of the Inland Lakes. This matter is pending in litigation in the U.S. Supreme Court and in the U.S. District Court in Wyoming. The parties do not agree on the question whether natural flow may be stored from the North Platte River in or for the account of the Inland Lakes under the existing Wyoming permits for the North Platte Project. Reserving all of their legal rights, the parties agree that, during any water year, while this litigation is pending, natural flow water may be considered to accrue to the Inland Lakes account in accordance with the procedure set out in paragraph B of Part A of the 1985 North Platte River Ownership and Natural Flow Accounting Procedures, and further subject to the following conditions:

1. For the water year 1987, 46,000 A.F. has been credited to the Inland Lakes ownership account.

2. The Bureau and Nebraska will maintain and make available to Wyoming upon request records accounting for all water stored in the Inland Lakes or accrued to the Inland Lakes account in other reservoirs.

3. Nothing in these procedures is intended to restrict the delivery of North Platte Project storage water to the Inland Lakes.

C. Guernsey - 45,612 A.F. (current capacity)
Priority Date - 04/20/23

1. River gains upstream of Guernsey Reservoir for the October 1 through April 30 period and not credited to the Inland Lakes will accrue to this ownership until filled. Gains May 1 through September 30 in excess of natural flow demands may accrue to Guernsey ownership until filled.

2. The Guernsey evaporation charge is computed as though all Guernsey ownership is in Guernsey Reservoir.

3. The Hydrographer-Commissioner of District 14 will be notified in a timely manner of all releases made to fulfill contractual obligations to Federal water contractors by the Bureau of Reclamation.

4. Guernsey Reservoir releases after April 30 are to be natural flow calls upon the river following coordination among Wyoming, Nebraska and Bureau of Reclamation personnel. When Guernsey Reservoir releases exceed the natural flow of the river at this point, then the difference is a release of storage water.

5. Guernsey ownership transferred to the Inland Lakes will remain in Guernsey ownership.

D. Kendrick - 1,201,678 A.F. (current capacity; Seminoe - 1,017,273 A.F., Alcova - 184,405 A.F.) Priority Dates (Seminoe - 12/01/31, Alcova - 04/25/36)

1. All gains upstream of Seminoe Reservoir for the October 1 through April 30 period after Pathfinder and Guernsey ownerships have filled are to accrue to Kendrick (Seminoe) ownership until filled. Likewise, all gains upstream of Alcova Reservoir for the October 1 through April 30 period after Pathfinder and Guernsey ownerships have filled are to accrue to Kendrick (Alcova) ownership until filled. Gains May 1 through September 30 in excess of natural flow demands may accrue to the Kendrick ownership until filled.

2. The evaporation chargeable to Kendrick ownership shall be the actual Seminoe and Alcova Reservoirs evaporation yesterday, plus the evaporation for Kendrick ownership stored in any other reservoir but assumed to be in Seminoe Reservoir, minus any loss charged to storage held under contract for other entities by the Bureau of Reclamation in Seminoe Reservoir.

E. Glendo - 183,238 A.F. (current capacity)
Priority Date - 08/30/51

1. This ownership consists of a power head pool of 63,148 A.F. (elevation 4570), an irrigation ownership pool not to exceed 100,000 A.F. and an estimated evaporation pool of 20,090 A.F.

2. All gains upstream of Glendo Reservoir for the period October 1 through April 30 after the Pathfinder, Guernsey, and Kendrick ownerships and the Inland Lakes Account have filled are to accrue to the Glendo ownership until filled. At any time that the Guernsey ownership has filled and the Pathfinder or Kendrick ownerships have not filled, all gains between Alcova and Glendo will accrue to Glendo ownership. Gains May 1 through September 30 in excess of natural flow demands may accrue to this ownership until filled.

3. When the power head pool of 63,148 A.F. (eleva-

tion 4570) is filled, no further accounting need be made for this pool. This minimum power head pool can be filled but once from the river. All Glendo ownership evaporation will be charged against the irrigation pool unless storage for evaporation has been underestimated and evaporation encroaches upon the power head pool. In this case, refilling of the power head pool may be allowed as an exception by the Wyoming State Engineer.

4. Glendo ownership can accrue annually in the irrigation pool up to 40,000 A.F. plus estimated evaporation, provided this total irrigation ownership including carry-over storage does not exceed 100,000 A.F. plus estimated evaporation. Any difference between actual evaporation charged to the Glendo ownership and that estimated previously will be accounted for by adjustment of the next year's allowable storage for evaporation.

5. The Glendo ownership will be accounted for on both a State and an individual contractor basis. Such accounting will include accruals, releases, evaporation, exchanges and carry-over storage. Such amounts will be allocated by account in proportion to each entity's contracted amount of the Glendo water supply. Neither State will be allowed to accrue, in any one year, more than its proportionate share of the ownership (15,000 A.F. to Wyoming and 25,000 A.F. to Nebraska) nor will the irrigation pool including carry-over storage accrue beyond 37,500 A.F. for Wyoming or 62,500 A.F. for Nebraska.

6. The evaporation chargeable to the Glendo ownership is the total actual evaporation minus that chargeable to other ownerships and minus any loss charged to storage held under contract for other entities by the Bureau of Reclamation in Glendo Reservoir.

7. Gains Alcova to Glendo for the October 1 through April 30 period are to be computed as Glendo Reservoir

inflow minus 98% of the Gray Reef outflow two (2) days earlier.

F. Excess to Ownership Storage

1. River gains upsteam of Guernsey Reservoir in excess of natural flow demands not applied to storage ownership accounts will accrue to the "Excess to Ownership" storage account up to 12,000 acre-feet. The "Excess to Ownership" storage account shall be used as operational waste or regulation water only. Any "Excess to Ownership" water greater than 12,000 A.F. that is captured will be converted and released to fulfill natural flow demands. Regulation water not to exceed 12,000 A.F. may be carried over for use in the following year.

2. The "Excess to Ownership" Account will accrue and be released in such a manner so as not to interfere with authorized project purposes or as would endanger the safety of a structure.

PART B.
NATURAL FLOW COMPUTING PROCEDURE

Inflow to Seminoe Reservoir

The Seminoe inflow will be the sum of the flows of the North Platte River above the Seminoe Reservoir and the Medicine Bow River above Seminoe Reservoir.

Natural Flow above Alcova Reservoir

The natural flow above Alcova Reservoir will be the inflow to Seminoe plus the flow of the Sweetwater River entering Pathfinder Reservoir and to this total will be added the following accrual for each month:

May	June	July	August	September
90 cfs	45 cfs	40 cfs	35 cfs	35 cfs

The total of the Seminoe inflow plus the flow of the Sweetwater River plus the accrual will be called the natural flow entering Alcova Reservoir and will be passed through Alcova Reservoir and Gray Reef Reservoir without loss.

Gray Reef Reservoir to Glendo Reservoir

Water released at the Gray Reef Reservoir will be charged with the following losses between Alcova and Glendo Reservoirs.

May	June	July	August	September
113 cfs	131 cfs	140 cfs	131 cfs	115 cfs

There will be a two (2) day time lag in transporting water from Gray Reef Reservoir to Glendo Reservoir. Water released at Gray Reef Reservoir will reach Glendo Reservoir two (2) days after the release date.

Glendo Outflow

A one (1) day time lag will be used in transporting water through the Glendo Reservoir. Natural flow entering the Glendo Reservoir will one (1) day later be called the Glendo Outflow and be passed through the Glendo Reservoir without loss.

Glendo Reservoir Through Whalen Dam

Water released at Glendo Reservoir plus 20 cfs of river accrual will be called the Guernsey Reservoir inflow for that day. A one (1) day time lag will be used in bringing water from the Glendo Outflow through Whalen Dam which will include the two Government Canals just above Whalen Dam. This water will be passed through Whalen Dam without loss.

Whalen Dam to the Wyoming-Nebraska State Line or to the Tri-State Dam

A one (1) day time lag is used in taking water from the River Station below Whalen Dam to the River Station below Tri-State Dam.

River Losses Guernsey Reservoir to Nebraska State Line

A loss of natural flow may be borrowed from storage and replaced from subsequent gains. Carriage losses in the river section Guernsey Reservoir to the Wyoming-Nebraska State Line are as follows:

May	June	July	August	September
90 cfs	97 cfs	101 cfs	97 cfs	90 cfs

These ownership accounting and natural flow computing procedures shall be subject to revision and adoption at the annual Natural Flow and Ownership Meeting, and shall not be considered as applicable for any year not adopted. Conditions arising in exception to these procedures will be resolved by agreement by the signatory parties.

It is the intent of this document to provide a reasonable means to maintain the status quo and to provide for conflict-free administration of the river pending resolution of the matters now in litigation.

4/27/87 — /s/ Gordon W. Fassett
Date — Wyoming State Engineer

April 29, 1987 — /s/ Michael Jess
Date — Director, Nebraska Department of Water Resources

May 14, 1987 — /s/ David G. Wilde
Date — Project Manager
Bureau of Reclamation

CERTIFICATE

THE STATE OF WYOMING)
COUNTY OF LARAMIE) SS
STATE ENGINEER)

I, Gordon W. Fassett, State Engineer of the STATE OF WYOMING, do hereby certify that the following document, which is attached, is a full, true, and correct copy of the original document as the same appears of record or is on file in the State Engineer's Office and of which I have the legal custody, namely:

Excerpt from North Platte River Ownership and Natural Flow Accounting Procedures for 1985

IN WITNESS WHEREOF, I hereunto set my hand at Cheyenne, Wyoming, this 2nd day of September 1987.

(Signed)
Gordon W. Fassett

Subscribed and sworn to before me this 2nd day of September 1987.

/s/ Francis A. Carr
Notary Public

My commission expires March 14th, 1991.

SEAL

Exhibit B to Affidavit of
Gordon W. Fassett

Excerpt From: NORTH PLATTE RIVER OWNERSHIP AND NATURAL FLOW ACCOUNTING PROCEDURES FOR 1985

PART A.

STORAGE OWNERSHIP ACCOUNTING PROCEDURE

* * *

B. Inland Lakes - 46,000 A.F. (Lakes Alice and Minatare)

1. During the months of October, November and April gains downstream from Alcova Reservoir will accrue to the Inland Lakes, up to a total of 46,000 A.F., and at a rate not to exceed 910 cubic feet per second. These gains may be stored in Guernsey and Glendo Reservoirs and transferred to the Inland Lakes when Pathfinder Irrigation District resumes spring operations. The transfer is to be completed no later than May 15.

2. Evaporation will be charged to this ownership for water stored in upstream reservoirs at the rate determined for the reservoir where stored.

3. The amount of water transferred from this account to the Inland Lakes shall not exceed 46,000 A.F. annually less evaporation losses, measured into the Interstate Canal if other water is being released and at Guernsey if only the Inland Lakes water is being released.

April 29, 1985 /s/ *George L. Christopulos
Date Wyoming State Engineer

April 16, 1985 /s/ Michael Jess
Date Director, Nebraska Department of Water Resources

May 3, 1985 /s/ David G. Wilde
Project Manager
Bureau of Reclamation

*Section B of Part A is not agreed to, however, it is agreed that Inland Lakes can be filled this year because of the available water supply.

CERTIFICATE

THE STATE OF WYOMING)
COUNTY OF LARAMIE) SS
BOARD OF CONTROL)

I, Francis A. Carr, as Adjudication Officer of the Board of Control, of the STATE OF WYOMING, do hereby certify that the following named document, which is attached hereto, is a full, true and correct copy of the original document as the same appears of record in the office of said Board, namely:

Certificate Record R-8, page 771 which adjudicates Grayrocks Reservoir, Permit No. 7649 Res.

IN WITNESS WHEREOF, I hereunto set my hand and affix the Seal of said Board at Cheyenne, Wyoming, this 27th day of August, 1987.

(Signed) _____
Francis A. Carr, Adjudication Officer
Board of Control, State of Wyoming

Exhibit C to Affidavit
of Gordon W. Fassett

THE STATE OF WYOMING

Certificate of Construction of Reservoir

Proof No. 32743
Certificate Record No. R-8, Page 771
Water Division No. 1, District No. 4

WHEREAS, Basin Electric Power Cooperative has presented to the State Board of Control of the State of Wyoming, proof of construction of the Grayrocks Reservoir, Permit No. 7649 Res., located in Sec. 5, 6, 7 & 13 T.25N., R.65W.; Sec. 1, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 29 & 30 T.25N., R.66W.; Sec. 36 T.26N., R.66W.; and Sec. 25 T.25N., R.67W., Platte County, Wyoming;

Whereas, the proof of construction sets forth that said reservoir has been completed in accordance with the terms of said permit to a capacity sufficient to impound 104,109.6 acre-feet of water; and that the source of the quantity of water authorized to be stored in the Grayrocks Reservoir is obtained from Laramie River, tributary North Platte River on which the reservoir is located,

24

NOW KNOW YE, That the State Board of Control, under the provisions of the Statutes of Wyoming, has by an order duly made 20 Nov. 1981 and entered on the 23rd day of March, A.D. 1982, in Order Record No. 25, Page 325, determined the priority and capacity of said reservoir as follows:

Name of Owner Basin Electric Power Cooperative; Address 1717 East Interstate Ave., Bismarck, N.D. 58501

Date of Priority April 23, 1973; Total available storage capacity in the Grayrocks Reservoir, as constructed under provisions of Permit No. 7649 Res., is ---104,109.6--- acre-feet. *FOR ADDITIONAL LIMITATIONS SEE NOTE ON ATTACHED TABLULATION SHEET.

The right to store water is limited to such an amount as shall be beneficially used, not to exceed one filling annually of said reservoir, for *Industrial and Recreational use.

IN TESTIMONY WHEREOF, I, GEORGE L. CHRISTOPULOS, President of the State Board of Control, have hereunto set my hand this 23rd day of March, A.D. 1982, and caused the seal of said Board to be hereunto affixed.

ATTEST:
/s/ Paul Schwieger
Ex-officio Secretary.

/s/ George L. Christopulos
President.

*NOTE: If, in the utilization of this reservoir, the owners of said reservoir either by-pass water which is available for storage or release water already stored for purposes other than for which the reservoir is adjudicated water so released or by-passed will be counted against their storage allocation and water will not be recaptured to replace the by-passed or released water at the expense of other appropriators.

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defandant.

AFFIDAVIT OF MICHAEL K. PURCELL

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

MICHAEL K. PURCELL, being first duly sworn upon oath, states as follows:

1. I am Administrator of the Wyoming Water Development Commission ("the Commission"), an agency of the State of Wyoming created by WYO. STAT. § 41-2-117 (1987 Cum. Supp.). In that capacity, I am responsible for overseeing the staff of and carrying out the functions of the Wyoming Water Development Commission. Those functions include, but are not limited to, the planning, selection, financing, construction, acquisition and operation of projects and facilities for the conservation, storage, distribution and use of water necessary in the public interest to develop and preserve Wyoming's water and related land resources.

2. The Commission is the state agency responsible for planning, financing, constructing and operating

the proposed Deer Creek Dam and Reservoir on Deer Creek in Wyoming. Deer Creek is a right-bank tributary which enters the North Platte River between Pathfinder and Guernsey Reservoirs near Glenrock, Wyoming. As Administrator of the Commission, I am familiar with, and responsible for, planning and feasibility studies for Deer Creek Dam and Reservoir and other water development projects of the State of Wyoming.

3. The proposed Deer Creek Dam and Reservoir is the only water development project currently proposed and funded by Wyoming for construction on any of the tributaries of the North Platte River below Pathfinder Reservoir.

4. Deer Creek Dam and Reservoir, when constructed and operational, will provide a supplemental source of water to the City of Casper, and other smaller municipalities in Wyoming below Alcova Reservoir. Water from Deer Creek Reservoir will be used by the City of Casper and other municipalities upstream of the mouth of Deer Creek by exchange. Water will be delivered from Deer Creek Reservoir through Deer Creek to the North Platte River in exchange for water consumed from the North Platte River upstream by those municipalities. Water also will be delivered directly from Deer Creek Reservoir for use by downstream municipalities. Until the full annual yield of Deer Creek Reservoir is needed for those municipal uses, the Commission plans to temporarily allow the water available in excess of the municipal needs to be used for non-municipal purposes.

5. The primary beneficiary of Deer Creek Reservoir will be the City of Casper. The City of Casper now

provides a municipal water supply to a population of approximately 57,000. Studies conducted for the Wyoming Water Development Commission under my supervision have indicated that Casper's water rights are presently inadequate to meet the requirements of Casper's existing users in times of below average supply when water rights would be regulated in priority. Deer Creek Reservoir is needed to provide Casper with an adequate, reliable supply of municipal water for its present and future population.

6. The storage capacity of Deer Creek Reservoir will be approximately 66,000 acre-feet. Studies conducted under my supervision to provide information to the U.S. Army Corps of Engineers for preparation of an Environmental Impact Statement indicate that the dependable annual yield for consumptive uses of Deer Creek Reservoir will be approximately 6,400 acre-feet to 9,600 acre-feet depending on the resolution of the Inland Lakes issue. The large capacity of the reservoir is needed to produce this relatively small dependable yield because Deer Creek Reservoir will be able to store only water that is surplus to the needs of appropriators with senior water rights entitled under Wyoming law to water from Deer Creek.

7. On January 25, 1985, the Wyoming Water Development Commission applied to the U.S. Army Corps of Engineers for a dredge and fill permit for construction of Deer Creek Dam and Reservoir under § 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1982). A draft environmental impact statement was published by the Corps of Engineers in September, 1986. As part of the environmental impact statement and public review process on the § 404 permit, the Wyoming Water Development Commis-

sion has conducted detailed studies of the amount and timing of depletions to the North Platte River from the operation of Deer Creek Reservoir. The State of Nebraska has participated in the public hearings on the environmental impact statement for the § 404 permit and, through that participation, has had access to studies conducted by the Wyoming Water Development Commission and the Corps of Engineers.

8. Pursuant to Section 7 of the federal Endangered Species Act, the U.S. Army Corps of Engineers consulted with the U.S. Fish and Wildlife Service concerning the possible effects of the construction and operation of Deer Creek Dam and Reservoir on threatened and endangered species. The consultation included evaluation of possible effects on the endangered whooping crane and its critical habitat on the Platte River in central Nebraska. A biological opinion using the 9,600 acre-feet yield estimate was issued on July 20, 1987, by the U.S. Fish and Wildlife Service concluding that the construction and operation of Deer Creek Dam and Reservoir would not likely jeopardize the continued existence of any threatened or endangered species. The biological opinion also concluded that the construction and operation of the Deer Creek Dam and Reservoir would not adversely modify the critical habitat of the endangered whooping crane, if Wyoming funds and carries out certain conservation measures. Wyoming has entered into an agreement with the U.S. Fish and Wildlife Service to carry out, upon issuance of the § 404 permit, the conservation measures set out in the biological opinion.

9. Wyoming has appropriated $48.25 million for the design and construction of Deer Creek Reservoir

and, as of this date, has expended approximately $2.1 million for studies, plans and specifications, permitting, design and right-of-way acquisition for Deer Creek Dam and Reservoir.

10. It is necessary for municipalities in the North Platte drainage in Wyoming to use reservoirs for the conservation and regulation of water deliveries to their municipal water supply systems. Such storage is essential to enable municipalities to furnish reliable year-round water supplies for a number of reasons. Those include seasonal and annual variations in the physical availability of water in the North Platte River drainage, variations in the legal availability of water under the Wyoming priority system for administration of water rights, and restrictions imposed by the United States Supreme Court's North Platte Decree.

(Signed)
Michael K. Purcell

Subscribed and sworn to me this 2nd day of Sept., 1987.

/s/ Leanna L. Clawson
Notary Public

My commission expires September 30, 1989.

SEAL

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defandant.

AFFIDAVIT OF STANLEY K. HATHAWAY

STATE OF WYOMING)
) ss.
COUNTY OF LARAMIE)

STANLEY K. HATHAWAY, being first duly sworn upon oath, states as follows:

1. I am attorney for the Corn Creek Irrigation District ("the District"), a public irrigation district created by order of the District Court of Goshen County, Wyoming, on January 20, 1978, pursuant to WYO. STAT. §§ 41-7-201, *et seq.* (1977). I have been the District's general counsel since its inception in 1978. I also represented the petitioning landowners who initiated the petition for the formation of the District in the District Court of Goshen County, Wyoming (Docket No. 19-460). In my capacity as the District's general counsel, I have been personally familiar with the proposed Corn Creek Project and the Corn Creek Irrigation District since the District's inception.

2. The Corn Creek Irrigation District is the successor to the Corn Creek Reservoir Association as sponsor of the proposed Corn Creek Project. When the Corn Creek Irrigation District was formed, all interest of the Corn Creek Rerservoir Association in contracts and permit applications related to the Corn Creek Project were conveyed to the District.

3. The Corn Creek Project, when completed, will provide water to irrigate lands in Goshen County, Wyoming, in the drainage of the North Platte and Laramie Rivers. Such lands are currently used for dryland farming. The primary sources of water supply for the Corn Creek Project will be from Glendo Reservoir on the North Platte River and from Grayrocks Reservoir on the Laramie River. Permit applications originally filed by the Corn Creek Reservoir Association and currently being pursued by the Corn Creek Irrigation District request the right to divert the water delivered from Glendo Reservoir and from Grayrocks Reservoir and, in addition, request the right to divert natural flow water from the Laramie River.

4. The Corn Creek Irrigation District, as successor to the Corn Creek Reservoir Association, has a contract with Basin Electric Power Cooperative, the operator of the Grayrocks Reservoir, for delivery of 22,500 acre-feet annually from Grayrocks Reservoir. That contract is recognized in paragraph 5 of the Agreement of Settlement and Compromise entered into among Basin Electric Power Cooperative, the State of Nebraska and others over the adequacy of the § 404 permit and Rural Electricfication Administration loan guarantees for the Grayrocks Reservoir.

5. The Corn Creek Irrigation District has requested the United States Bureau of Reclamation to enter into a water service contract for delivery of 10,100 acre-feet of water annually from Glendo Reservoir for the Corn Creek Project.

6. I was personally involved as counsel for the landowners who petitioned for formation of the District in the proceeding in the District Court of Goshen County, Wyoming, in 1977 and 1978 (Docket No. 19-460). I attended and participated in the two days of hearing held on January 5 and 6, 1978. The State of Nebraska appeared at that hearing by its Assistant Attorney General, Steven C. Smith, and local counsel, Gerald Connolly, and objected to the formation of the district. In that case, my clients requested the Court to dismiss the State of Nebraska for lack of standing. That request was denied and Nebraska was allowed to fully participate in that hearing. The statute under which the petition for formation of the district was filed, WYO. STAT. §§ 41-7-201, *et seq.* (1977), requires a finding that the project sponsored by the district is feasible. Nebraska argued that the Corn Creek Irrigation District would have an inadequate supply of water because Nebraska had prior rights to the water of the Laramie River under the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and that the Corn Creek Project therefore was infeasible. The court overruled Nebraska's objection and found the project to be feasible.

7. The Corn Creek Project now proposed by the Corn Creek Irrigation District is essentially the same project that was proposed at the time of formation of the Corn Creek Irrigation District in 1978 and that was described in testimony before the District Court of

Goshen County, Wyoming, in the formation proceeding (Docket No. 19-460). The project has not yet been constructed because of the lack of sufficient funds.

(Signed)
Stanley K. Hathaway

Subscribed and sworn to me this 24th day of August, 1987.

/s/ Rick A. Thompson
Notary Public

Commission expires Febrary 15, 1988.

SEAL

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff.
v.
STATE OF WYOMING,
Defandant.

AFFIDAVIT OF DOROTHY W. FRITZ

STATE OF WYOMING)
) ss.
COUNTY OF GOSHEN)

DOROTHY W. FRITZ, being first duly sworn upon oath, states as follows:

1. I am the Clerk of the District Court in and for the County of Goshen, State of Wyoming. I have occupied the position of Clerk of the Court continuously since January, 1979. In that capacity, I am the proper custodian of the records of the court and the proper officer to certify copies of such records.

2. I was Deputy Clerk of the District Court of Goshen County, Wyoming, in Janaury of 1978 when Docket No. 1[illegible]460, *In the Matter of the Corn Creek Irrigation District*, was tried to the court.

3. Attached hereto are certified copies of the following documents from the court's record in Docket

No. 19-460:

Petition for Formation of Irrigation District filed on November 17, 1977;

Objection to Petition for Formation of Irrigation District filed by the State of Nebraska on December 30, 1977;

Order dated January 20, 1978.

4. I made a diligent search of the record of the court in Docket No. 19-460. That search revealed that no appeal was taken from the January 20, 1978 order attached hereto.

(Signed)
Dorothy W. Fritz

Subscribed and sworn to me this 20th day of August, 1987.

/s/ Alice O. Jones
Notary Public

Commission expires on November 26, 1989.

SEAL

Exhibit A to Affidavit of
Dorothy W. Fritz

THE STATE OF WYOMING,

ss.

County of Goshen

I, Dorothy W. Fritz, Clerk of the Eighth Judicial District Court within and for the County and State aforesaid, so hereby certify the foregoing to be a true and complete copy of

PETITION FOR FORMATION OF
IRRIGATION DISTRICT
Docket 19-460

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Torrington, Wyoming this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of District Court.
By _____
Deputy.

THE STATE OF WYOMING,

ss.

County of Goshen

I, J. T. Langdon, Judge of the District Court, in and for the County of Goshen, in the Eighth Judicial District of the State of Wyoming, do hereby certify that Dorothy W. Fritz who has given the preceding certificate, was at the time of so doing, the Clerk of the District Court, of the County and State aforesaid, duly qualified to act as such, that she is the proper custodian of the records of said Court and the proper officer to give such certificate, and that the same is in due form of law and that the signature thereto attached is her genuine signature.

WITNESS my hand at Torrington this 4th day of December 1986.

/s/ J. T. Langdon
Judge of the EIGHTH Judicial District.

THE STATE OF WYOMING)
) ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the District Court in and for the County of Goshen, State of Wyoming, do hereby certify that the The Judge J.T. Langdon who has given the preceding certificate, was at the time of so doing, Judge of the EIGHTH Judicial District, duly elected and legally qualified to act as such, and to all whose acts, full faith and credit ought to be given.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Torrington in said County, this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of the District Court.

STATE OF WYOMING	)	IN THE
	) SS	DISTRICT COURT
COUNTY OF GOSHEN	)	FIRST JUDICIAL DISTRICT
IN THE MATTER OF THE	)	19-460
CORN CREEK IRRIGATION	)	FILED
DISTRICT.	)	NOV 17, 1977

PETITION FOR FORMATION OF IRRIGATION DISTRICT

COMES NOW the undersigned petitioners and respectfully represent to the Court as follows:

I.

The undersigned and the signers of accompanying petitions identical herewith constitute a majority of the freeholders owning more than one-third of the lands within the proposed district, the boundaries of which are hereinafter particularly described, all of which land lies within Goshen County, Wyoming, and state that it is their purpose to organize an irrigation district under the laws of the State of Wyoming.

II.

Your Petitioners desire to provide for the irrigation of approximately fifteen thousand acres of lands that are presently dry farm and grazing lands, by means of a sprinkler irrigation system or systems to be constructed and supplied with irrigation water stored in two or more reservoirs and delivered to the lands by a pumping and delivery system to be constructed as hereinafter described.

III.

Your petitioners desire that the name of the district be designated CORN CREEK IRRIGATION DISTRICT.

IV.

The necessity for the proposed irrigation works results from the following facts:

All the lands included in said district are arid lands and, without irrigation, have a limited productivity. Approximately 42 percent of the land area within the district is planted to dry land wheat in a summer fallow method that requires half of the land to be idle and non-productive each year. Approximately 58 percent of the land is grazing land with grass production limited by inadequate rainfall. Under irrigation said lands would develop a high degree of productivity and become of great value commercially. An adequate supply of water for irrigation of said lands exists under the ownership of Corn Creek Reservoir Association by virtue of a contract for storage of 22,500 acre feet of water to be stored in the Greyrocks Reservoir to be constructed, and an additional 10,600 acre feet of water stored in Glendo Reservoir which will be contracted from the Bureau of Reclamation. The participation of the district in the ownership and construction of Greyrocks Reservoir, as well as the construction of pumping and delivery systems to deliver irrigation water to the lands of the district, will be financed by loans from the State of Wyoming and one or more funding agreements with agencies of the United States. All of said funding arrangements require the formation of an irrigation district as a legal entity capable of assessing benefits to the lands as well as construction and maintenance charges against the lands to be irrigated; and that your petitioners have no other source of securing water for the irrigation of said lands in a practical and feasible manner except by the organization of the proposed district and construction of irrigation works as herein described.

V.

The object and purpose of the system proposed to be constructed is to irrigate for the first time all of the lands included within said district which constitute approximately fifteen thousand acres. The general description of the irrigation works is as follows:

The water supply originates from two different major drainages, being the Laramie River and the North Platte River. This water will be diverted from near the confluence of the Laramie and Platte Rivers and water delivered from either or both sources. With regard to the North Platte River, water stored in Glendo Reservoir reserved for irrigation in this area will be contracted from the Bureau of Reclamation in the amount of 10,600 acre feet. The Corn Creek Reservoir Association has initiated a water service contract with the Bureau and no major problems are anticipated.

On the Laramie River, a large reservoir named Greyrocks is being planned by the Basin Electric Cooperative, harnessing flood flows and providing a water supply for a steam electric generating plant. There is a reserve capactiy planned in the reservoir which Corn Creek Reservoir Association has contracted for to insure 22,500 acre feet of water to be delivered to the Laramie River Bridge annually. 15,000 acre feet will be delivered from April 1st to October 1st annually and 7,500 acre feet will be delivered during the balance of each year. This storage water has been traded for senior direct flow rights on the Laramie River held by the Corn Creek Reservoir Association.

The proposed system will place under sprinkler irrigation approximately 1,430 acres on a bench known as Harmony Heights and 13,700 acres below the bench in Goshen Hole. Water will be conveyed by pipeline and concrete lined canal from the confluence of the Laramie and North Platte Rivers to Teeters Reservoir, a storage reser-

voir to be built on Cherry Creek. The Harmony Heights acreage will be irrigated from lateral pipelines off the main pipeline. Acreage in Goshen Hole will receive Teeters Reservoir storage water via a network of concrete line distribution canals. Water delivered to the farm units is repressurized by centrifugal booster pumps and distributed on the land primarily by center pivot sprinklers, each wetting approximately 130 acres.

Although the lands to be included in said district, hereinafter described in this Petition, amount to approximately 20,000 acres, it is anticipated that only 15,000 acres thereof, more or less, will be irrigated. Center pivot systems, it is anticipated, will irrigate only about 84% of each quarter section of land and some lands included in the district will necessarily have to be excluded from irrigation because of soil and topographical conditions.

The river pumping plant will be located approximately fifty feet from the confluence of the North Platte and Laramie Rivers and will be of the false well type. A 43 inch intake line will extend to the south bank of the Laramie River terminating at a concrete wing wall. The water will then be pumped to can-type verticle turbine pumps and boosted to a pressure needed to pump water to an upper elevation. The pressure developed by this booster pump will be utilized by most of the sprinklers on Harmony Heights. Unused water is then conveyed by a concrete lined canal to the proposed Teeters Reservoir which will have an active storage capacity of approximately 15,700 acre feet. During the off-irrigation season additional water will be pumped into Teeters Reservoir. During the growing season water will be released from Teeters Reservoir into a concrete lined canal distribution system which will serve the district lands in Goshen Hole.

The distribution system in the Harmony Heights area will be completely closed and equipped with remote control

valves that will automatically close if a sprinkler system should stop, thus preventing overwatering. Small booster pumps serving the individual sprinkler system will be installed near the terminal points of the pipeline. In the Goshen Hole area, concrete sumps incorporated into the canals will be utilized. Centrifigual pumps located on concrete pads adjacent to those sumps will provide pressure for the sprinkler systems. The plan will also include the installation of transmission lines and substations to wheel Basin Electric Power from its main transmission line.

The estimated cost of the district's participation in the construction of Greyrocks Reservoir is $6,000,000 which will be fully reimbursed by Basin Electric Power Cooperative under the contract with Corn Creek Reservoir Association. The estimated costs of the remainder of the project system to bring water to individual farm units, without individual sprinkler systems, is $11,264,000. It is contemplated that $5,068,800 of this amount would be furnished by the Soil Conservation Service of the United States Department of Agriculture under Public Law 566 or RC&D cost sharing programs. The cost share of the district in the amount of $6,195,200 would be financed under a four percent interest loan from the State of Wyoming amortized over a forty year period.

VI.

A general description of the lands, all in Goshen County, Wyoming, proposed to be included in said district is as follows, to-wit:

IN TOWNSHIP 23 NORTH, RANGE 63 WEST OF THE 6th P.M.

Section 19: NE¼; S½SW¼
Section 20: W½SW¼
Section 28: W½SW¼; SE¼; W½NW¼
Section 29: E½; SW¼; N½NW¼
Section 30: S½; NE¼; N½NW¼

Section 31: NE¼
Section 32: N½
Section 33: NW¼

IN TOWNSHIP 23 NORTH, RANGE 64 WEST OF THE 6th P.M.
Section 4: SW¼
Section 5: E½; SW¼; S½NW¼
Section 6: S½
Section 7: N½; SE¼
Section 15: W½
Section 17: W½
Section 19: All
Section 20: W½; SE¼
Section 21: All
Section 22: W½
Section 23: SW¼; W½SE¼; SE¼SE¼
Section 24: S½SW¼; S½SE¼
Section 25: N½; SE¼
Section 26: NW¼; W½NE¼; NE¼NE¼
Section 27: NW¼; E½NE¼
Section 28: N½
Section 29: E½; E½NW¼; NW¼NW¼
Section 30: NE¼

IN TOWNSHIP 23 NORTH, RANGE 65 WEST OF THE 6th P.M.
Section 1: All
Section 2: E½
Section 10: SE¼
Section 11: SW¼; NE¼; N½SE¼
Section 12: NE¼; SW¼; W½NW¼
Section 13: SW¼
Section 14: All
Section 15: NE¼
Section 23: NE¼
Section 24: All

IN TOWNSHIP 24 NORTH, RANGE 63 WEST OF THE 6th P.M.
Section 16: W½
Section 17: NE¼
Section 18: SW¼
Section 19: SE¼
Section 20: W½; NE¼
Section 29: S½SW¼; SE¼; NW¼
Section 30: NE¼; S½
Section 32: NW¼

IN TOWNSHIP 24 NORTH, RANGE 64 WEST OF THE 6th P.M.
Section 11: E½
Section 13: SE¼
Section 24: E½
Section 28: NE¼SW¼
Section 31: S½
Section 32: S½; NE¼
Section 33: All

IN TOWNSHIP 24 NORTH, RANGE 65 WEST OF THE 6th P.M.
Section 25: SE¼
Section 35: E½
Section 36: E½; SW¼

IN TOWNSHIP 25 NORTH, RANGE 64 WEST OF THE 6th P.M.
Section 21: All
Section 22: S½
Section 28: All

VII.

There are no entrymen on public lands in said district and the names of the freeholders owning lands in said district so far as known to your Petitioners are as follows: Denny-Stricker Livestock, Inc., Melvin R. Eaton, Francis B.

Austin, Carl O. Carlson, Jr., Carol J. Carlson, E. Leva Carlson, A.J. Bar Ranch, Inc., Violet Price, Ronald R. Price, State of Wyoming, Gordon G. Booth, Mary Ann Booth, Katie Marlin, Francis E. Clark, Jessie L. Lillie, Haas Farms, Inc., H and T Ranch Company, Earl McClun, Mary McClun, Gilbert L. Bernbeck, Gayle Bernbeck, John C. Teeters, Lillian I. Teeters, Ronald C. Teeters, Kenneth H. Yorges, Berneice Yorges, Kenneth Pursley, Kenneth S. Peterson, Carol J. Peterson, Harold Ernst, E. Beth Ernst, Russell E. Stout, Mary Charlotte Stout, Wallace Newton, Dorothy L. Newton, Austin G. Felton, Eva Margaret Felton, Mary Margaret Byergo, Frank Austin Felton, John Horace Felton, Ernest Erzinger, Mildred Erzinger, Kermit Brown, Ellen Brown, Joel Teeters, Estate of Merl Teeters, Tri-County Grain Company, B & J Associates (a limited partnership consisting of Ruth Johnston and Enoch Baumgardner).

VIII.

While the lands proposed to be included in the irrigation district are not all contiguous your Petitioners allege that the benefits of the proposed work in each part will exceed the damages from and costs of said proposed work in each part and the proposed work can be done more cheaply if in a single district than otherwise.

IX.

The Petitioners desire and propose to cooperate with the United States as herein described.

X.

Accompanying this Petition is a preliminary engineering report on the feasibility of the project, including a report on the sufficiency of its water supply, the approximate area of irrigable land within the district, and an estimate of the cost of construction, all of which has been approved by the State Engineer of Wyoming.

WHEREFORE, your Petitioners pray that a hearing be fixed upon this Petition directing the Clerk of this Court to cause the proper and statutory notice of its filing to be given, and that upon said hearing an Order be made and entered by the Court approving and confirming this Petition, defining the boundaries of the District, dividing the district into five subdivisions to be known as Commissioner Districts and establishing this proposed district as a corporation, to be known as CORN CREEK IRRIGATION DISTRICT, with all the powers granted by law and appointing five commissioners with the duties and powers vested in such commissioners by law.

(signatures omitted)

Exhibit B to Affidavit of
Dorothy W. Fritz

THE STATE OF WYOMING,)
)ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the Eighth Judicial District Court within and for the County and State aforesaid, so hereby certify the foregoing to be a true and complete copy of
OBJECTION TO PETITION FOR FORMATION OF IRRIGATION DISTRICT
Docket 19-460

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Torrington, Wyoming this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of District Court.
By _____
Deputy.

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, J. T. Langdon, Judge of the District Court, in and for the County of Goshen, in the Eighth Judicial District of the State of Wyoming, do hereby certify that Dorothy W. Fritz who has given the preceding certificate, was at the time of so doing, the Clerk of the District Court, of the County and State aforesaid, duly qualified to act as such, that she is the proper custodian of the records of said Court and the proper officer to give such certificate, and that the same is in due form of law and that the signature thereto attached is her genuine signature.

WITNESS my hand at Torrington this 4th day of December 1986.

/s/ J. T. Langdon
Judge of EIGHTH Judicial District.

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the District Court in and for the County of Goshen, State of Wyoming, do hereby certify that the The Judge J.T. Langdon who has given the preceding certificate, was at the time of so doing, Judge of the EIGHTH Judicial District, duly elected and legally qualified to act as such, and to all whose acts, full faith and credit ought to be given.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Torrington in said County, this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of the District Court.

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

IN THE MATTER OF THE	)	19-460
	)	OBJECTION TO
CORN CREEK	)	PETITION FOR
	)	FORMATION OF
IRRIGATION DISTRICT.	)	IRRIGATION DISTRICT

COMES NOW the State of Nebrska, by and through Paul L. Douglas, Attorney General of the State of Nebraska, by the authority vested in his office under Neb.Rev.Stat. §84-207 (Reissue 1976), and objects to the petition filed herein for reason that said petition and accompanying preliminary engineering report fail to fairly and reasonably establish the feasibility of the district and the sufficiency of the proposed water supply. In support of this objection the objector respectfully represents to the court as follows:

I.

That the State of Nebraska files this objection under the provisions of section 41-279 *Wyo. Stats.* (1957), as a person who may be affected by the formation of the Corn Creek Irrigation District since the waters proposed to be appropriated and used by the district are waters which normally flow from the Laramie River into the North Platte River and are eventually used by Nebraska citizens for agricultural, industrial and domestic purposes. These Laramie River flows, by contributing to the total flow of the North Platte River in Nebraska, are also necessary to maintain the quality of the environment in the North Platte and Platte River Basins in Nebraska.

II.

That the petitioner states that it has a contract for storage of 22,500 acre-feet of water with Basin Electric Power Cooperative, which water is to be stored in the

proposed Greyrocks Reservoir which is to be located on the Laramie River in Wyoming.

III.

That before Greyrocks Reservoir can be constructed, Section 404 of the Federal Water Pollution Control Act (33 U.S.C. §1344, as amended) requires the issuance of a permit by the United States Army Corps of Engineers. Thus far, Basin Electric Power Cooperative, as project manager, has failed to obtain this permit from the Corps. Without said permit the reservoir cannot be constructed and without the reservoir Basin Electric Power Cooperative cannot deliver 22,500 acre-feet of storage water to the district.

IV.

That the State of Nebraska has filed a complaint in the United States District Court for the District of Nebraska (State of *Nebraska v. Rural Electrification Administration, et al.*, CV-76-L-242), a copy of which is attached hereto and incorporated herein. Basin Electric Power Cooperative, as project manager, has been permitted to intervene as a party defendant in that proceeding which is scheduled for trial in October, 1978. Also attached hereto and incorporated herein is an affidavit of James L. Grahl, which was filed in support of the motion of Basin Electric Power Cooperative to intervene in those proceedings. The objectors respectfully request the court to consider the statement in paragraph 8 of that affidavit. The statement in paragraph 8 clearly shows that construction of Grayrocks Reservoir and Power Plant depends upon Rural Electrificatioin Administration guaranteed financing. Pendency and final resolution of that action could jeopardize project financing and construction, and accordingly, the ability of Basin Electric Power Cooperative to deliver 22,500 acre-feet of water to the petitioners herein.

V.

That the State of Nebraska has been and is currently negotiating with Basin Electric Power Cooperative concerning the construction and operation of the proposed Greyrocks Reservoir. The State of Nebraska has offered to withdraw its litigation and objections to the issuance of the 404 Permit if Basin Electric Power Cooperative guarantees to release certain amounts of water from the reservoir which will flow into the North Platte River and into Nebraska for uses within Nebraska. The State of Nebraska believes that guaranteed releases from the reservoir will protect rights and established uses of Nebraska citizens to those flows in addition to those rights to the contributions of water the Laramie River makes to the North Platte River which accrue to the State of Nebraska under the United States Supreme Court decree in *Nebraska v. Wyoming*, 352 U.S. 589 (1945), as modified June 15, 1953. Furthermore we also seek, through an agreement on guaranteed releases, to alleviate our concern that the water consumed in generating electricity by the project may have detrimental effects upon the environment and economy of the State of Nebraska. The objector believes that there is not enough water available in the Laramie River, including all water proposed to be impounded in Greyrocks Reservoir, to meet the total requirements of the State of Nebraska, the project and the proposed irrigation district.

VI.

That because of the foregoing the State of Nebraska submits that there are serious doubts about the reliability, sufficiency and future status of the district's proposed water supply.

WHEREFORE, the objector prays that the court dismiss said petition at the cost of the petitioner. In the alternative the objector prays this court enter an order continuing this matter until Basin Electric Power Coopera-

tive has received its Section 404 Permit from the Corps of Engineers and until the issues in *Nebraska v. Rural Electrification Association, et al.*, have been resolved, or until such other time or contingency as the court may deem proper.

(Signed)
Paul L. Douglas
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

(Signed)
Gerald Connolly, Local Counsel
110 West 22nd Avenue
Torryington, [sic] Wyoming 82240

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER) VERIFICATION

Paul L. Douglas, being first duly sworn deposes and says that the is the duly elected and acting Attorney General of the State of Nebraska, that he is one of the attorneys for the objector in the above entitled cause, that he has read the above and foregoing Objection and knows the contents thereof and that the allegations of fact in said Objections are true as he verily believes.

(Signed)
Paul L. Douglas, Attorney General
Subscribed and sworn to before me this 29th day of December, 1977.
/s/ Dorothy N. Jones
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Objection to Petition for Formation of Irrigation District upon Mr. Bob C. Sigler, 2020 East "D" Street, Torrington, Wyoming 28840, on this 29th day of December, 1977, by mailing said copy through the United States Mail, with first class postage prepaid.

(Signed)
Paul L. Douglas
Attorney General
State of Nebraska

(Signed)
Gerald Connolly, Local Counsel
110 West 22nd Avenue
Torrington, Wyoming

Exhibit C to Affidavit of
Dorothy W. Fritz

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the Eighth Judicial District Court within and for the County and State aforesaid, so hereby certify the foregoing to be a true and complete copy of ORDER Docket 19-460

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the official seal of said Court, at my office in Torrington, Wyoming this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of District Court.
By _____
Deputy.

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, J.T. Langdon, Judge of the District Court, in and for the County of Goshen, in the Eighth Judicial District of the State of Wyoming, do hereby certify that Dorothy W. Fritz who has given the preceding certificate, was at the time of so doing, the Clerk of the District Court, of the County and State aforesaid, duly qualified to act as such, that she is the proper custodian of the records of said Court and the proper officer to give such certificate, and that the same is in due form of law and that the signature thereto attached is her genuine signature.

WITNESS my hand at Torrington this 4th day of December 1986.

/s/ J. T. Langdon
Judge of EIGHTH Judicial District.

THE STATE OF WYOMING,)
) ss.
County of Goshen)

I, Dorothy W. Fritz, Clerk of the District Court in and for the County of Goshen, State of Wyoming, do hereby certify that the The Judge J.T. Langdon who has given the preceding certificate, was at the time of so doing, Judge of the EIGHTH Judicial District, duly elected and legally qualified to act as such, and to all whose acts, full faith and credit ought to be given.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Torrington in said County, this 4th day of December A.D. 1986.

/s/ Dorothy W. Fritz
Clerk of the District Court.

STATE OF WYOMING)
) SS
COUNTY OF GOSHEN)

		IN THE
In The Matter Of The	)	DISTRICT COURT
	)	EIGHTH
CORN CREEK	)	JUDICIAL DISTRICT
IRRIGATION DISTRICT	)	Docket No. 19-460

ORDER

The Petition for the formation of the Corn Creek Irrigation District having come on for hearing on the 5th and 6th days of January, 1978, the petitioners appearing by and through their attorneys Stanley K. Hathaway, Bob C. Sigler and Dan J. Pauli; the contestants Wallace and Dorothy Newton and A.J. Bar Ranch Inc., appearing by and through their attorney Frank J. Jones; the State of Nebraska appearing by the through Steven C. Smith, Assistant Attorney General, State of Nebraska and Gerald Connolly; and the contestants, Robert T. Nelson, O.L. Barkman, Herbert W. Walker, Kenneth M. Walker, Ellen L. Walker, Al Barkman, Patricia C. Barkman, Leo Clark, Norma Clark, Alfred H. Barkman, Erma L. Barkman, Virgil Jagger, Edith A. Jagger, Merle J. Lisle and Shirley A. Lisle, (being the purported purchasers of land from Gurney and Edna Bernice Gregg), Lillie Motsick, William J. Motsick, Wallace Newton (as to his separate petition to exclude lands not presently included in the boundaries of the proposed district), Kenneth R. Pursley, Dale Bremer, Miriam Bremer, Ralph Bremer, Lenore Bremer, Tony Pontarola, Pete Pontarola, James M. Pontarola, Jeanette M. Pontarola, J.E. Tittle, Louise Tittle, Bruce A. Jagger, Trustee, R.E. Thompson, Evelyn P. Thompson, William A. Duncan, Keith O. Duncan and Charles Ross appearing through Bruce A. Jagger and Gerald Connolly; and Bruce A. Jagger also representing himself as trustee and personally as a contestant; and the Court having examined the files herein and having heard all the testimony and the

arguments of counsel and being fully advised in the premises:

THE COURT DOTH FIND that the Petition filed herein for the formation of the Corn Creek Irrigation District is sufficient and that it is signed by a sufficient number of parties and that due and timely notice of this hearing has been given as required by law and by Order of this Court, and that the Court has jurisdiction in this matter.

THE COURT DOTH FURTHER FIND that the Corn Creek Irrigation District as proposed is feasible and that the report of the engineer accompanying said Petition is sufficient and the approval of the State Engineer is adequate and that an Order should be entered for the formation of said District.

THE COURT DOTH FURTHER FIND, as to the protest filed by the State of Nebraska, that the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the proposed District, and therefore, the State of Nebraska has no grounds for objection to the creation of said District and that its protest should therefore be denied.

THE COURT DOTH FURTHER FIND that the protest filed on behalf of the A.J. Bar Ranch Inc., to have its land excluded from the proposed District should be denied for the reason that there has been no sufficient showing that said land is not properly includable in the boundaries of the proposed District and for the additional reason that A.J. Bar Ranch, Inc., had indicated a desire to have its lands included

within the District and had not indicated a contrary desire until the first day of the hearing before this Court. The Court further notes, however, that prior to the hearing on the Commissioners Report, the Commissioners appointed by the Court, should make a thorough investigation of all property proposed to be included in the District and that the Commissioners at that time should closely examine lands of the A.J. Bar Ranch, Inc., to determine if said lands will be benefited if included within the District and whether the burden upon said contestants might be eased by replacing some of their lands with other lands belonging to free-holders who desire to come into the District.

THE COURT DOTH FURTHER FIND that Wallace and Dorothy Newton have filed a Petition herein to have the following lands excluded from the boundaries of the proposed District, to-wit:

TOWNSHIP 23 NORTH, RANGE 65 WEST OF THE 6th P.M. GOSHEN COUNTY

Section 1: All

Section 2: E½

And the Court further finds that said lands of Wallace and Dorothy Newton, and only those lands above listed, should be excluded from the boundaries of the proposed District.

THE COURT DOTH FURTHER FIND that certain contestants have filed Petitions and Objections herein seeking to have this Court permanently exclude from the boundaries of the proposed District certain lands listed in said Petitions and Objections which lands are not presently located within the boundaries of the proposed District; the names of said contestants being as follows, to-wit: Robert T. Nelson, O.L. Barkman, Herbert W. Walker, Kenneth M. Walker, Ellen L. Walker, Al Barkman, Patricia C. Barkman, Leo Clark, Norma Clark, Alfred H. Barkman, Erma L. Barkman, Virgil Jagger, Edith A. Jagger, Merle J. Lisle and Shirley A. Lisle (being the purported purchasers of land

from Gurney and Edna Bernice Gregg), Lillie Motsick, William J. Motsick, Wallace Newton, Kenneth R. Pursley, Dale Bremer, Miriam Bremer, Ralph Bremer, Lenore Bremer, Tony Pontarola, Pete Pontarola, James M. Pontarola, Jeanette M. Pontarola, J.E. Tittle, Louise Tittle, Bruce A. Jagger, Trustee, R.E. Thompson, Evelyn P. Thompson, William A. Duncan, Keith O. Duncan and Charles Ross. The Court further finds that it does not have jurisdiction to permanently exclude said lands owned by said parties from the boundaries of the District and that even if the Court does have such jurisdiction, the Court finds that this is not an appropriate time to have such lands permanently excluded, and that therefore the Petitions and Objections of said contestants should be denied.

THE COURT DOTH FURTHER FIND that the proposed Corn Creek Irrigation District should be divided into five (5) Commissioner Districts, as hereinafter set forth, and that the following named individuals should be appointed as the first commissioners of said District, to-wit: Gordon G. Booth, Joel Teeters, Albert Goertz, Enoch Baumgardner and Melvin R. Eaton.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. That the Petition for the formation of the Corn Creek Irrigation District filed herein be, and the same is hereby, in all things ratified, approved and confirmed.

2. That the Corn Creek Irrigation District, with the boundaries hereinafter fixed and determined, be, and the same is hereby organized and established as a corporation by the name of the the "CORN CREEK IRRIGATION DISTRICT" with all powers and rights granted to such corporations pursuant to Wyoming law.

3. That the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of

Wyoming v. Colorado, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or under any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the Corn Creek Irrigation District, and therefore, the objection of the State of Nebraska to the formation of said District, be, and the same is hereby, denied.

4. That the protest of A.J. Bar Ranch Inc., to have its lands excluded from the boundaries of the Corn Creek Irrigation District be, and the same is hereby, denied.

5. That the protest filed herein by Wallace and Dorothy Newton to have the following lands excluded from the Corn Creek Irrigation District, to-wit:

TOWNSHIP 23 NORTH, RANGE 65 WEST OF THE 6th P.M. GOSHEN COUNTY

Section 1: All
Section 2: E½

is hereby granted and said lands, and only said lands, are hereby ordered excluded from the boundaries of the District.

6. That the Petitions and Objections of the following named contestants to have the lands described in their Petitions and Objections (which lands are not presently included in the boundaries of the Corn Creek Irrigation District) permanently excluded from the boundaries of the Corn Creek Irrigation District be, and the same are hereby denied, to-wit: Robert T. Nelson, O.L. Barkman, Herbert W. Walker, Kenneth M. Walker, Ellen L. Walker, Al Barkman, Patricia C. Barkman, Leo Clark, Norma Clark, Alfred H. Barkman, Erma L. Barkman, Virgil Jagger, Edith A. Jagger, Merle J. Lisle and Shirley A. Lisle (being the

purported purchasers of land from Gurney and Edna Bernice Gregg), Lillie Motsick, William J. Motsick, Ralph Bremer, Lenore Bremer, Miriam Bremer, Dale Bremer, Kenneth R. Pursley, Wallace Newton, Tony Pontarola, Pete Pontarola, James M. Pontarola, Jeannette M. Pontarola, J.E. Tittle, Louise Tittle, Bruce A. Jagger, Trustee, R.E. Thompson, Evelyn P. Thompson, William A. Duncan, Keith O. Duncan and Charles Ross.

7. That the boundaries of said Corn Creek Irrigation District shall be the exterior boundaries of the following lands which are hereby included in said District, to-wit:

IN TOWNSHIP 23 NORTH, RANGE 63 WEST OF THE 6th P.M.

Section 19: NE¼; S½SW¼
Section 20: W½SW¼
Section 28: W½SW¼; SE¼; W½NW¼
Section 29: E½; SW¼; N½NW¼
Section 30: S½; NE¼; N½NW¼
Section 31: NE¼
Section 32: N½
Section 33: NW¼

IN TOWNSHIP 23 NORTH, RANGE 64 WEST OF THE 6th P.M.

Section 4: SW¼
Section 5: E½; SW¼; S½NW¼
Section 6: S½
Section 7: N½; SE¼
Section 15: W½
Section 17: W½
Section 19: All
Section 20: W½; SE¼
Section 21: All
Section 22: W½
Section 23: SW¼; W½SE¼; SE¼SE¼

Section 24: S½SW¼; S½SE¼
Section 25: N½; SE¼
Section 26: NW¼; W½NE¼; NE¼NE¼
Section 27: NW¼; E½NE¼
Section 28: N½
Section 29: E½; E½NW¼; NW¼NW¼
Section 30: NE¼

IN TOWNSHIP 23 NORTH, RANGE 65 WEST OF THE 6th P.M.

Section 10: SE¼
Section 11: SW¼; NE¼; N½SE¼
Section 12: NE¼; SW¼; W½NW¼
Section 13: SW¼
Section 14: All
Section 15: NE¼
Section 23: NE¼
Section 24: All

IN TOWNSHIP 24 NORTH, RANGE 63 WEST OF THE 6th P.M.

Section 16: W½
Section 17: NE¼
Section 18: SW¼
Section 19: SE¼
Section 20: W½; NE¼
Section 29: S½SW¼; SE¼; NW¼
Section 30: NE¼; S½
Section 32: NW¼

IN TOWNSHIP 24 NORTH, RANGE 64 WEST OF THE 6th P.M.

Section 11: E½
Section 13: SE¼
Section 24: E½
Section 28: NE¼SW¼

Section 31: S½
Section 32: S½; NE¼
Section 33: All

IN TOWNSHIP 24 NORTH, RANGE 65 WEST OF THE 6th P.M.

Section 25: SE¼
Section 35: E½
Section 36: E½; SW¼

IN TOWNSHIP 25 NORTH, RANGE 64 WEST OF THE 6th P.M.

Section 21: All
Section 22: S½
Section 28: All

8. That the Corn Creek Irrigation District be, and the same is hereby divided into five (5) Commissioner districts, described as follows:

Commissioner District No. 1 shall include all that portion of the Corn Creek Irrigation District which lies within Township 25 North, Range 64 West of the 6th P.M.; Township 24 North, Range 63 West of the 6th P.M.; and Township 24 North, Range 64 West of the 6th P.M. except for that portion of the District lying in Sections 28, 31, 32, and 33, Township 24 North, Range 64, West of the 6th P.M.

Commissioner District No. 2 shall include all that portion of the Corn Creek Irrigation District which lies within Sections 28, 31, 32 and 33, Township 24 North, Range 64 West of the 6th P.M.; all that portion of the District which lies within Township 24 North, Range 65 West of the 6th P.M.; and all that portion of the District which lies within Sections 4 and 5, Township 24 North, Range 64 West of the 6th P.M.

Commissioner District No. 3 shall include all that portion of the Corn Creek Irrigation District which lies within Township 23 North, Range 65 West of the 6th P.M.; and all that portion of the District which lies within Sections 6, 7, and the West half of Section 19, Township 23 North, Range 64 West of the 6th P.M.

Commissioner District No. 4 shall include all that portion of the Corn Creek Irrigation District which lies within Sections 15, 17, East one-half of Section 19, Sections 20, 21, 22, West one-half of Section 27 and Sections 28, 29 and 30 of Township 23 North, Range 64 West of the 6th P.M.

Commissioner District No. 5 shall include all that portion of the Corn Creek Irrigation District which lies within Sections 23, 24, 25, 26 and the East one-half of Section 27, Township 23 North, Range 64 West of the 6th P.M. and all that portion of the District which lies within Township 23 North, Range 63 West of the 6th P.M.

9. That the following freeholders are hereby appointed as Commissioners of the said Corn Creek Irrigation District:

Commissioner District No. 1: Gordon G. Booth
Commissioner District No. 2: Joel Teeters
Commissioner District No. 3: Albert Goertz
Commissioner District No. 4: Enoch Baumgardner
Commissioner District No. 5: Melvin R. Eaton

Said appointments to become effective upon their subscribing to the oath required by law and the making and filing with the Court their joint and several bond in the penal sum of $1,000.00 with sureties to be approved by the Court or the Judge thereof. Said Commissioners shall hold office until the 3rd Tuesday in February, 1979, and until their respective successors are qualified, and shall be at all times under the direction of this Court, and the Court reserves

the right to remove said Commissioners from office upon good cause shown after a hearing as provided by law, and to appoint a successor to such Commissioner so removed. Said Commissioners and their successors in office shall constitute the corporate authority of said Corn Creek Irrigation District and shall exercise the functions conferred on them by law and they shall with all convenient speed proceed to do the work and make the report required of them by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that this finding, Order and Decree shall be final and conclusive upon all parties in interest unless appealed from to the Wyoming Supreme Court within thirty days after the same is filed in the office of the Clerk of this Court.

DONE IN OPEN COURT.

/s/ George P. Sawyer
Judge

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defandant.

WYOMING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

QUESTIONS PRESENTED

I. Whether there is a genuine issue as to any material fact with respect to Nebraska's claims for enforcement of the Decree and, if not, whether Wyoming is entitled to judgment as a matter of law on those claims.

II. Whether Wyoming is entitled to judgment as a matter of law confirming that Nebraska's right to North Platte River water under the Decree is limited to water required for irrigation of lands served by the canals specified in the Decree that divert at or upstream of Tri-State Dam.

PARTIES INVOLVED

The State of Nebraska initiated this lawsuit against the State of Wyoming. No claims have been asserted by or against the State of Colorado or the United States of America. Colorado was an impleaded defendant and the United States was an intervenor in the previous litigation that resulted in the Decree sought to be enforced in this case.

Motions to intervene have been filed by the National Audubon Society, Basin Electric Power Cooperative, Central Nebraska Public Power and Irrigation District, the Nebraska Public Power District and the Platte River Whooping Crane Habitat Maintenance Trust.

JURISDICTION

Nebraska and Wyoming invoke the Court's retained jurisdiction under Paragraph XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 665, 671-72 (1945), as modified, *Nebraska v. Wyoming*, 345 U.S. 981 (1953).[1] The Decree was entered under Article III, Section 2, Clause 2, of the United States Constitution and the Judiciary Act, 28 U.S.C. § 1251(a) (1982). The Decree apportioned the natural flows of the North Platte River among Nebraska, Wyoming and Colorado for irrigation purposes. Nebraska's petition requests injunctive relief enforcing the Decree. Wyoming has counterclaimed, seeking injunctive relief enforcing the Decree against Nebraska.

[1] As used in this brief, the "Decree" refers to the 1945 decree (325 U.S. 665) as modified by the Court's 1953 order (345 U.S. 981).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution,
Article III, Section 2, Clause 2:

> In all Cases affecting Ambassadors and other public Ministers and Consuls and those in which a State shall be a party, the Supreme Court shall have original jurisdiction.

Judiciary Act,
28 U.S.C. § 1251(a) (1982):

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

STATEMENT OF THE CASE

Nebraska has invoked the Court's retained jurisdiction under Paragraph XIII of the Decree for the limited purpose of enforcing the Decree. Nebraska's petition alleges that certain actions in Wyoming violate or threaten to violate the Decree and should be enjoined. Wyoming has admitted the actions that Nebraska alleges. Wyoming denies, however, that those actions violate or threaten to violate the Decree. Wyoming Answer to Petition at 1-5. The question whether Nebraska is entitled to the relief requested in its petition is, therefore, a pure question of law that is appropriate for determination on summary judgment.

Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief was filed on October 6, 1986. The Court granted Nebraska leave to file the petition. Wyoming then answered the

petition and, upon leave of the Court, filed a counterclaim.

The Decree places certain restrictions on diversions and storage of water from the North Platte River and its tributaries in each of the three states. Decree, paras. I-V. The purpose of those restrictions is to apportion the natural flow of the river during the irrigation season. The apportionment to Nebraska under the Decree is limited to irrigation water for Nebraska lands supplied by specified irrigation canals diverting from the North Platte River at or above Tri-State Dam.[2] Decree, para. V; *Nebraska v. Wyoming*, 325 U.S. 589, 625, 628, 654-55 (1945). A map of the North Platte River basin is included in the Appendix at A-1.

The Specific restrictions on use of water in Wyoming that the Court found necessary to protect Nebraska's apportionment under the Decree are as follows:

-- Exclusive of the Kendrick Project and Seminoe Reservoir, irrigation with water from the North Platte River above Guernsey Reservoir and its tributaries above Pathfinder Reservoir is limited to 168,000 acres, and storage of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Reservoir is limited to 18,000 acre-feet per year. Decree, para. II.

-- The relative priorities of the storage rights of the federal reclamation projects on the North

[2]References in this brief to canals diverting at or above Tri-State Dam include the Ramshorn Canal which historically diverted just below Tri-State Dam.

Platte River in Wyoming are fixed among themselves and in relation to the five specified canals serving Nebraska lands. Decree, paras. III, IV.

-- Wyoming is enjoined from diverting or using more than twenty-five percent (25%) of the natural flow in the Guernsey Dam to Tri-State Dam section of the river from May 1 to September 30 of each year; Nebraska is enjoined from diverting or using more than seventy-five percent (75%). Decree, para. V.

The Decree does not restrict diversion or storage in Wyoming for non-irrigation purposes and does not restrict diversions or storage from tributaries entering the North Platte below Pathfinder Dam. The Decree apportions only natural flow, not storage water. Decree, para. VI. It also affirmatively exempts from any restriction the use of water in Colorado and Wyoming for "ordinary and usual domestic, municipal and stock watering purposes and consumption". Decree, para. X. Paragraph XII(d) of the Decree provides that the Decree shall not affect "...[the] apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River".

Nebraska asserts that Wyoming is violating or threatens to violate the Decree in four ways:

(1) By the operation of Grayrocks Reservoir on the Laramie River;

(2) By the proposed construction of new pumping, diversion and storage facilities near the confluence of the Laramie and North Platte Rivers;

(3) By the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

(4) By actions to require the United States Bureau of Reclamation to obtain a Wyoming permit for diversion of water in Wyoming for storage in the Inland Lakes in Nebraska. Nebraska Petition, para. 3.

The record in this case, including the pleadings and affidavits, establishes the following undisputed facts concerning the actions of Wyoming that Nebraska alleges constitute violations or threatened violations of the Decree:

Grayrocks Reservoir

Grayrocks Reservoir was completed on the Laramie River mainstem northeast of Wheatland, Wyoming, in 1980 pursuant to Wyoming permits. It is used to supply the Laramie River Station, a large coal-fired steam electric power generating plant that was constructed at the same time. The reservoir and power plant were constructed by the Missouri Basin Power Project, a consortium of consumer-owned electric systems supplying power in eight states, including Nebraska and Wyoming. Basin Electric Power Cooperative ("Basin Electric") is the operator of the power plant and reservoir. Memorandum in Support of Motion of Basin Electric Power Cooperative for Leave to Intervene at 3. In 1978, Nebraska and several environmental groups filed lawsuits in the United States District Court in Nebraska challenging loan guarantees by the Rural Electrification Administration and issuance of a Section 404 dredge and fill permit by the Army Corps

of Engineers. They requested an injunction against construction of the reservoir and power plant on grounds of non-compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4361 (1982), and the Endangered Species Act, 16 U.S.C. §§ 1531-1542 (1982). The U.S. District Court entered the requested injunction. *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978).

While the case was pending on appeal to the Eighth Circuit Court of Appeals, the parties to the litigation entered an Agreement of Settlement and Compromise dated December 4, 1978, in which Nebraska withdrew "all objections" to issuance of the permit. Memorandum in Support of Motion of Basin Electric Power Cooperative for Leave to Intervene at 5-7. That agreement is reproduced in the Appendix at A-23 - A-31. It is referred to in this brief as the "Settlement Agreement". The Settlement Agreement provided for certain limitations on the operation of Grayrocks Reservoir and for limitations on total water depletions by the Laramie River Station. App. A-24 -A-28. Pursuant to the Settlement Agreement, the parties executed and filed with the Court of Appeals a stipulation dated February 20, 1979, which resulted in an order vacating the District Court's judgment and dismissing the case with prejudice, subject to the right of any party to "petition the District Court for interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978." The stipulation and the order of the Eighth Circuit Court of Appeals are reproduced in the Appendix at A-19, A-32. Wyoming was not a party to the litigation or to the Settlement Agreement or stipulation.

Proposed Diversion and Storage Facilities Near the Confluence of the Laramie and North Platte Rivers (Corn Creek Project).

The Corn Creek Project is the only significant water development project currently proposed for construction near the confluence of the Laramie and North Platte Rivers. Affidavit of Gordon W. Fassett. The Corn Creek Project is a proposed project for irrigation of lands currently used for dryland farming and grazing in Goshen County, Wyoming. The current sponsor of the project is the Corn Creek Irrigation District, which was formed in 1978 under Wyoming law [WYO. STAT. §§ 41-7-201 to -210 (1977)]. The primary water supply for the project would be storage water supplied from Glendo Reservoir on the North Platte and from Grayrocks Reservoir on the Laramie to the District's pumping facilities at the mouth of the Laramie. In addition, the pending permit application requests the right to divert natural flow water from the Laramie River near its mouth. The Grayrocks Reservoir storage water would be delivered pursuant to an existing agreement between the District's predecessor, Corn Creek Reservoir Association, and Basin Electric Power Cooperative. Affidavit of Stanley K. Hathaway. That agreement is expressly recognized in the Grayrocks Reservoir Settlement Agreement. App., A-23 - A-31. The Glendo Reservoir water would be supplied under a proposed contract between the District and the Bureau of Reclamation. Such water would be part of Wyoming's annual allocation from Glendo Reservoir pursuant to the 1953 modification of the North Platte Decree. Decree, para. XVII (B); Affidavit of Gordon W. Fassett.

The Corn Creek Irrigation District was formed by

order of the District Court, Eighth Judicial District, Goshen County, Wyoming, entered January 20, 1978. *In Re the Corn Creek Irrigation District*, Civil Action No. 19-460 (Wyo. Dist. Ct. 1978). The State of Nebraska filed an Objection to Petition for Formation of Irrigation District, asserting that the proposed district would not have an adequate water supply because of Nebraska's asserted superior rights to Laramie River water under the Decree. Affidavit of Dorothy W. Fritz. After a two-day hearing on the petition, in which Nebraska participated by counsel, the district court entered its judgment and decree on January 20, 1978, establishing the District and determining:

> 3. That the State of Nebraska has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936), *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and *Wyoming v. Colorado*, 353 U.S. 953 (1957), or under any other authority, law, statute or regulation of any nature whatsoever, and that it furthermore has no interest in the 10,600 acre feet of Glendo Unit Storage water of the Bureau of Reclamation which forms a part of the water supply for the Corn Creek Irrigation District, and therefore, the objection of the State of Nebraska to the formation of said District, be, and the same is hereby, denied.

Certified copies of the Petition for Formation of Irrigation District, Nebraska's objection and the Opinion and Order of the District Court are attached to the Affidavit of Dorothy W. Fritz. No appeal was taken from the district court's judgment. Affidavit of Dorothy W. Fritz.

Proposed Storage Facilities on Tributaries Between Pathfinder Reservoir and Guernsey Reservoir (Deer Creek Project)

Deer Creek Reservoir is the only water development project currently permitted for construction on any tributary entering the North Platte River between Pathfinder and Guernsey Reservoirs. It is a municipal storage project proposed to be constructed on Deer Creek, a tributary entering the North Platte River east of Casper, Wyoming. The sponsor of the project is the Wyoming Water Development Commission, an agency of the State of Wyoming. Affidavit of Michael K. Purcell.

Deer Creek Reservoir would, by exchange, provide a needed supplemental source of water for the City of Casper, whose current service area population is about 57,000, and for other smaller communities along the North Platte below Alcova Reservoir. Without the Deer Creek Project, Casper's existing water supply is inadequate in times of shortage. Affidavit of Michael K. Purcell. Wyoming has appropriated a total of $48.25 million for the Deer Creek Project. 1982 Wyo. Sess. Laws ch. 60; 1984 Wyo. Sess. Laws ch. 52; 1985 Wyo. Sess. Laws ch. 89. Approximately $2.1 million have been expended for studies, plans and specifications, final design, and right-of-way acquisition. Affidavit of Michael K. Purcell.

The design capacity of Deer Creek Reservoir is approximately 66,000 acre-feet. Its estimated annual yield is approximately 6,400 to 9,600 acre-feet.[3] Affidavit of Michael K. Purcell. The annual yield is highly

[3] The difference in yield estimates is due in part to the uncertainty regarding the priority and extent of the natural flow water rights used to supply the Inland Lakes.

dependent on carryover storage because of the variability of runoff in Deer Creek from year to year. Deer Creek Reservoir can only store water in excess of the requirements of existing downstream senior water rights that are entitled to water from Deer Creek. For that reason, it will store primarily in surplus water supply years and is unlikely to conflict with the water supply for the Nebraska canals specified in the Decree. Affidavit of Gordon W. Fassett.

On January 25, 1985, the Wyoming Water Development Commission applied to the U.S. Army Corps of Engineers for a dredge and fill permit for Deer Creek Reservoir under Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1982). A Draft Environmental Impact Statement (published September, 1986) for the Deer Creek Project has been prepared by the Corps of Engineers, Omaha District, and is currently in the public interest review process. Public hearings have been held in both Wyoming and Nebraska. Officials of the State of Nebraska have participated in the hearings. On July 20, 1987, the United States Fish and Wildlife Service issued its biological opinion concerning the effect of Deer Creek Reservoir on federally listed threatened and endangered species. That opinion concluded that construction and operation of Deer Creek Reservoir would not jeopardize the species nor adversely affect the critical habitat of the endangered whooping crane on the Platte River in central Nebraska if certain conservation measures are undertaken by Wyoming as provided in the agreement executed by Wyoming and the U.S. Fish and Wildlife Service. Affidavit of Michael K. Purcell.

Inland Lakes

Wyoming filed a lawsuit against the United States in the District Court for the Eighth Judicial District, Goshen County, Wyoming. *Wyoming ex rel. Christopulos v. United States*, Civil Action No. 23-13 (filed October 3, 1986). The complaint is reproduced in the Appendix at A-36 - A-44. That lawsuit, brought at the request of the Wyoming State Engineer, asks the court to declare that the Bureau of Reclamation must comply with Wyoming law in operating its North Platte Project facilities to divert water from the North Platte River in Wyoming to storage in four off-channel reservoirs in Nebraska known as the Inland Lakes. That suit seeks to enjoin such storage, including the storage of water out of priority in the Bureau's other reservoirs in Wyoming for the benefit of the Inland Lakes "until the defendants have complied with the laws of the State of Wyoming" and have obtained the permits required by Wyoming law. An order dated October 24, 1986, removed the case to the U.S. District Court for the District of Wyoming (Docket No. C86-0370-B). The federal defendants filed a motion to dismiss or in the alternative to stay the proceedings. By order dated March 27, 1987, the District Court denied the motion to dismiss and held that it had jurisdiction, but stayed the proceeding pending a determination of whether the same issues are before the Supreme Court in this case. A certified copy of the Order Staying Proceedings is reproduced in the Appendix at A-45.

Counterclaim

Wyoming filed a counterclaim alleging, *inter alia*, that Nebraska has violated the Decree (1) by demanding natural flow water for diversion in excess of the

beneficial use requirements of the canals entitled to water under the Decree and (2) by bypassing or diverting water from sources above Tri-State Dam to uses below Tri-State Dam that are not recognized or authorized by the Decree. Nebraska has generally denied the allegations in Wyoming's counterclaim. The counterclaim is based on those provisions of the Decree and the Court's opinion that limit Nebraska's rights to water supplies for lands irrigated by canals diverting at or upstream of Tri-State Dam. In its answer Nebraska does not deny that its rights are so limited.

SUMMARY OF ARGUMENT

Nebraska accuses Wyoming of violating the Decree and asks the Court to enjoin Wyoming's actions. Nebraska disavows any desire or attempt to modify the Decree. The facts underlying Nebraska's allegations are not in dispute. What is in dispute is the legal import of those facts under the Decree. That is a question of law that should be decided on summary judgment.

This Court, in its 1945 Decree in this case, determined that Nebraska has no right to water from the Laramie River, and accordingly excluded the Laramie River from the apportionment of the North Platte River. Therefore, Nebraska's assertion that actions on the Laramie River in Wyoming violate the Decree must be rejected as a matter of law. Furthermore, Nebraska is estopped to assert that either Grayrocks Reservoir or the proposed Corn Creek Project violates or threatens to violate the Decree. Nebraska withdrew all objection to Grayrocks Reservoir in an agreement that allowed construction of that reservoir to proceed and imposed specific limits on the operation of that reser-

voir. Nebraska's claim that the proposed Corn Creek Project would violate the Decree was litigated voluntarily by Nebraska in a Wyoming court. Nebraska did not appeal the final ruling against it, and it cannot relitigate that issue here.

Paragraph X of the Decree affirmatively exempts the development of municipal water supplies in Wyoming from any restriction. Nebraska's assertion that municipal projects such as Deer Creek Reservoir will violate the Decree is wrong because it ignores Paragraph X. Moreover, Deer Creek Reservoir will be located on a tributary that enters the North Platte River below Pathfinder Dam. The Decree does not restrict Wyoming's use of water from such tributaries.

This Court ruled in 1945 that the United States Bureau of Reclamation must comply with state law in appropriating water for its North Platte Project. Wyoming's lawsuit against the Bureau seeks a determination of whether the Bureau has proceeded in compliance with Wyoming law in appropriating water for storage in the Inland Lakes and, if not, what it must do to comply with Wyoming law. Wyoming has a need and a right to have that matter finally determined. The mere bringing of the lawsuit to obtain that determination does not violate the Decree. The lawsuit should be allowed to proceed.

For these reasons, Nebraska's petition for enforcement of the Decree and for injunctive relief should be denied. Trial of the remaining Wyoming counterclaim may be greatly simplified by a partial summary judgment confirming that Nebraska's rights under the Decree are limited to use on lands irrigated by water diverted from the North Platte at or upstream of Tri-

State Dam. Even if the Court decides that trial on some or all of Nebraska's claims is necessary, a determination of the extent of Nebraska's rights under the Decree would limit the issues and expedite trial preparation. The Court, over Nebraska's objection, expressly ruled in its 1945 opinion that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State. . .". *Nebraska v. Wyoming*, 325 U.S. 589, 628 (1945).

ARGUMENT

I. THE MATERIAL FACTS CONTROLLING THE QUESTIONS OF LAW ARE UNDISPUTED, AND AND WYOMING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON NEBRASKA'S CLAIMS FOR ENFORCEMENT OF THE DECREE.

Nebraska's petition for enforcement of the Decree raises no genuine issue of material fact that would require a trial. The parties do not dispute the facts as to the actions in Wyoming that Nebraska asserts have violated or threaten to violate the Decree. The sole question is whether those actions, which are admitted by Wyoming, constitute a violation or threatened violation of the Decree. This motion asks the Court to determine that question of law on summary judgment.

Under FED. R. CIV. P. 56, which is made applicable in this proceeding by SUP. CT. R. 9.2, summary judgment is the proper remedy where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See generally Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986). Here, the material facts are not in dispute.

While there may be questions of interpretation of the Decree, those are questions of law that may be decided without a trial. *See, e.g., United States v. California*, 332 U.S. 19, 24 (1947) (original jurisdiction case in which dispute over ownership of the three-mile marginal ocean belt off the California coast was decided as a matter of law on United States motion for judgment without taking of evidence); *California ex rel. State Land Commission v. United States*, 457 U.S. 273 (1982) (original jurisdiction case in which dispute regarding title to accreted ocean front land was decided as a matter of law on cross-motions for summary judgment and for judgment on the pleadings without taking of evidence).

The actions and proposed actions in Wyoming of which Nebraska complains do not violate or threaten to violate the Decree. Therefore, as a matter of law, Nebraska is not entitled to the injunctive relief it seeks.

A. *Neither Grayrocks Reservoir Nor the Proposed Corn Creek Project Violates the Decree Because the Decree Does Not Restrict the Use of Laramie River Water in Wyoming.*

1. *The Court has already determined in this case that Nebraska has no right to waters of the Laramie River.*

Nebraska's claim to Laramie River water was fully litigated by the parties and rejected by the Court in the previous litigation in this case. The Special Master concluded:

> The water of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, 259 U.S. 419, and that of the South Platte River was equitably distributed by compact between Nebraska

> and Colorado ratified by the Congress in 1926. This conclusion takes into account the interests of all parties and no redistribution of the waters of those rivers should be undertaken in this suit.

Special Master's Report at 8, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The Court confirmed the Special Master's conclusion and said:

> The waters of the South Platte and the Laramie were previously apportioned -- the former between Colorado and Nebraska by compact, the latter between Colorado and Wyoming by decree. Those apportionments are in no way affected by the decree in this case.

Nebraska v. Wyoming, 325 U.S. at 592 n.1 (citations omitted). Furthermore, the Decree itself provides that it shall not affect "the apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." Decree, para. XII(d).

In these conclusions, the Court and the Special Master were merely giving effect to the previous decree of apportionment in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922). The 1922 decree had been construed by the Supreme Court as confirming "the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries . . .". *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936).

Nebraska's claim to waters of the Laramie River

was squarely framed in the pleadings and briefs in the previous litigation in this case. In response to Nebraska's original Bill of Complaint, Colorado asserted that the waters of the Laramie River "were and are fully and completely divided and apportioned" between Wyoming and Colorado and therefore Nebraska should have no relief extending to the Laramie River. Colorado Answer and Cross-Bill at 33, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Wyoming admitted that the Laramie River had historically contributed water to the North Platte River but joined Colorado in the assertion that the Laramie River had been fully apportioned between Wyoming and Colorado by the prior decree. Wyoming Answer to Colorado Cross-Bill at 9-10, *id.*

In response, Nebraska admitted only that the Supreme Court had adjudicated the relative rights of Wyoming and Colorado in the Laramie River. Nebraska asserted that, not having been party to the Laramie River litigation, it was not bound by the Laramie River decree and that its claim to water from the Laramie River had never been settled or adjudicated. Nebraska Answer to Colorado Cross-Bill at 8-9, *id.*

There was a considerable amount of evidence presented to the Special Master concerning the contribution of the Laramie River to the North Platte River. *See*, for example, the testimony of Nebraska's witness R. I. Meeker, Record at 133, 176; Wyoming Exhibit Nos. 112, 173; Special Master's Report at 269-71, *id.*

In its brief before the Special Master, after close of the evidence, Nebraska maintained the position that it was not bound by the previous decree apportioning the Laramie. Nebraska Opening Brief Before Special Master at 43, *id.* Both Wyoming and Colorado urged the

Special Master to exclude the Laramie River from any apportionment in this case. Wyoming Opening Brief Before Special Master at 138-39, 401, *id.*; Colorado Opening Brief Before Special Master at 10, 64-65, 217-18, *id.* Both also noted that Nebraska's own witness R. I. Meeker had testified that the dependable flow of the Laramie River reaching the North Platte River was "negligible" during times of shortage in the irrigation season. Wyoming Opening Brief Before Special Master at 141-42, *id.*; Colorado Opening Brief Before Special Master at 207, *id.*

In his recommendations for a decree, the Special Master specifically excluded the Laramie River from the proposed apportionment. Special Master's Report at 177, *id.* Nebraska did not take exception to the Special Master's exclusion of the Laramie River from the apportionment and the Court adopted the Special Master's proposal.

Nebraska's suggestion that the Master and the Court intended to include the Laramie River in the 75/25 division of natural flow conflicts with the plain language of the Master's Report, the opinion and the Decree. The Master's and the Court's intent to exclude the Laramie is further evidenced by the exclusion of Laramie River acreage from the irrigated acreage and water requirement figures that formed the basis for the 75/25 apportionment. Moreover, that apportionment applies only to water that reaches the North Platte in the Whalen to Tri-State section. Nebraska's claim asserts, in effect, that the Decree prohibited any increase in Wyoming consumptive uses of the Laramie after 1945 in order to insure maintenance of the then-existing inflows from the Laramie to the North Platte. On the contrary, the Decree does not restrict

future Wyoming uses of Laramie River water. Again, the Special Master, the Court and the parties did not consider the Laramie to be a significant source of the supply available to Nebraska from the North Platte.

The Court's conclusion that the Laramie River was fully apportioned between Colorado and Wyoming was a final adjudication of that issue. It bars Nebraska from now asserting that any use of the Laramie River by Wyoming violates the Decree or otherwise interferes with Nebraska's right to an equitable portion of the waters of the North Platte River. *Arizona v. California*, 460 U.S. 605 (1983) (fact that decree of Supreme Court in original jurisdiction had retained jurisdiction to accommodate changed conditions did not affect finality of determination of specific water rights in first proceeding).

2. *Even if Nebraska had an equitable right to Laramie River water, it is estopped to assert that operation of Grayrocks Reservoir violates that right.*

Nebraska is a party to the Settlement Agreement which allowed construction of Grayrocks Reservoir to proceed. Construction of the reservoir and the Laramie River Station, at a cost of approximately $1,340,000,000 was able to be completed because the Settlement Agreement provided for removal of the injunction against construction issued by the District Court at the request of Nebraska and others. Memorandum in Support of Motion of Basin Electric Power Cooperative for Leave to Intervene at 3-7.

Although not specifically raised in Nebraska's lawsuit as a ground of opposition, one of Nebraska's objections to the construction of Grayrocks Reservoir

was Nebraska's claim that construction and operation of the reservoir would interfere with Nebraska's right to water from the Laramie River. *See* Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 3, 10-12. In the Settlement Agreement, Nebraska agreed to specific operational limits on the Grayrocks Reservoir and withdrew all objections it had to the federal actions required to allow construction of the reservoir to proceed. App., A-29. Equity surely requires that Nebraska now be estopped to assert that construction or operation of Grayrocks Reservoir consistent with the Settlement Agreement violates its rights. *See generally Dickerson v. Colgrove,* 100 U.S. 578 (1879); *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959).

Nebraska attempts to escape this estoppel in its Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition. There it said that, despite the plain language of its petition, what it really is complaining about is not the operation of Grayrocks Reservoir, but rather "threats" by Wyoming to allow Wyoming appropriators to divert from the Laramie River the water that is bypassed or released by Grayrocks Reservoir under the Settlement Agreement. At the same time, however, Nebraska admits that Wyoming is not a party to, and therefore is not bound by, the Settlement Agreement. Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 12.

Wyoming has stated, and reiterates here, that it has administered, and will in the future administer, the water rights for Grayrocks Reservoir according to Wyoming law. *See* Wyoming Answer to Petition, para. 3(a); Affidavit of Gordon W. Fassett. Nebraska has not disputed that fact. The adjudicated water right for

Grayrocks Reservoir does not provide for the use of water to maintain flows in the Laramie or for any uses in Nebraska. Affidavit of Gordon W. Fassett. Accordingly, under Wyoming law, any water in the Laramie River below Grayrocks Reservoir may be used by Wyoming appropriators.

Nebraska's argument implies that there is a direct conflict between Wyoming law and the provisions of the Settlement Agreement. Wyoming disagrees, but even assuming such a conflict exists, Wyoming water officials are not free to ignore Wyoming law. Certainly the Decree does not require this. In fact the Decree expressly leaves the intrastate administration of water rights to the respective, individual states. Decree, para. XII(a). The Court's desire to leave each state with "full freedom of intrastate administration of her share of the water" was one of the primary reasons for rejection of Nebraska's proposal for a strict interstate priority schedule. *Nebraska v. Wyoming*, 325 U.S. 589, 643 (1945).

In summary, Nebraska's vague accusations that Wyoming intends "to subvert" and "to act in derogation of" the Decree by its actions with respect to Grayrocks Reservoir have no support in the facts or the law. The Decree has nothing to do with Grayrocks Reservoir or the Settlement Agreement. The Decree expressly does not affect the Laramie River and it leaves Wyoming free to administer Laramie River water rights as its law requires.

3. *Nebraska is bound by a prior judicial determination that it has no right to Laramie River water that would be affected by the Corn Creek Project.*

Nebraska appeared as an objector in the proceed-

ings in the Wyoming court for the formation of the Corn Creek Irrigation District for the purpose of constructing and operating the Corn Creek Project. Affidavit of Dorothy W. Fritz. Nebraska placed in issue there the very claim it raises here -- that the depletions by the project would violate Nebraska's rights under the North Platte Decree. Nebraska argued that because it had a prior right to Laramie River waters, there would be insufficient water available for the Corn Creek Project. *See* copy of Objection, Exhibit B to the Affidavit of Dorothy W. Fritz. Nebraska had a full and fair opportunity to litigate that issue. The court squarely held that Nebraska had no legitimate claim to Laramie River water under the North Platte Decree. *See* copy of Order, Exhibit C to the Affidavit of Dorothy W. Fritz. Because Nebraska's claim questioned the feasibility of the project, Wyoming law required the Court to decide the issue in determining whether to grant the petition for formation of the District. WYO. STAT. §§ 41-7-201 to -210 (1977); *In Re Washakie Needles Irrigation District*, 52 Wyo. 518, 76 P.2d 617 (1938). Nebraska did not appeal from the court's judgment and therefore is bound by it. Affidavit of Dorothy W. Fritz; *Illinois v. Michigan*, 409 U.S. 36, 37 (1972).

Nebraska freely chose to present that issue to the state court in Wyoming and freely chose not to appeal the ruling against it. As the Supreme Court said of the United States' attempt to relitigate a matter previously determined in a state court, "[c]onsiderations of comity as well as repose militate against redetermination of issues in a federal forum at the behest of a plaintiff who has chosen to litigate them in state court." *Montana v. United States*, 440 U.S. 147, 163 (1979). *See generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

B. *Municipal Water Development on the Tributaries Entering the North Platte River Between Pathfinder Reservoir and Guernsey Reservoir, Such as the Proposed Deer ~~Corn~~ Creek Reservoir, Does Not Violate the Decree.*

Deer Creek Reservoir is the only significant water development project currently permitted for future construction on any tributary entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. Affidavit of Gordon W. Fassett. The allegation in Nebraska's petition regarding the "proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir" refers to Deer Creek Reservoir. Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 5. If Nebraska's petition is intended to refer to any future water development on those tributaries, other than Deer Creek Reservoir, the arguments in this brief apply with equal force to such future development.

There is no dispute that Wyoming proposes to build Deer Creek Reservoir and that Deer Creek Reservoir will result in certain depletions to the flow of the North Platte River. Wyoming Answer, para. 3(c). Wyoming estimates that the average annual yield of Deer Creek Reservoir ultimately will be from 6400 to 9600 acre-feet. Affidavit of Michael K. Purcell.

The precise amount and timing of depletions to the North Platte River from operation of Deer Creek Reservoir are not stated in the pleadings or affidavits. Wyoming has conducted detailed studies which predict

the amount and timing of depletions to the North Platte River from Deer Creek Reservoir and Wyoming has provided the results of those studies to Nebraska through the public review process on the § 404 permit application and the Environmental Impact Statement. Affidavit of Michael K. Purcell. Nebraska disputed the results of those studies in its comments on the Draft Environmental Impact Statement. Nebraska alleged that depletions to the North Platte River from Deer Creek Reservoir could be as much as 25,000 acre-feet annually. Even if that fact issue is still in dispute, it is immaterial to the question of whether Deer Creek Reservoir violates the Decree. The mere existence of disputed issues of fact that are not material cannot defeat Wyoming's entitlement to judgment as a matter of law that construction and operation of Deer Creek Reservoir will not violate the Decree. Only if there were genuine issues of *material* fact would the Court be required to conduct a trial. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986).

Here, Wyoming has a right under the Decree to construct Deer Creek Reservoir regardless of the precise amount and timing of its depletions to the North Platte River. Any dispute about those depletions therefore is not material to this case. It may be material to the environmental disclosures required in the Environmental Impact Statement process and to the public interest review required in the § 404 permit process, but it is irrelevant to the question whether Deer Creek Reservoir violates the Decree.

As a matter of law, the construction and operation

of a municipal water storage project, such as Deer Creek Reservoir, on a tributary entering the North Platte River between Pathfinder and Guernsey Reservoirs will not violate the Decree for two reasons: (1) the Decree does not restrict Wyoming's right to develop water resources on tributaries below Pathfinder Reservoir, and (2) the Decree affirmatively exempts ordinary and usual municipal uses from its operation.

1. *The Decree does not restrict Wyoming's use of water for any purpose from tributaries entering the North Platte River below Pathfinder Reservoir.*

The Decree places specific restrictions on the diversion, storage and use of water in each of the three states. None of those restrictions applies to Wyoming's use of water from the tributaries entering the North Platte River below Pathfinder Reservoir. Wyoming's use of water from those tributaries cannot, as a matter of law, violate the Decree.

The absence of restriction on the tributaries between Pathfinder and Guernsey Reservoirs was not an oversight. Nor can Nebraska argue that any restriction on those tributaries is implicit in the Decree. The Special Master concluded that regulation of the tributaries, even considering the water supply during the 1931-1940 extreme drought period, was unjustified because:

> On the tributary streams the runoffs are of shorter duration even than those above Pathfinder. The flows reach their peak in May, fall off rapidly during June, and usually run dry by the first of July, before there is a serious

> shortage of water in the river. There are hundreds of small diversions on these tributaries, regulation of which could be of little, if any, benefit to the river below.

Special Master's Report at 52, *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (footnotes omitted).

In the Decree the Court retains jurisdiction to address, *inter alia*, "the question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." Decree, para. XIII(c). Although Nebraska has invoked the Court's retained jurisdiction under Paragraph XIII of the Decree, it has emphatically stated that it has done so for the sole purpose of enforcing the Decree and not for modifying the Decree in any way, and has not alleged changed conditions suggesting the need for any modification. Reply to Wyoming Brief in Opposition to Motion for Leave to File Petition at 2; Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 3. Because the Decree does not restrict Wyoming's use of water from the tributaries between Pathfinder and Guernsey Reservoirs, Nebraska's request to enforce the Decree against such use must be denied as a matter of law.

2. *Wyoming's apportionment under the Decree includes the right to build and operate projects such as Deer Creek Reservoir for ordinary and usual municipal uses.*

In the previous litigation in this case, the parties agreed that "there should be no restriction upon the diversion from the North Platte River in Colorado or

Wyoming of water for ordinary and usual domestic and municipal purposes and consumption and that nothing in the recommended decree is intended to or will interfere with such diversions and uses." *Nebraska v. Wyoming*, 325 U.S. at 656. The Court adopted that provision and extended it to the tributaries at Wyoming's suggestion. *Id.* That resulted in a separate provision of the Decree affirmatively providing that the Decree "shall not affect or restrict" ordinary and usual domestic and municipal uses. Decree, para. X.

It is undisputed that Deer Creek Reservoir will be used to provide a municipal water supply for the City of Casper and other small municipalities along the North Platte River below Alcova Reservoir. The City of Casper needs Deer Creek Reservoir in order to provide an adequate, reliable supply of water to its present population. Affidavit of Michael K. Purcell.[4] The municipal use of water from Deer Creek Reservoir is also ordinary and usual. There is no suggestion in the Court's opinion or Decree that the words "ordinary and usual municipal use" were intended to have a meaning other than their ordinary meaning in common usage. They obviously refer to any commonly occurring use of water by a municipal entity in providing a water supply to its citizens and customers. *See generally* 2 C. Kinney, *Law of Irrigation and Water Rights*

[4]The water from Deer Creek Reservoir will not be delivered directly to the City of Casper's water diversion facilities. Rather, the primary use of the reservoir will be to release water through Deer Creek to the North Platte River below Casper's diversion works as a substitute supply to allow Casper to deplete the North Platte River by an equivalent amount. Affidavit of Michael K. Purcell. The important point, however, is that Deer Creek Reservoir will be used to supply water to the municipalities and such use therefore is a municipal use. Water available from the reservoir in excess of municipal needs will be temporarily used to supply non-municipal uses.

1200 (2d ed. 1912); 1 R. Clark & C. Martz, *Waters and Water Rights* § 54.3 (1967).

At the time of the Special Master's Report and Decree, the laws of both Wyoming and Colorado specifically recognized that inherent in a municipal water right is the right and the need to expand the use to accommodate growth of the municipality. *Holt v. City of Cheyenne*, 22 Wyo. 212, 137 P. 876 (1914); *City and County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1939). Nebraska law is in accord. *See Metropolitan Utilities District of Omaha v. Meritt Beach Co.*, 179 Neb. 783, 800, 140 N.W.2d 626, 637 (1966) (municipality permitted to supplement its water supply with ground water from Platte River alluvial well field, since "use of ground water by the inhabitants of a city for the purpose of health, convenience, and comfort is a public use of such water", citing *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933)). Nebraska law allows appropriators, including municipalites, to store unappropriated waters in surface reservoirs or to divert such waters to recharge ground water supplies. NEB. REV. STAT. § 46-241 (1943, Reissue 1984). Wyoming's use of Deer Creek Reservoir to supply the needs of Casper and other municipalities would be considered an ordinary and usual municipal use under Nebraska law. In any event, it is precisely the type of use contemplated by Paragraph X of the Decree.

Nebraska asks the Court to enforce the Decree to restrict or limit Wyoming's development of municipal uses such as Deer Creek Reservoir. The relief requested by Nebraska is so plainly contrary to Paragraph X of the Decree that it must be denied as a matter of law.

There is no reasonable construction of the Decree that would allow Nebraska to invoke the Court's retained jurisdiction under Paragraph XIII to restrict or limit a municipal use that is expressly exempt from such restriction by Paragraph X of the Decree. The Decree must be read and construed in its entirety to give effect to all of its provisions. Nebraska's interpretation of the Decree disregards Paragraph X.

The Decree, in effect, apportioned to Colorado and Wyoming the right to use water from the North Platte and its tributaries for future ordinary and usual domestic and municipal uses without restriction. To restrict municipal use now would be to effect a new apportionment and to substantially modify the Decree. Nebraska cannot have such relief in a suit to *enforce* the Decree.

The Decree's treatment of municipal uses is consistent with both common sense and principles of certainty and finality. Although subject to administration in the priority system like other water rights, domestic uses (both private and municipal) are generally recognized to be preferred uses, as they are by Nebraska, Wyoming and Colorado. NEB. CONST. art. XV, § 6; NEB. REV. STAT. §§ 46-204, 46-613, 46-648 (Reissue 1984); WYO. STAT. § 41-3-102 (1977); COLO. CONST. art. XVI, § 6. *See also Connecticut v. Massachusetts*, 282 U.S. 660, 673 (1931).[5] The express affirmative exemption of munici-

[5] There, Connecticut asserted that any further reduction in the flow of the Connecticut River would injure its vested rights. The Boston area faced a serious water shortage. Denying the injunction sought by Connecticut, the Court said:

> [T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence ... Drinking and

pal uses by a separate article of the Decree reflects intent that future expansion of such uses not be limited and that such uses be treated differently than irrigation uses for purposes of the Court's retained jurisdiction. Otherwise, Paragraph X would be superfluous.

Nebraska agrues that Wyoming's interpretation of Paragraph X of the decree would "gut the underlying apportionment for irrigation expressed in the Decree" by allowing municipal uses in Wyoming and Colorado potentially to deplete the entire flow of the North Platte. Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 14. Paragraph X of the Decree reflects the special Master's and the Court's recognition that future domestic and municipal uses in the sparsely populated North Platte basin in Wyoming and Colorado would not be large enough to threaten Nebraska's apportionment for irrigation. The operation of the priority system to protect existing senior rights under Wyoming and Colorado law greatly limits the potential for increased depletions of North Platte River flows by future municipal use.

Wyoming believes that Deer Creek Reservoir poses no threat to Nebraska's apportionment. While Nebraska may disagree, it has not alleged facts that, if proved, would support a finding of threat of injury to its canals in the Whalen to Tri-State section, which are its only rights under the Decree.

The Court's treatment of municipal uses is also consistent with its reluctance in the earlier opinion and

> domestic purposes are the highest uses of water. An ample supply of wholesome water is essential.

282 U.S. at 669, 673.

Decree to interfere with uses of water in Wyoming more than necessary to prevent the injury that Nebraska alleged had occurred during the 1930's drought period. Both the Special Master and the Court questioned whether Nebraska had demonstrated any threat of injury under average water supply conditions. They pointed out that the Decree was intended to address the conditions of the severe drought of the 1930's and that, if water supply conditions returned to normal, perhaps no restriction would be needed.[6] Special Master's Report at 10-11, 119-22, *Nebraska v. Wyoming*, 325 U.S. 589, 610, 620 (1945).

It is not possible for the Court to both grant the relief requested by Nebraska and give effect to Paragraph X of the Decree. Wyoming is entitled to a judgment determining as a matter of law that the Decree allows Wyoming to construct and operate municipal water development projects such as Deer Creek Reservoir. Certainty and finality regarding this issue are essential for municipal water supply planning in the North Platte basin in Wyoming.

C. *Wyoming's Suit to Require the United States Bureau of Reclamation to Obtain Wyoming Permits for Storage in the Inland Lakes Does Not Violate the Decree.*

The only "action" that threatens in any way to affect the storage of water in the Inland Lakes is the lawsuit that Wyoming filed in the Wyoming court against the Bureau of Reclamation and other federal agencies and officials. The complaint seeks an injunc-

[6] The *Nebraska v. Wyoming* opinion was a five to three decision with one justice not participating. The three dissenting justices believed that no restrictions against Wyoming were necessary or justified. *Nebraska v. Wyoming*, 325 U.S. 589, 664 (1945) (Roberts, Frankfurter and Rutledge, JJ., dissenting).

tion against the storage of water in the Inland Lakes until the United States has obtained the requisite Wyoming permit. However, Wyoming has agreed that, during the pendency of the litigation involving the Inland Lakes, it will not interfere with storage of water for the Inland Lakes under certain criteria agreed to among Nebraska, Wyoming and the Bureau of Reclamation. *See* Affidavit of Gordon W. Fassett and copy of 1987 North Platte River Ownership and Natural Flow Accounting Procedures attached thereto as Exhibits A and B.

The Wyoming lawsuit was originally filed in the Wyoming District Court in Torrington, Wyoming. It subsequently was removed, upon motion by the federal defendants, to the Federal District Court for Wyoming. The federal court denied the federal defendants' motion to dismiss and held that it had jurisdiction, but stayed proceedings pending a determination of whether the same issues will be litigated in this original action. A certified copy of the Order Staying Proceedings is reproduced in the Appendix at A-45.

This Court unquestionably decided in the earlier litigation in this case that Section 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. § 383 (1982), requires the Bureau of Reclamation to proceed in conformity with state water laws in constructing and operating its projects. *Nebraska v. Wyoming*, 295 U.S. 40, 42 (1935); *Nebraska v. Wyoming*, 325 U.S. 589, 612-15, 629 (1945). *See also California v. United States*, 438 U.S. 645 (1978). Nebraska affirmatively argued that point in the earlier litigation and cannot now take a contrary position. Answer Brief of State of Nebraska, Complainant, to Brief of United States Before Special Master, *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Edwards v.*

Aetna Life Insurance Co., 690 F.2d 595 (6th Cir. 1982) ("judicial estoppel" applied to bar party from asserting inconsistent position where court had previously ruled in that party's favor). Wyoming is entitled to judicial confirmation that Section 8 of the Reclamation Act still applies in Wyoming, and that the Bureau of Reclamation may not continue to disregard Wyoming law. It cannot be seriously argued that Wyoming's effort to obtain such a judicial determination constitutes a violation of the Decree.

Assuming that Section 8 of the Reclamation Act still applies in Wyoming, the question presented in the Wyoming law suit is whether the Bureau has proceeded in conformity with Wyoming law and, if not, what it must do to comply with Wyoming law. Those are issues of state law and it is not appropriate or efficient for the Supreme Court to attempt to resolve those in the first instance. *Arkansas v. Texas*, 346 U.S. 368 (1953). The Wyoming court is competent to decide such questions of Wyoming law but, where the United States has exercised its right to remove the case to federal court, the federal court is competent to, and in fact has a duty to, interpret and apply the state law as well. *Arizona v. Maypenny*, 451 U.S. 232 (1981). *See generally Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Nebraska suggests that the Bureau of Reclamation has a right to the storage of water for Inland Lakes under the Decree that exempts it from compliance with Wyoming law. Even assuming *arguendo* that Nebraska's argument is correct, there is no reason that the federal court cannot give full effect to the Supreme Court's Decree or any other principle of federal law that may be involved. Nebraska is incorrect in its insistence that it must be a party to the controversy

over the extent of the Bureau's rights simply because the case may involve interpretation and application of the Supreme Court's Decree. *See Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 110-11 (1938) (absence of signatory states as parties in suit to interpret and enforce apportionment compact held no bar to jurisdiction over the action).

The Bureau is the owner and operator of the North Platte Project for the benefit of the irrigators under the project. *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945). The Bureau has an obligation to secure the water rights for the project for the benefit of those irrigators. *Nevada v. United States*, 463 U.S. 110, 126-28 (1983). If the irrigators under the North Platte Project in Nebraska believe that their rights are not adequately protected by the Bureau, they are free to seek intervention in the case pending in federal court in Wyoming.

The Wyoming lawsuit seeks a determination of specific water rights and involves a limited, specific group of water users in Nebraska. Since those water users' interests can be adequately protected by the Bureau of Reclamation or by their own participation, there is no need for Nebraska to appear for them in the role of *parens patriae*. The mere fact that the case may involve interpretation and application of this Court's Decree requires neither that Nebraska be made a party nor that the Supreme Court exercise its original jurisdiction to preempt the litigation.

The Decree apportioning the North Platte River is an important, if not dominant, part of the law of the river. Any litigation concerning water rights on the North Platte River might involve interpretation and application of the Decree. A rule requiring the Sup-

reme Court to exercise its original jurisdiction whenever litigation, even among private parties, raises a question of interpretation or application of the Decree would not serve the interests of justice or sound judicial administration. It is entirely appropriate for state courts and lower federal courts to decide such questions in the first instance. The parties have recourse to the Supreme Court through the normal appellate process if they believe the lower court has erred in interpreting or applying the Decree. *See Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). If Nebraska believes that the ultimate outcome of that pending litigation to which it is not a party affects its apportionment under the Decree, it may then seek to invoke this Court's retained jurisdiction to consider such changed conditions.

The question that the Court must address is whether the Wyoming lawsuit itself violates the Decree. Surely it does not. The Bureau's refusal to apply for permits required by Wyoming law has caused uncertainty regarding the Bureau's operation of its North Platte Project to supply the Inland Lakes and regarding the effect of such operation on other Wyoming water rights. Without such permits, Wyoming water officials are unable properly to carry out their statutory duties to administer water rights in the North Platte River. Affidavit of Gordon W. Fassett. Wyoming's attempt to remove that uncertainty by requiring the Bureau of Reclamation to comply with Section 8 of the Reclamation Act and obtain Wyoming permits is not a violation of the Supreme Court's Decree.

There being no genuine issues of material fact in dispute concerning the action Wyoming has taken, this

Court should rule as a matter of law that the Wyoming lawsuit does not violate the Decree and should direct the federal district court in Wyoming to proceed with the case.

II. NEBRASKA'S RIGHTS UNDER THE APPORTIONMENT PROVIDED BY THE DECREE ARE LIMITED TO WATER SUPPLIES FOR LANDS IRRIGATED BY CANALS DIVERTING AT OR UPSTREAM OF TRI-STATE DAM.

Nebraska's pleadings do not describe any specific water rights, category of water rights or geographic area that Nebraska believes are injured by the Wyoming actions alleged in the Petition. To the extent that Nebraska seeks to enforce the Decree against Wyoming for the benefit of uses supplied by diversions below Tri-State Dam, the relief it claims is clearly beyond the scope and intent of the Decree and should be denied as a matter of law. Even if it were concluded that there are factual issues requiring a trial, partial summary judgment defining the limits of Nebraska's rights under the Decree would clarify the issues for such a trial and provide for more efficient trial preparation.

If, as Wyoming contends, it is *res judicata* that Nebraska's rights under the Decree are limited to uses of water diverted at or above Tri-State Dam, this proceeding will be simpler and less costly than otherwise. It would not be necessary for the parties to conduct pre-trial investigations nor to introduce evidence regarding surface and ground water resources and uses in the North Platte and Platte River basins in central Nebraska. It also would be unnecessary for the Court to consider uses of Platte River water to provide

flows for maintenance of the migratory bird habitat in the "Big Bend" reach of the Platte River as has been claimed by the National Audubon Society and the Platte River Whooping Crane Habitat Maintenance Trust, who seek to intervene. That matter would be determined as an intrastate matter among Nebraska interests.

The question of the limits of Nebraska's rights under the Decree is also raised by Wyoming's counterclaim. Wyoming asserts, *inter alia*, that Nebraska has violated the Decree (1) by demanding natural flow water for diversion in excess of the beneficial use requirements of the canals entitled to water under the Decree and (2) by bypassing or diverting water from sources above Tri-State Dam to uses below Tri-State Dam that are not recognized or authorized by the Decree. Wyoming Counterclaim, para. 2. Nebraska has denied those actions and has generally denied any violation of the Decree.

The question of the extent of Nebraska's rights under the Decree is a question of interpretation of the Decree that can be decided as a matter of law. While there may be disputed issues of fact as to whether and how much water has been diverted to uses below Tri-State, the basic legal question of whether Nebraska is entitled under the Decree to demand water for such uses is ripe for determination. A ruling on that legal question will simplify and clarify the factual issues raised by Wyoming's counterclaim. Such a procedure was employed in *United States v. California*, 332 U.S. 19, 26 (1947), where the Court, in an original action, upon motion for judgment filed by the United States, determined as a matter of law the basic legal issue of ownership of the three-mile marginal ocean belt.

There, the Court recognized:

> And there is no reason why, after determining in general who owns the three-mile belt here involved, the court might not later, if necessary, have more detailed hearings in order to determine with greater definiteness particular segments of the boundary. *Oklahoma v. Texas*, 258 U.S. 574, 582. Such practice is commonplace in actions similar to this which are in the nature of equitable proceedings.

Id., 332 U.S. at 26.

The judgment that Wyoming seeks on its counterclaim at this stage of the case is necessarily a partial summary judgment. It is within the scope and purpose of FED. R. CIV. P. 56(d). In the words of the drafters of the Federal Rules of Civil Procedure:

> The partial summary judgment is merely a pre-trial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact.

Advisory Committee Notes Accompanying 1946 Amendment to FED. R. CIV. P. 56.

Nebraska originally contended in the earlier litigation in this case that the apportionment should extend all the way down the North Platte and Platte Rivers in Nebraska to Grand Island, Nebraska. Special Master's

Report at 92, *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Nebraska presented extensive evidence of uses in the entire North Platte River basin. Special Master's Report at 254-67, *id.* At the close of the evidence, the Special Master concluded the following as to uses below Tri-State Dam:

> Nebraska now insists upon interstate priority administration extending only as far east as Bridgeport in that State. This removes the section east of Bridgeport from any further direct involvement in the case. As to the section west of Bridgeport to the Tri-State Dam, the conclusion has already been stated that its canals are so well supplied from return flows and other local sources that the section may be omitted from any consideration of interstate distribution.

Special Master's Report at 92, *id.*

Nebraska took exception to the Special Master's conclusion that no apportionment should be made for uses below Tri-State Dam. *Nebraska v. Wyoming*, 325 U.S. 589, 654-55 (1945). The Supreme Court expressly denied Nebraska's exception and adopted the Special Master's conclusion. The Court held:

> We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State. . . . If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, applica-

> tion for appropriate relief may be made at the foot of the decree.

Id., 325 U.S. at 628-29.

The Decree specifies certain canals serving Nebraska lands that are entitled to priority over diversion and storage by the federal projects in Wyoming and that are entitled to delivery of water under Nebraska's 75% apportionment of the natural flow below Whalen. Decree, paras. IV-V. Finally, the very basis of the apportionment of 75% of the natural flow below Whalen to Nebraska was a determination by the Special Master of the reasonable requirements of the Nebraska lands irrigated by canals diverting at or above Tri-State Dam. *Nebraska v. Wyoming*, 325 U.S. 589, 646-51 (1945).

When read in their entirety, the Decree, the Court's opinion and the Special Master's Report make clear the Court's conclusion that an apportionment of water in the North Platte River in Wyoming was not necessary to protect Nebraska uses below Tri-State Dam. Again, it is noteworthy that the Special Master had serious questions whether *any* restriction on Wyoming was necessary to prevent unreasonable harm to Nebraska. Special Master's Report at 10-11, 119-22, *id.* That is why the relief he recommended was limited in scope.

It is very important to Wyoming that it have certainty in the apportionment of the North Platte. This Court has recognized the value and importance of certainty and finality in the allocation of water resources in the arid west. *Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. United States*, 463 U.S. 110 (1983). The

limit of Nebraska's rights under the Decree to lands supplied by diversions at or above Tri-State Dam has been a key element in Wyoming's water supply planning. This issue must be laid to rest if Wyoming is to be able to reasonably plan future water development.

To the extent Nebraska seeks to enforce the Decree in order to provide water for Nebraska uses below Tri-State Dam, its petition should be denied as a matter of law. Moreover, for the purpose of simplifying and clarifying the issues remaining to be tried on Wyoming's counterclaim, the Court should confirm as a matter of law that Nebraska's rights under the Decree are limited to the supply of water for lands irrigated by canals diverting at or upstream of Tri-State Dam.

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment for Wyoming and against Nebraska on all of the claims in Nebraska's petition and should declare as a matter of law that Nebraska's rights under the Decree are limited to the irrigation of lands served by the canals specified in the Decree diverting at or upstream of Tri-State Dam.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

JENNIFER HAGER
Assistant Attorney General

123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

No. 108. Original

In The Supreme Court

Of The United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defandant.

APPENDIX
TO WYOMING BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

NEBRASKA v. WYOMING
(325 U.S. 589)
Decree

DECREE.
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the

Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that

unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transporation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	*Area Acres*	*Daily Loses-Second Feet May*	*June*	*July*	*Aug.*	*Sept.*
Alcova to Wendover	*8,360*	*53*	*76*	*87*	*76*	*56*
Guernsey Res. to Whalen	*560*	*4*	*5*	*6*	*5*	*4*
Whalen to State Line	*2,430*	*16*	*22*	*25*	*22*	*16*

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of

70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, it officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases

from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court

retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the state of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief

magistrates of the States of Colorado, Wyoming and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, ORIGINAL. NEBRASKA v. WYOMING (COLORADO, IMPLEADED DEFENDANT, AND THE UNITED SSTATES, IINTERVENOR.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment

of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado and Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never

exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	*Canal*	*Limitation in Sec. Feet*	*Seasonal Limitation in Acre Ft.*
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of

70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	*Area Acres*	*Daily Loss-Second Feet May*	*June*	*July*	*Aug.*	*Sept.*
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than

submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash*, Assistant Attorney General, for the State of Nebraska, *Howard B. Black*, Attorney General, for the State of Wyoming, *Duke W. Dunbar*, Attorney General, *H. Lawrence Hinkley*, Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STATE OF NEBRASKA, et al., Appellees,	)	
v.	)	No. 78-1775
BASIN ELECTRIC POWER COOPERATIVE, et al., Appellants.	)	
STATE OF NEBRASKA, et al., Appellees,	)	
v.	)	
RURAL ELECTRIFICATION ADMINISTRATION, et al., Appellants.	)	No. 78-1778

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that:

1. The Agreement of Settlement and Compromise ("Agreement") which was fully and finally executed on December 4, 1978, and which is attached to the Memorandum of Law being filed herewith as Appendix A and which is incorporated herein by reference, constitutes a full and final resolution of the disputes which gave rise to the above-captioned consolidated appeals.

2. Paragraph 14 of the Agreement provides that the Agreement shall be null and void unless each of the following occurs:

(a) the Secretary of the Interior gives his concurrence to section 12 of this Agreement;

(b) the Grayrocks Dam and Reservoir receives an exemption as provided in section 5 of the Endangered Species Act Amendments of 1978 or the Committee referred to therein determines that by virtue of this Agreement no exemption is required for the Project to proceed as in this Agreement provided; and

(c) the district court's judgment is vacated and the pending litigation is dismissed with prejudice.

3. The conditions subsequent contained in Paragraphs 14(a) and (b) of the Agreement have been satisfied. Attached as Exhibit B to the Memorandum of Law being filed herewith, is a letter of the Secretary of the Interior to Edward Weinberg dated January 5, 1979[1] which reflects the Secretary's concurrence to Section 12 of the Agreement. Attached as Exhibit C to the Memorandum of Law being filed herewith is a copy of the official transcript of the Endangered Species Committee. As pages 12-14 of that transcript reflect, the Endangered Species Committee voted unanimously in favor of the proposition which:

> "...[G]rants an exemption for Grayrocks project with the explicit condition of those mitigation and enhancement provisions set forth in the agreement of settlement and compromise dated December 4, 1978, by and among the litigants in the case of Nebraska et al. versus REA, et al."
>
> (Tr. at 12).

4. To satisfy the condition subsequent of Paragraph 14(c) of the Agreement, this Court is requested to enter an order which:

(1) provides that the amended judgment of the District Court below which was entered on October 23, 1978 and docketed on October 24, 1978 is vacated;

[1] The letter bears an erroneous date of January 5, 1978. The letter was actually issued on January 5, 1979.

(2) provides that these consolidated appeals are dismissed;

(3) remands the cases to the District Court with instructions to dismiss the cases with prejudice, provided that any party to the limitation may petition the District Court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978 which is attached as Exhibit A to the parties' Joint Memorandum of Law and which is incorporated herein by reference; and

(4) provides that, except as specifically provided in the Agreement, each party is to bear its own costs incurred in this litigation.

A proposed order which all parties agree will carry the Agreement into effect is being filed herewith.

5. The Rural Electrification Administration of the Department of Agriculture is currently preparing a supplemental environmental impact statement on the Missouri Basin Power Project, as required by Paragraph 13 of the Agreement.

6. All plaintiffs and intervening plaintiffs below agree, with respect to the Project which is the subject to the litigation herein, that they will neither bring nor support any new litigation by whomever brought asserting that any new environmental impact statements under the National Environmental Policy Act or actions under the Endangered Species Act of 1973, as amended by the Endangered Species Act Amendments of 1978, or under the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977, or under the Fish and Wildlife Coordination Act, are required in connection with the carrying out by the Missouri Basin Power Project of its obligations under the Agreement.

Dated: February 20, 1979.

(Signed)
Attorney for Defendant Basin
Electric Power Cooperative and
all Intervening Defendants

(Signed)
Attorney for Federal Defendants

(Signed)
Attorney for National Wildlife Federation,
Nebraska Wildlife Federation, and
National Audubon Society

(Signed)
Attorney for State of Nebraska

(Signed)
Attorney for Powder River Basin
Resource Council and Laramie River
Conservation Council

AGREEMENT OF SETTLEMENT AND COMPROMISE

THIS AGREEMENT OF SETTLEMENT AND COMPROMISE ("Agreement"), made and entered into this 4th day of December, 1978, by and among Basin Electric Power Cooperative ("Basin"), on its own behalf and as project manager and operating agent for the Missouri Basin Power Project ("Project"); Tri-State Generation and Transmission Association, Inc. ("Tri-State"), on its behalf and as agent for Chimney Rock Public Power District, the Midwest Electric Membership Corporation, Panhandle Rural Electric Membership Association, Northwest Rural Public Power District and Wheat Belt Power District; City of Lincoln, Nebraska; Wyoming Municipal Power Agency ("WMPA"); the State of Nebraska; the National Wildlife Federation, Inc.; Nebraska Wildlife Federation; National Audubon Society; Powder River Basin Resource Council; Laramie River Conservation Council; Anthony C. Liotta, in his official capacity as Deputy Assistant Attorney General, Land and Natural Resources Division, United States Department of Justice; Robert W. Feragen, in his official capacity as Administrator of the Rural Electrification Administration, United States; and James W. Ray, in his official capacity as District Engineer, Omaha District, United States Army Corps of Engineers.

WHEREAS, the parties desire to settle and compromise the dispute that has arisen among them concerning whether the REA Administrator, in issuing loan guarantees for the Project, and the District Engineer, Omaha District, U.S. Army Corps of Engineers, in issuing a dredge and fill permit for the Grayrocks Dam and Reservoir, a feature of the Project, under Section 404 of the Federal Water Pollution Control Act, as amended, acted in compliance with applicable laws and regulations;

NOW THEREFORE, in consideration of the promises

and convenants herein contained, the parties hereto agree as follows:

1. The maximum annual consumptive water use by the power plant at the Laramie River Station will be limited to 23,250 acre-feet per year.

2. To satisfy the requirements cited in Section 1 above, the Project will first utilize the quantity of water which is available to the Project as a result of the Boughton Ditch acquisition. The Project will, secondly, utilize the quantity of water which is available to the Project from the inundated water rights at the reservoir site. The Project will, thirdly, utilize the quantity of water which has been made available to the Project from the Johnson well fields in accordance with the Order of the Wyoming State Engineer dated November 1, 1978 (The Project shall withdraw the "enlargement application" set forth in Paragraph 4 of that Order at page 12). The Project will, fourthly, utilize the water which is stored in the Grayrocks Reservoir. The water rights representing the foregoing are enumerated in Exhibit A appended hereto and incorporated herein by reference. The Project shall not obtain any water or water rights within the Laramie River drainage other than those set out above and enumerated in Exhibit A, or store any water in the Grayrocks Reservoir except pursuant to water rights set out above and enumerated in Exhibit A, or cause the other obligations of this Agreement to be satisfied by water or water rights from within the Laramie River drainage other than by those set out above and enumerated in Exhibit A, except that:

(a) The project may for purposes of start up, initial plant operation and for subsequent intermittent periods of plant operation, utilize groundwater from irrigation wells existing as of the date of this Agreement, or from new wells used in lieu of existing irrigation wells, but only so that such

groundwater use by the Project shall not exceed on an annual basis the amount of water historically consumed by the irrigation appropriation and use from the above mentioned existing wells as determined by the appropriate Wyoming state agency. (This groundwater use shall not increase the limit stated in Section 1); and

(b) This provision shall not preclude acquisition of water or water rights of Corn Creek Irrigation District by the Project to satisfy the other provisions of this Agreement out of water rights or applications for water rights of Corn Creek Irrigation District existing as of the date of this Agreement.

3. All water intake structures will be designed and implemented for the sole purpose of supplying water to the Project for Project purposes. No other intake structures will be allowed and the Project will not authorize other entities to construct intake structures at the reservoir site. All intake structures will be metered. A stream-gauging station will be provided above the reservoir and at a distance sufficiently remote from the reservoir so that reservoir storage will not affect the accuracy of the stream-guaging [sic] apparatus. There will be stream-gauging station located below the dam and reservoir site but above any additional drainage or draw from the river and another stream-guaging [sic] station at the mouth of the Laramie River. There will be metering apparatus in each pumping structure supplying water to the Project, including all underground water wells.

4. (a) The Project agrees to release adequate flows from Grayrocks Reservoir to insure that flows at a minimum, as measured at the first gauging station below the dam, are 40 cfs during April, and 40 cfs or 75% of the natural flow at the same gauging station during the remaining five months of the year (May through September, inclusive),

whichever is greater. The Project agrees to operate the Grayrocks Reservoir so as to provide for the delivery of 40 cfs at the mouth of the Laramie River during six months of the year (October through March, inclusive), 50 cfs during April, and 40 cfs or 75% of the natural flow of the Laramie River at its mouth during the remaining five months of the year (May thorugh [sic] September, inclusive), whichever is greater: provided, that the Project will not be required to release more than 200 cfs at any one time nor more than 12,000 acre-feet during any month.

(b) During the initial reservoir filling period, flows will be maintained at the mouth of the Laramie River of at least 20 cfs from October through March, and at 40 cfs during the six months until 70,000 acre-feet have been placed in storage.

(c) Whenever total reservoir storage drops below 50,000 acre-feet, the flow levels to be maintained by the Project shall be 20 cfs from October through March, and 40 cfs from April through September, as measured at the mouth of the Laramie River.

5. When and if the Corn Creek Irrigation District constructs its diversion and delivery system and the District begins using water from the Laramie River Basin, the Project will deliver into the mouth of the Laramie River on an annual basis an amount of water equal to the minimum flows specified in Section 4 minus 22,500 acre-feet and, in addition, will deliver into the North Platte River on an annual basis 11,250 acre-feet, subject to adjustment as provided below. The Project may meet this obligation (subject to the limitations in Section 2) with any flows from the Laramie River which exceed the number of acre-feet derived by subtracting 22,500 from the minimum flow figures in Section 4. Alternatively, at its option, the Project may acquire a portion of this amount or an equivalent

amount of water from sources in Wyoming and/or the North Platte Basin in Nebraska and deliver it to the North Platte. This obligation shall continue for as long as the Laramie River Station remains in commercial operation.

6. If the water delivered to the North Platte River by the Project is obtained from any source below the confluence of the Laramie River and the North Platte River, the Project shall be credited with the amount deemed to be conveyance loss. Conveyance loss shall be determined by the North Platte Natural Flow Committee referred to in Section 8.

7. The Project will deliver water annually as provided in sections 5 and 6 above, in the same irrigation season that it is withdrawn by the Corn Creek Irrigation District. For purposes of this Agreement, the irrigation season shall be April through September, inclusive. As used in sections 5 and 6, "deliver" includes, without limitation, abandonment to the North Platte, or failure to use, either temporarily or permanently, Laramie River or North Platte River water or water rights, the right to the use of which has been acquired by the Project, either by purchase, contract or otherwise, so that either the flow of the North Platte is augmented or an existing depletion is avoided as the result of such abandonment or failure to use.

8. The Project will annually submit to the Governor of the State of Nebraska, the Attorney General of the State of Nebraska, and the Director of the Department of Water Resources of the State of Nebraska (with copies to the Laramie River Conservation Council, the Powder River Basin Resource Council, and the National Wildlife Federation) a written report containing all the data and information necessary to show that all conditions agreed to in this Agreement have been fully complied with. The annual report will also incude all pertinent data and information

gathered from the metering and gauging apparatus required in section 3 above. The Project will submit this written report, as well as an oral report, if asked to do so, to the North Platte Natural Flow Committee meeting of officials of the State of Nebraska and the State of Wyoming each year. For the purpose of assuring interested parties that the gauging apparatus is accurately recording data and in proper working condition, officials of the Nebraska Department of Water Resources will be allowed to verify the information supplied from the gauging apparatus and to conduct appropriate tests, subject to prior agreement by the project Operating Agent, upon such apparatus to determine that they are in proper working condition. The Project will allow officials of the State of Nebraska to have access to all records kept and the right to request and receive reasonable supplemental data regarding compliance by the Project with the water release and delivery requirements of this Agreement.

9. Each October, Basin will request a meeting with a representative to be designated by the State of Nebraska, at which Basin will review its proposed operating plan for Grayrocks Reservoir for the next calendar year. Basin will give serious consideration to comments and recommendations by the Nebraska representative and modify its operating plan to the extent compatible in its judgment with full and efficient operation of Laramie River Station, its commitments to other parties in respect to reservoir management, and with any recommendations by other interested parties such as the U.S. Fish and Wildlife Service and the State of Wyoming. Similar information and consultation will be provided during the year if, in the judgment of the Operating Agent, significant changes in the operating plans are required.

10. Upon the occurrence of all of the events specified in Section 14, the Project, through Basin, shall establish the

Platte River Whooping Crane Habitat Maintenance Trust by executing a trust declaration in the form appended hereto as Exhibit B, which is incorporated herein by reference.

11. (a) Basin, Tri-State and WMPA agree that the proposed amendment to Wyoming Statute §41-3-104, attached hereto as Exhibit C is consistent with the policies of their respective organizations and for a period of ten (10) years hereafter agree to actively support the proposed amendment before the Wyoming Legislature. They further agree to actively support the specific concept of this proposed amendment if it is contained in or included with other proposed amendments to Wyoming Statute §41-3-104, which they otherwise may not choose to support.

(b) Basin (except as otherwise set forth in this Agreement as to the Project), Tri-State, and WMPA agree that they shall not, without prior written consent of the Laramie River Conservation Council and the Powder River Basin Resource Council, transfer, nor seek to transfer from irrigation use or appropriation to industrial use or appropriation, water or water rights within the Laramie River drainage before the 1st day of December, 1988.

12. The parties agree that compliance by the Project with this Agreement satisfies the requirements of the Endangered Species Act of 1973 as amended by the Endangered Species Act Amendments of 1978.

13. All objections to the adequacy of the existing EIS and to the 404 Permit as amended and to the REA loan guarantees are withdrawn. A supplemental EIS is under preparation. The non-Federal parties agree not to challenge its adequacy.

14. This Agreement shall be null and void unless each

of the following occurs:

(a) the Secretary of the Interior gives his concurrence to section 12 of this Agreement;

(b) the Grayrocks Dam and Reservoir receives an exemption as provided in section 5 of the Endangered Species Act Amendments of 1978 or the Committee referred to therein determines that by virtue of this Agreement no exemption is required for the Project to proceed as in this Agreement provided; and

(c) the district court's judgment is vacated and the pending litigation is dismissed with prejudice.

15. Upon execution of this Agreement, the parties, through their respective counsel, will promptly file in the Eighth Circuit Court of Appeals a stipulation incorporating this Agreement and requesting that the Eighth Circuit Court of Appeals take appropriate action to vacate the judgment of the District Court and to dismiss the pending litigation with prejudice. The stipulation shall also incorporate the agreement of plaintiffs that they will neither bring nor support any new litigation by whomever brought asserting any further environmental impact statements or actions under the Endangered Species Act of 1973 as amended by the Endangered Species Act Amendments of 1978 are required in connection with carrying out by the Project of its obligations under this Agreement.

16. Upon the occurrence of all of the events specified in Section 14, the Project shall pay attorneys' fees and costs as follows:

State of Nebraska	$60,000
Powder River Basin Resource Council and Laramie River Conservation Council	25,000

National Wildlife Federation,
Nebraska Wildlife Federation,
and National Audubon Society 50,000

17. This Agreement shall be executed in fourteen counterparts, numbered consecutively 1 through 14, each of which shall be deemed to be an original.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

(Signed)

Basin Electric Power Cooperative
Tri-State Generation and Transmission Association, Inc.
City of Lincoln
Wyoming Municipal Power Agency
The State of Nebraska (Governor and Attorney General)
The National Wildlife Federation, Inc.
The Nebraska Wildlife Federation
National Audubon Society, Inc.
Powder River Basin Resource Council
Laramie River Conservation Council
Deputy Assistant Attorney General*
Land and Natural Resources Division
Department of Justice
Administrator, Rural Electrification Administration*
District Engineer, Omaha District*
U.S. Army Corps of Engineers

*The Justice Department, the Rural Electrification Administration and the Corps of Engineers have no involvement in Sections 11 and 16 of this Agreement.

[EXHIBITS OMITTED]

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 78-1775

State of Nebraska, et al., Appellees, v. Basin Electric Power Cooperative, Inc., et al., Appellants.	)	Appeals from the United States District Court for the District of Nebraska

No. 78-1778

State of Nebraska, et al., Appellees, v. Rural Electrification Administration et al., Appellants.	)	

Filed: February 27, 1979

Before GIBSON, Chief Judge, HEANEY and STEPHENSON, Circuit Judges.

ORDER

This cause having come before the court on a "Joint Motion Filed on Behalf of All Parties for an Order Dismissing Appeals, Vacating the Judgment Below, and Remanding the Cases to the District Court with Instructions to Dismiss With Prejudice," and the court having fully considered that motion, the accompanying Stipulation and Joint Memorandum of Law, and the entire record herein, it is

ORDERED that the amended judgment of the district

court below which was entered on October 23, 1978, and docketed on October 24, 1978, is hereby vacated;

FURTHER ORDERED that these consolidated appeals are hereby dismissed;

FURTHER ORDERED that these cases are hereby remanded to the district court with instruction to dismiss the cases with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978, which is attached as Exhibit A to the parties' Joint Memorandum of Law and which is incorporated herein by reference; and

FURTHER ORDERED that, except as specifically provided in the Agreement of Settlement and Compromise, each party is to bear its own costs incurred in this litigation. Mandate will issue forthwith.

A true copy.

Attest: (Signed)
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, et al.	)	
Plaintiffs.	)	
vs.	)	ORDER OF
RURAL ELECTRIFICATION	)	DISMISSAL
ADMINISTRATION, et al,	)	
Defendants.	)	CV76-L-242

Pursuant to the mandate from the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that this case is dismissed with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978.

Dated March 23, 1979.

BY THE COURT
(Signed)
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

STATE OF NEBRASKA, et al, Plaintiffs,	)	ORDER OF DISMISSAL CV78-L-90
vs.	)	
JAMES W. RAY, et al, Defendants.	)	

Pursuant to the mandate from the United States Court of Appeals for the Eighth Circuit,

IT IS ORDERED that this case is dismissed with prejudice, provided that any party to the litigation may petition the district court for the interpretation and enforcement of any of the terms of the Agreement of Settlement and Compromise dated December 4, 1978.

Dated March 23, 1979.

BY THE COURT
(Signed)
Chief Judge

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT IN AND FOR GOSHEN COUNTY, WYOMING

STATE OF WYOMING, ex rel., GEORGE L. CHRISTOPULOS, WYOMING STATE ENGINEER, Plaintiff, vs. UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION, and DONALD PAUL HODEL, SECRETARY OF THE INTERIOR; C. DALE DUVALL, COMMISSIONER OF RECLAMATION; BILL E. MARTIN, REGIONAL DIRECTOR, MISSOURI BASIN REGION, U.S. BUREAU OF RECLAMATION; DAVID G. WILDE, PROJECT MANAGER, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; KENNETH C. RANDOLPH, CHIEF, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION; WILLIAM McCRACKEN, HYDROLOGIC TECHNICIAN, LAND AND WATER OPERATIONS BRANCH, NORTH PLATTE RIVER PROJECTS OFFICE, U.S. BUREAU OF RECLAMATION, in their official capacities, Defendants.	Docket No. 23-13 Filed October 3, 1986 (Signed) Clerk of District Court, Goshen Co.

COMPLAINT

COMES NOW the State of Wyoming by and through its attorney, A.G. McClintock, Attorney General, and in support of this complaint against Defendants alleges:

1. This action is brought pursuant to W.S. 41-2-111 upon request of the State Engineer to bring a suit to enjoin the unlawful diversion, storage and use of the waters of the State.

2. This court has jurisdiction over this matter pursuant to W.S. 41-2-111, Article 5, Section 10 of the Wyoming Constitution and W.S. 1-37-101 et seq. (1977). In particular, W.S. 41-2-111 empowers the district court to enjoin the unlawful appropriation, diversion or use of waters of the State. A showing of injury in a suit brought pursuant to W.S. 41-2-111 is not required as a condition to the issuance of any temporary restraining order, preliminary or permanent injunction.

3. This District Court has jurisdiction over the Defendants pursuant to the McCarren Amendment, 43 U.S.C. § 666. That Act provides in part:

> Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by

reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided That no judgment for costs shall be entered against the United States in any such suit.

4. Venue in the District Court of Goshen County, Wyoming is proper since the illegal diversion complained of herein occurs at Whalen Diversion Dam, on the North Platte River in Goshen County, Wyoming.

5. Defendant Donald Paul Hodel is Secretary of the Interior and, pursuant to 43 U.S.C. § 373, is charged by Congress with the duty of carrying out the provisions of the Reclamation Act of 1902, as amended. 43 U.S.C. § 371 et seq.

6. Defendant C. Dale Duvall is Commissioner of Reclamation and, pursuant to 43 U.S.C. § 373a, is charged by Congress with administration of the Reclamation Act of 1902, as amended. 43 U.S.C. §§ 371 et seq.

7. Defendant Bill E. Martin is the Regional Director for the Missouri Basin Region, U.S. Bureau of Reclamation (Bureau) which region includes the part of the North Platte River drainage that is relevant to this suit.

8. Defendants David G. Wilde, Project Manager, Kenneth C. Randolph, Chief of Land and Water Operations, and William McCracken, Hydrologic Technician, are employees of the U.S. Bureau of Reclamation in the North Platte River Projects Office in Mills, Wyoming and are responsible for the Bureau operations and facilities relevant to this action.

9. The Defendant United States owns and, through the

remaining Defendants, controls the diversion structures, conveyance systems and storage facilities in the "North Platte Project" along with the other storage facilities on the North Platte River in Wyoming where the unlawful acts occur and are therefore necessary parties to this suit.

10. The "North Platte Project" consists of reservoirs, structures and a system of canals and ditches that convey and distribute waters of the North Platte River to lands in Wyoming and Nebraska as part of a federal reclamation project. Defendants' Pathfinder Reservoir, Guernsey Reservoir, Whalen Diversion Dam, the Interstate Canal and four off-channel reservoirs (hereinafter referred to as the Inland Lakes) located in Nebraska and supplied by the Interstate Canal are the relevant component parts of the "North Platte Project."

11. The "North Platte Project" was planned, constructed and is to be operated in accordance with the provisions of an Act of Congress known as the Reclamation Act of 1902 as amended. 32 Stat. 388. Section 8 of that Act provides:

> That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of waters thereof; *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and

beneficial use shall be the basis, the measure, and the limit of the right.

Id. at 390 (See 43 U.S.C. §§372, 383).

12. The North Platte River in Wyoming from which the unlawful diversions complained of herein are made is subject to administration according to Wyoming law and the terms and conditions of the Supreme Court's Order and Decree entered in *Nebraska v. Wyoming*, 325 U.S. 665, 66 S.Ct. 1, 89 L.Ed.2d 1857 (1945). Neither the Supreme Court's decree or its opinion in *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815, (1945) relieved the Defendants from the duty of complying with the provisions of Wyoming law in order to appropriate, divert or use the waters of the North Platte River in Wyoming.

13. Article 8 Section 1 of the Wyoming Constitution provides that the water of all natural streams, springs, lakes or other collections of still water within the boundaries of the State are property of the Plaintiff, State of Wyoming.

14. Article 8 Section 3 of the Wyoming Constitution provides that priority of appropriation for beneficial uses shall give the better right.

15. Article 8 Section 5 of the Wyoming Constitution empowers the State Engineer to supervise the distribution of the waters of the State.

16. Pursuant to W.S. 41-4-501, any person, association or corporation intending to beneficially use the public water of the State must apply for and obtain a permit before doing so.

17. Pursuant to W.S. 41-3-301 et seq. (1977), any person, corporation, association or organization, of any nature

whatsoever, intending to divert water for beneficial use through storage must first apply for and obtain a permit before doing so.

18. Any person, association or corporation intending to store water in an off-stream reservoir is required to apply for and obtain a permit for the diversion of water through the reservoir supply canals to the reservoir and for the reservoir itself. W.S. 41-3-301 et seq. and W.S. 41-4-501 et seq. (1977).

19. Defendants are "persons" as defined by W.S. 8-1-102(a)(vi) and used in W.S. 41-4-301 et seq. and 41-3-501 et seq. and are subject to the provisions of Wyoming law.

20. Before Wyoming's waters can be appropriated, stored or diverted within this State for use outside of the State, compliance with the provisions of W.S. 41-3-115 (1977) is required.

21. Pursuant to Wyoming law, Defendants have secured adjudicated water rights for the "North Platte Project" for storage of water in Pathfinder Reservoir and Guernsey Reservoir. This water is allocated for irrigation of lands in Wyoming and Nebraska served through the Interstate Canal.

22. Defendants have not applied for or secured a permit to divert the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes pursuant to Wyoming law. There is no other means of acquiring the right to divert Wyoming water for that purpose than through those provisions of Wyoming law set forth above. *Lewis v. Board of Control*, 699 P.2d 822 (Wyo. 1986).

23. Defendants have been diverting, are now diverting, and intend to continue diverting the natural flow of the

North Platte River at Whalen Diversion Dam, Goshen County, Wyoming through the Interstate Canal for storage in the Inland Lakes.

24. Defendant's diversion of the natural flow of the North Platte River at Whalen Diversion Dam for conveyance through the Interstate Canal for storage in the Inland Lakes is unlawful and therefore must cease.

25. Additionally, Defendants have in the past, are now and intend to continue diverting, accumulating and storing the natural flow of the North Platte River in their reservoirs in Wyoming for the benefit of the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs contrary to Wyoming law.

26. Defendants have neither applied for nor secured the necessary permits pursuant to Wyoming law to divert, accumulate and store water for the benefit of Inland Lakes in the manner described above in allegation 25. W.S. 41-3-301 et seq. and 41-4-501 et seq.

27. Defendants' accumulation and storage of natural flow waters in their Wyoming reservoirs, in the manner described above in allegation 25 for the benefit of Inland Lakes is unlawful and therefore must cease.

WHEREFORE, Plaintiff prays:

1. That this Court declare that Defendants have no rights to divert the natural flows of the North Platte River in Wyoming in any manner for storage in the Inland Lakes until they acquire such a right in the manner prescribed by Wyoming law.

2. That this Court permanently enjoin Defendants,

their agents, employees, and representatives from diverting natural flows of the North Platte River in Wyoming through the Interstate Canal for storage in the Inland Lakes or in any manner diverting, accumulating and storing water within their Wyoming reservoirs on the North Platte River for the benefit of storage in the Inland Lakes out of priority, ahead of and separate and apart from the adjudicated storage rights in those reservoirs until the Defendants have complied with the laws of the State of Wyoming.

3. That this Court grant such other relief as it may deem necessary, just and proper.

Respectfully submitted this 3rd day of October, 1986.

(Signed)
A.G. McClintock
Attorney General
Jennifer Hager
Assistant Attorney General
Dennis C. Cook
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

PLAINTIFF'S ATTORNEYS

State of Wyoming)
) ss
County of Laramie)

George L. Christopulos, being duly sworn, deposes and says: he is the State Engineer for the State of Wyoming, the above named Plaintiff; he has read the foregoing complaint and the same is true to the best of his knowledge and belief.

(Signed)
George L. Christopulos

Subscribed and sworn to before me this 3rd day of October, 1986.

(Signed)
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

STATE OF WYOMING, ex rel., GEORGE L. CHRISTOPULOS, WYOMING STATE ENGINEER,

Plaintiff,

vs.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION, and DONALD PAUL HODEL, Secretary of the Interior; C. DALE DUVALL, Commissioner of Reclamation; BILL E. MARTIN, Regional Director, Missouri Basin Region, U.S. Bureau of Reclamation; DAVID G. WILDE, Project Manager, North Platte River Projects Office, U.S. Bureau of Reclamation; KENNETH C. RANDOLPH, Chief, Land and Water Operations Branch, North Platte River Projects Office, U.S. Bureau of Reclamation; WILLIAM McCRACKEN, Hydrologic Technician, Land and Water Operations Branch, North Platte River Projects Office, U.S. Bureau of Reclamation, in their official capacities,

Defendants.

NO. C86-0370-B

ORDER STAYING PROCEEDINGS

This matter came before the Court on defendants' motion to dismiss or to stay the proceedings and on plaintiff's motion to remand the case to state district court. The Court, having heard the arguments of counsel, having reviewed the pleadings, and being fully advised in the premises, FINDS and ORDERS as follows:

This is an action to enjoin the United States, its agencies and officials from diverting water from the North Platte River at Whalen Diversion Dam in Wyoming and sending the water through the Interstate Canal for storage in Inland Lakes, Nebraska. The State of Wyoming also seeks to enjoin the defendants from diverting Wyoming water until the United States obtains permits required by Wyoming law. The complaint was filed in Wyoming District Court and removed to this Court.

The complaint alleges that the defendants administer the Reclamation Act of 1902, as amended, 43 U.S.C. §§ 371 *et seq*. Section 8 of that Act requires defendants to comply with state water appropriation and diversion laws. The complaint consequently alleges that diversion of the North Platte River is unlawful absent a permit from the State Engineer. The State alleges jurisdiction under Wyo. Stat. § 41-2-111 (1977) and the McCarren Amendment, 43 U.S.C. § 666.

Related litigation is pending in the United States Supreme Court. The State of Nebraska was granted leave to file a petition in the Supreme Court for an order enforcing the Court's decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), apportioning the interstate flow of the North Platte River. Nebraska claims that Wyoming violated the decree by attempting to prevent the Bureau of Reclamation from diverting water in the North Platte River for storage in Nebraska.

The United States argues that the complaint must be dismissed. It first contends that the state court lacked jurisdiction, thus defeating this Court's jurisdiction on removal. *See Goodrich v. Burlington Northern R.R. Co.*, 701 F.2d 129 (10th Cir. 1983) (derivative nature of removal jurisdiction deprives federal courts of subject matter jurisdiction on removal where the state courts lacked jurisdiction). The second argument for dismissal is that the State of Nebraska is a necessary party which should be joined if feasible. Because joinder of the State of Nebraska is impossible, the United States urges that the action should be dismissed pursuant to Fed. R. Civ. P. 19(b). Each argument is flawed.

The McCarren Amendment confers concurrent jurisdiction on the federal and state courts. *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 809 (1976). The Amendment states in relevant part that:

> [c]onsent is hereby given to join the United States as a defendant in any suit . . . for the administration of such [water] rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

43 U.S.C. § 666(a)(2). The grant of concurrent jurisdiction thus empowers state courts to hear suits against the United States concerning the administration of water rights. *See, e.g., Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 479 (1981) (mere grant of jurisdictoin to federal courts does not oust state courts from exercising concurrent jurisdiction); *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 507-08 (1962) (concurrent jurisdiction permits state courts to enforce federal rights). This Court consequently obtained jurisdiction on removal.

The argument is premature that Nebraska is a necessary party which should be joined if feasible. In deciding whether to grant a motion to dismiss, the complaint must be read in the light most favorable to the opposing party. *Love v. Summit County*, 776 F.2d 908, 909 (10th Cir. 1985), *cert. denied*, 93 L.Ed.2d 25 (1986). A complaint should not be dismissed unless no set of facts would permit recovery. *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). All well-pleaded facts must be taken as true, and all reasonable inferences must be drawn in favor of the opposing party. *Id.* The State of Nebraska and irrigators within Nebraska appear to be necessary parties. This determination, however, cannot be made with certainty at this stage of the proceedings. Rule 19(b) requires consideration of plaintiff's interest in its chosen forum, defendants' right to avoid multiple lititgation and inconsistent judgments, the extent to which a judgment may impair the third party's ability to protect its interests, and the courts' interest in consistent and efficient adjudication. *Provident Bank v. Patterson*, 390 U.S. 102, 109-11 (1968). A proper evaluation of these factors cannot be conducted solely on the pleadings. Defendants' motion to dismiss must therefore be denied.

Denying the motion to dismiss does not, however, mandate a remand to the state courts. The defendant officials of the United States have a statutory right to remove the case to United States District Court. 28 U.S.C. § 1442(a). In addition, several factors must be examined in deciding whether a federal court should defer to the state courts. These include the convenience of the federal forum, the desirability of avoiding piecemeal litigation, which court first obtained jurisdiction, the stage of the proceedings, and the obligation of the federal courts to exercise their jurisdiction. *Colorado River Conservation District v. United States*, 424 U.S. at 817-20. *See also, Arizona v. San Carlos Indian Tribe*, 463 U.S. 545, 567-68 (affirming remand to state court).

Avoiding duplicative litigation is the overriding consideration in this case. Unlike the situations in *Colorado River Conservation District v. United States* and *Arizona v. San Carlos Indian Tribe*, this case does not involve complex litigation concerning the water rights of large numbers of claimants. In addition, the United States Supreme Court has assumed jurisdiction of a case raising similar issues between almost identical parties. Remanding the case would permit parallel proceedings in the state courts, thus increasing the potential for wasteful litigation and enhancing the danger of subjecting the parties to inconsistent judgments. These considerations apply with equal force to continuing the litigation in this Court. Until it becomes clear that the issues raised in this case are not in fact before the United States Supreme Court, the best alternative is to stay these proceedings pending a decision by the United States Supreme Court. A stay will not prejudice the rights of either party to this action and will better serve the interests of comity. It is therefore

ORDERED that the motion of the United States to stay the proceedings be, and the same hereby is, granted, and all further action in this case is stayed pending a determination of the issues by the United States Supreme Court or a showing that a resumption of the proceedings in this Court will not encroach upon the jurisdiction of the United States Supreme Court in the case between *Nebraska vs. Wyoming*, pending before it. It is further

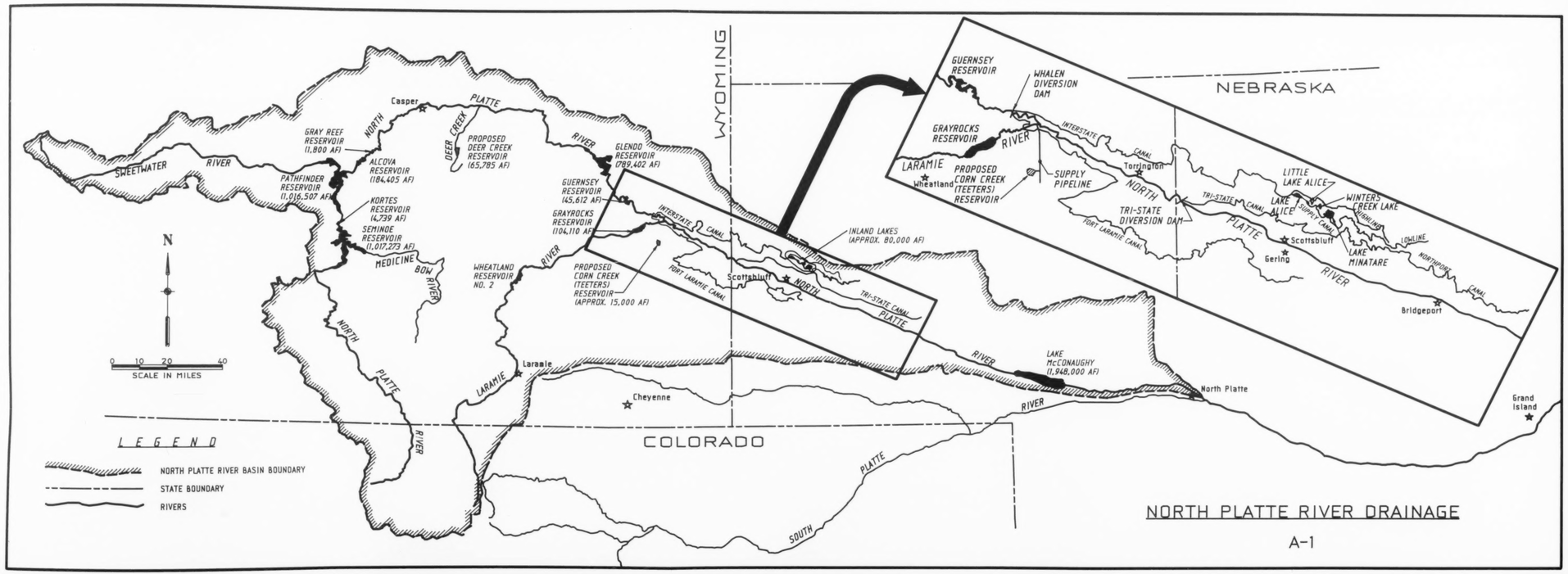
ORDERED that the motion of the United States to dismiss the complaint be, and the same hereby is, denied. It is further

ORDERED that the motion of the State of Wyoming to remand the proceedings be, and the same hereby is, denied.

Dated this 27th day of March, 1987.

/s/ Clarence A. Brimmer
CHIEF JUDGE
UNITED STATES DISTRICT
COURT

CERTIFIED A TRUE COPY:
William C. Beaman
Clerk
By (Signed)
Deputy Clerk



NORTH PLATTE RIVER DRAINAGE

A-1

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

BASIN ELECTRIC'S MOTION FOR LEAVE TO FILE A RESPONSE IN OPPOSITION TO NEBRASKA'S MOTION TO AMEND PETITION AND RESPONSE IN OPPOSITION

EDWARD WEINBERG
(Counsel of Record)
RICHMOND F. ALLAN
DUNCAN WEINBERG, MILLER
& PEMBROKE, P.C.
1615 M Street, NW
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

February 16, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

BASIN ELECTRIC'S MOTION FOR LEAVE TO FILE A RESPONSE IN OPPOSITION TO NEBRASKA'S MOTION TO AMEND PETITION

Basin Electric Power Cooperative (Basin Electric), whose motion to intervene as a party defendant in this action is pending before the Special Master, moves for leave to file the accompanying Response in Opposition to Nebraska's Motion to Amend Petition (hereinafter "Nebraska's motion to amend"). In support of this motion Basin Electric states:

1. On January 25, 1988, the Court entered an order inviting "Defendants" to respond within 21 days to Nebraska's motion to amend. As set out in the accompanying response in opposition, Nebraska's motion to amend raises substantial issues not presented by its original petition. By its original petition Nebraska sought only to protect what it perceived to be its rights to North Platte River system water for irrigation purposes as apportioned to it by the decree

in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953). By its amended petition, Nebraska seeks apportionment of waters not subject to the decree, those of the eastern end of the North Platte River and of the Platte River itself, for the purpose not of making water available for irrigation but for the purpose of maintaining instream flows for the benefit of an area of federally designated critical wildlife habitat on the Platte River.

2. Nebraska's motion to amend is dated January 12, 1988 and was originally filed with the Honorable Owen Olpin, Special Master, to whom, by its order of June 22, 1987, 55 LW 3852, this Court referred Nebraska's original petition as well as a number of motions for leave to intervene, including that of Basin Electric, which had been filed following the Court's order of October 20, 1986, 55 LW 3493, granting Nebraska leave to file its original petition.

3. On January 15, 1988, the Special Master ordered Nebraska promptly to file its motion to amend with this Court. The Special Master's order stated that it was being issued "in view of the jurisdictional question raised" by Nebraska's motion. He cited this Court's rule 9.3 as authority for his action.

4. While the Special Master has heard oral argument on all the pending motions for leave to intervene, including Basin Electric's, those motions remain under advisement.

5. Basin Electric's motion for leave to intervene and accompanying papers, including Basin Electric's proposed answer, establish that, if granted leave to intervene, Basin Electric's status will be that of an intervenor-defendant.

6. In view of the procedural situation which now prevails, in order that the Court may be fully apprised of the reach of the new issues Nebraska seeks to present, the term "defendants" as used in this Court's order of January 25 should be construed to extend to the applicants for leave to intervene as parties defendant, including Basin Electric. It is respectfully submitted that Basin Electric's motion for leave to file the accompanying response in opposition should be granted.

Respectfully submitted,

EDWARD WEINBERG
(Counsel of Record)
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER
& PEMBROKE, P.C.
1615 M Street, NW
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

BASIN ELECTRIC'S RESPONSE IN OPPOSITION TO NEBRASKA'S MOTION TO AMEND PETITION

EDWARD WEINBERG
(Counsel of Record)
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER
& PEMBROKE, P.C.
1615 M Street, NW
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

TABLE OF CONTENTS*

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT	1
REASONS NEBRASKA'S MOTION SHOULD BE DENIED	
Nebraska Seeks To Inject Issues Beyond the Scope of the Case	4
There Have Been No Material Changes in Conditions	7
The Platte River Critical Habitat Is Well Protected Under the Endangered Species Act and Other Federal Acts	8
Nebraska Has No Peculiar Interest In and Can Suffer No Peculiar Injury From the Maintenance of the Platte River Critical Habitat	11
CONCLUSION	16
APPENDIX	A1

* List of affiliates required by Rule 28.1 filed April 13, 1987 as Appendix to Basin Electric's Motion for Leave to Intervene.

TABLE OF AUTHORITIES

CASES	Page
Alabama v. Arizona, 291 U.S. 286 (1934)	11,12,13
Arizona v. New Mexico, 425 U.S. 794 (1976)	11
Central Nebraska Public Power and Irrigation District, Project No. 1417-000, et al., 39 FERC ¶ 61,378 (1987)	9,10
Colorado v. Kansas, 320 U.S. 383 (1943)	12
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	12
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	11
Louisiana v. Texas, 176 U.S. 1 (1900)	11
Massachusetts v. Missouri, 308 U.S. 1 (1939)	11
Missouri v. Illinois, 200 U.S. 496 (1906)	12
Nebraska v. Wyoming, 325 U.S. 589 (No. 6, Original, 1945), *decree* 325 U.S. 664 (1945), *decree modified and supplemented*, 345 U.S. 981 (1953)	*passim*
New York v. New Jersey, 256 U.S. 296 (1921)	12
North Dakota v. Minnesota, 263 U.S. 365 (1923)	12
Washington v. Oregon, 297 U.S. 517 (1936)	12

STATUTES AND REGULATIONS	
Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884, as amended, 16 U.S.C. §§ 1531-1543	*passim*
Federal Power Act, pt. I, 41 Stat. 1077, as amended, 16 U.S.C. §§ 791a-823a	9
Federal Water Pollution Control Act, § 404, added Oct. 18, 1972, Pub. L. 92-500, 86 Stat. 884, as amended, 33 U.S.C. § 1344	10,13
50 C.F.R. § 17.11 (1986)	15
50 C.F.R. § 17.95 (1986)	5,8,14,15

40 Fed. Reg. 58308 (Dec. 16, 1975) 5
43 Fed. Reg. 20938 (May 15, 1978) 5
Rule 9.3, Rules of the Supreme Court 4

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant

BASIN ELECTRIC'S RESPONSE IN OPPOSITION TO NEBRASKA'S MOTION TO AMEND PETITION

Statement

In its original petition for an order to enforce the decree in this case, which the Court granted leave to file on October 20, 1986, 55 LW 3493, Nebraska alleged that Wyoming was violating and threatening to violate the decree by:

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers;

> c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and
>
> d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.[1]

In its reply to Wyoming's opposition to its motion for leave to file its original petition Nebraska stated:

> Each of Nebraska's allegations involves present or threatened interference with its apportionment established by the Court in this case. *Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so. We do not propose to litigate anything new, but simply to protect what the Court has already decided.* In short, we are asking the Court to protect the integrity of its Decree pursuant to its express and specific retention of jurisdiction.[2]

The decree in this case entered in 1945, 325 U.S. 664, as modified and supplemented in 1953, 345 U.S. 981, apportions for irrigation purposes the water of

---

[1] Neb. Pet. for Order Enforcing Decree 2 (Oct. 6, 1986).

[2] Neb. Reply to Wyo. Br. in Opp. 2 (Jan. 14, 1987) (emphasis supplied).

that portion of the North Platte River from its source in Colorado to Tri-State Dam, immediately east of the western boundary of Nebraska.[3] The Court characterized the controversy as pertaining "to the use for irrigation purposes of the water of the North Platte River, a non-navigable stream." 325 U.S. at 591. Nebraska initially contended that the apportionment to be made should take account of all irrigated lands in Nebraska from Tri-State Dam to Grand Island.[4] *Id.* at 607. Subsequently, Nebraska conceded that lands between Bridgeport and Grand Island could be served from local supplies. *Id.* It continued to assert, however, that the apportionment should take account of diversions between the state line (or Tri-State Dam) and Bridgeport, about 60 miles downstream from the state line. *Id.*

The master found that lands served by diversions below Tri-State could be adequately served by local supplies, even during periods of drought, without calling on up-river water, *id.*, and the Court held that an equitable apportionment would not permit Nebraska to demand water from above Whalen for use below Tri-State. *Id.* at 628, 654-55.

Thus, this case, for the purpose of irrigation, apportioned the water of the North Platte from its source in Colorado to Tri-State Dam, located about

---

[3] The lowest diversions of the water apportioned by the decree are made from Tri-State Dam located about a mile east of the Wyoming-Nebraska line. 325 U.S. at 595.

[4] The North Platte is joined by the South Platte at the City of North Platte to become the Platte. The City of North Platte is approximately 200 river miles east of the state line. Grand Island is on the Platte about 350 river miles east of the state line.

a mile east of the Wyoming-Nebraska border. The decree does not apportion water from the North Platte to Nebraska for diversion below Tri-State. It does not apportion any water from the North Platte to be diverted in the reach of the river from Tri-State to the North Platte's confluence with the South Platte at the City of North Platte, where the two form the Platte River. And, of course, it does not apportion any water either for diversion from the Platte River or for the maintenance of instream flows.

Reasons Nebraska's Motion Should Be Denied

Nebraska Seeks To Inject Issues Beyond the Scope of the Case

Nebraska now seeks leave of the Court to amend its petition to assert claims that are clearly without the ambit of the case previously presented to and decided by the Court and the existing decree.[5] Nebraska does not seriously contend to the contrary.[6]

---

[5] Although Nebraska styled its motion as a motion to amend its petition, the Special Master, in requiring that it be filed with the Court under Rule 9.3, treated it as a motion for leave to file a new original action. In that Nebraska now seeks an apportionment for the purpose of providing instream flows in the Platte River for the benefit of a federally designated area of critical wildlife habitat thereon, the Special Master's view of Nebraska's motion is clearly correct.

[6] *See* Neb. Br. in Supp. of Mot. to Amend Pet. 2-3 (Jan. 11, 1988); Neb. Amended Pet. 4-5 (¶¶ 7, 8), 6 (clauses 3, 4 of prayer) (Jan. 11, 1988); letter of Jan. 8, 1988, from Counsel for Nebraska to Special Master (Appendix hereto). The suggestion in ¶ 7 of Nebraska's proposed amended petition that the Court might "construe" the existing decree as apportioning water to maintain instream flows for the area of critical habitat on the Platte River is frivolous. In plain terms, the decree apportions only water of

In attempting to justify its new claim that the decree should be modified to secure instream flows in the North Platte and Platte Rivers for the benefit of federally designated critical wildlife habitat, Nebraska cites several federal laws enacted since this case was decided for the protection of the environment and fish and wildlife.[7]

No area of the North Platte in Nebraska has been designated as critical habitat under the Endangered Species Act, as amended, 16 U.S.C. §§ 1531-1543. The Secretary of the Interior has determined, pursuant to 16 U.S.C. §§ 1533, 1536, that a 53-mile-long stretch of the Big Bend portion of the Platte River contains habitat that is critical to the endangered whooping crane. 40 Fed. Reg. 58308 (Dec. 16, 1975) (proposed determination); 43 Fed. Reg. 20938 (May 15, 1978) (final determination); 50 C.F.R. § 17.95 (1986). This stretch of the river extends from Lexington, Nebraska to Shelton, Nebraska and commences about 250 miles down stream from the Tri-State Dam.

It is clear, therefore, that Nebraska's amendment would expand the purpose of the case from apportioning for irrigation the water of that portion of the North Platte from its headwaters to about the Wyoming-Nebraska border to apportioning for wildlife habitat the water of the entire North Platte and a substantial segment of the Platte.

---

the North Platte above Tri-State for irrigation. It apportions no water for the maintenance of insteam flows for any purpose and does not come within 200 miles of the Platte River or within 250 miles of the area of critical habitat thereon. *See supra* 1-4.

[7] Neb. Br. in Supp. of Mot. to Amend Pet. 2-3 (Jan. 11, 1988).

Basin Electric submits that Nebraska cannot be permitted to so transmogrify this case without making such a showing of interest and injury as would move the Court to grant leave to file a discrete original action.[8]

---

[8] In ¶ 3 of its original petition Nebraska alleges that Wyoming is violating and threatening to violate the apportionment established by the decree by:

> a. Depleting the flows of the North Platte River by the operation of Greyrock's [sic] Reservoir on the Laramie River, a tributary of the North Platte River.

In ¶ 5 of its proposed amended petition, in lieu of the above allegation, Nebraska avers that Wyoming is violating and threatening to violate the equitable apportionment established by the decree by:

> A. Allowing depletion of flows of the North Platte River through current and proposed state administration of water rights on the Laramie River, a tributary of the North Platte River, in a manner inconsistent with the apportionment in the Decree *and the provisions of the Endangered Species Act*. . . . (Emphasis supplied.)

(Subparagraphs B, C and D of ¶ 5 of Nebraska's proposed amended petition appear substantively the same as subparagraphs b, c and d of ¶ 3 of its original petition.)

As explicated in its memorandum in support of its pending motion for leave to intervene, Basin Electric is a principal owner and the manager and operator of the Missouri Basin Power Project, principal features of which are the Grayrocks Dam and Reservoir. Although Nebraska is a party to the agreement in accordance with which the project is operated, *see* Wyo. Br. in Opp. to Mot. for Lv. to File Pet. A-20 through A-36 (Dec. 17, 1986), both Nebraska and Wyoming have taken positions antithetical to the interests of the project and no other party can appropriately represent such interests. *See* Basin's Memo in Supp.

There Have Been No Material Changes in Conditions

Except for observing that, since the decree was entered in this case, Congress has passed several acts designed to protect the environment and fish and wildlife, Nebraska has not alleged that there have been any significant changes in conditions.[9] Within the principle that decrees may be modified to accommodate "changed conditions," the term refers to changed physical conditions, not to changed attitudes about the relative values of goods or resources. *Cf.* 325 U.S. at 622-23. The mere fact that, in recent years, Congress has evinced increasing concern about conserving the environment and fish and wildlife does not constitute such changed conditions as would warrant amendment of the decree.

All of the laws referred to by Nebraska are federal laws that assign responsibilities to federal officers in the discharge of their functions to protect the envi-

---

of Mot. for Lv. to Intervene 8-11 (April 13, 1987).

The allegations of proposed ¶ 5.A are as hostile to Basin Electric's interests as are those of original ¶ 3.a. The depletions of the Laramie currently allowed by Wyoming include, of course, those resulting from the operation of Grayrocks. In proposed ¶ 5.A, Nebraska not only continues to allege that the depletions of the Laramie are inconsistent with the decree but newly alleges that they are inconsistent with the provisions of the Endangered Species Act.

[9] If proved, Nebraska's charges, that Wyoming is doing or threatening things that will result in Nebraska getting less water than it is entitled to, would not constitute changed conditions warranting any modification of the provisions of the decree. If made out, such charges would simply constitute grounds for taking steps to enforce the decree, not change it.

ronment and fish and wildlife. The area along the Platte River that is designated as critical habitat for the whooping crane was so designated by the Secretary of the Interior pursuant to § 4(a)(3) of the Endangered Species Act, as amended, 16 U.S.C. § 1533(a)(3),[10] and the Secretaries of Interior, Treasury and Commerce (or Defense) are charged by § 11(e)(1), as amended, 16 U.S.C. § 1540(e)(1), to enforce the Act.

The Platte River Critical Habitat Is Well Protected Under the Endangered Species Act and Other Federal Acts

The Endangered Species Act provides that no federal action and no action by any other entity or person, public or private, receiving federal assistance or requiring federal permission shall be taken without consideration of its impact on endangered species and their habitat. 16 U.S.C. § 1536(a).

Basin Electric's Grayrocks Dam and Reservoir were reviewed for compliance with the Endangered Species Act specifically in relation to the Platte River critical habitat and are operated both under an agreement containing provisions to make water available for the benefit of the habitat[11] and under identical requirements imposed by the Endangered Species Committee for the benefit of the habitat. *See* Wyo. Mot. for Summ. Judg. A-20 through A-36 (Sept. 11, 1987); Basin's Memo in Supp. of Mot. for Lv. to Intervene 3-7, A-2 through A-7 (April 13, 1987).

---

[10] *See also* 50 C.F.R. § 17.95 (1986 pp. 157-58).

[11] The State of Nebraska, the United States Department of Justice, the Rural Electrification Administration, and the Corps of Engineers, among others, are parties to this agreement.

Ancillary to proceedings before the Federal Energy Regulatory Commission (FERC) to relicense under part I of the Federal Power Act, 16 U.S.C. §§ 791a-823a, the Keystone Diversion Dam and the Kingsley Dam projects, located on the North Platte River between Bridgeport and North Platte, and owned, respectively, by the Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District, the Commission recently stated "the effects of the projects on these resources [the whooping crane and other endangered species and the Platte River critical habitat area] will be fully explored and considered as required by law prior to Commission action on the applications for new license." *Central Nebraska Public Power and Irrigation District, Project No. 1417-000, et al.*, 39 FERC ¶ 61,378 at p. 62,223 (June 30, 1987) (order denying petition to amend annual licenses). The Commission concluded: "Finally, given the importance of the whooping crane, we will act as expeditiously as possible on the licensees' applications for new license." *Id.*

Nebraska's original petition presents the issue of whether the prospective Corn Creek project, near the confluence of the Laramie and North Platte Rivers, and the Deer Creek project, on a tributary of the North Platte between Pathfinder and Guernsey reservoirs, may invade its apportionment for irrigation under the existing decree. Insofar as Nebraska would now allege that these projects might adversely affect the area of critical habitat on the Platte, it is clear that there are means at hand much better adapted to prevent this than interstate water litigation by original action.

At the very least, the Federal Government will be involved in both of these projects to determine whether and under what conditions they should be granted permits under § 404 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1344.[12] In determining whether to grant a permit the Corps of Engineers will be required to comply with the Endangered Species Act and other acts for the protection of the environment and fish and wildlife and, among other things, to confer with the Secretary of the Interior (Fish and Wildlife Service) and to deal with the impact, if any, of the projects on the Platte River critical habitat. 16 U.S.C. § 1536.

Given that the Endangered Species Act and the other federal acts for the protection of the environment and fish and wildlife cited by Nebraska include comprehensive provisions for notice, consultation, participation, and review to accomplish their ends, there is no need to undertake to serve these ends by original water apportionment actions in this Court. Compared with the precision of the processes prescribed by these statutes, which entail the assembly and analysis of extensive data and the conduct of specific studies, original actions are blunt instruments.[13] It is

---

[12] Wyoming represents, relative to the Deer Creek project, that an application for a § 404 permit has been filed and is being processed by the Corps of Engineers. *See* Wyo. Mot. for Summ. Judg. 26, 28-29 (Sept. 11, 1987) (affidavit of Michael K. Purcell).

[13] As noted by FERC in *Central Nebraska Public Power*, 39 FERC at p. 61,378, the Fish and Wildlife Service and the Bureau of Reclamation are engaged in a comprehensive study of the Platte River. This study, entitled "Platte River Management Joint Study," as revised March 12, 1985, contains the following

settled that the Court will not exercise its original jurisdiction without a showing of absolute necessity, *Alabama v. Arizona*, 291 U.S. 286, 291 (1934); *Louisiana v. Texas*, 176 U.S. 1, 15 (1900), and that no such necessity exists where the matter can be dealt with elsewhere. *Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976); *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972); *Massachusetts v. Missouri*, 308 U.S. 1, 18-19 (1939). Clearly, the interests of the Platte River critical habitat are being adequately looked after incident to the administration of the Endangered Species Act, the Federal Power Act, the Federal Water Pollution Control Act, and other federal laws and do not require the intervention of the Court by way of an original action.

Nebraska Has No Peculiar Interest In and Can Suffer No Peculiar Injury From the Maintenance of the Platte River Critical Habitat

The Court has repeatedly held that a state that would invoke its original jurisdictions must show particularized interest and injury.

---

statement of purpose:

> The purpose of the parties involved in Phase I of the Platte River Management Joint Study is to cooperate in discussions seeking ways to develop and implement recovery plans and programs which will enable Federal agency actions associated with water project development and depletions in the Platte River Basin to proceed in compliance with the Endangered Species Act while avoiding conflicts between the Endangered Species Act and state water rights systems and the use of water apportioned to a state pursuant to the compact and decrees concerning the waters of the Platte River and its tributaries.

In *Colorado v. Kansas*, 320 U.S. 383 (1943), after stating that the vital question was "whether Kansas has made good her claim to relief founded on the charge that Colorado has, since our prior decision, increased depletion of the water supply to the material damage of Kansas' substantial interests," *id.* at 393, the Court said:

> In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved. Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted.

Id. at 393-94. *Accord Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Alabama v. Arizona*, 291 U.S. at 292; *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 520 (1906).

Nebraska has alleged neither particularized interest nor injury in support of its undertaking to secure a

modification of the decree to apportion water for the Platte River critical habitat area. It does not allege that the area has been shorted of water by reason of anything done in Wyoming, Colorado or elsewhere.[14] Grayrocks Dam and Reservoir are being operated by Basin Electric in accordance with the agreement to which Nebraska and the U.S. Department of Justice, among others, are parties and the order of the Endangered Species Committee. The Corn Creek project is not yet scheduled for construction and may never be built. If it is, it will have to meet the requirements of the Endangered Species Act to receive a permit under § 404 of the Federal Water Pollution Control Act. The Fish and Wildlife Service has determined that the Deer Creek project will not adversely affect the Platte River critical habitat area, provided Wyoming does certain things it has agreed with the Fish and Wildlife Service to do.[15]

Such amorphous allegations as are contained in ¶ 8 of Nebraska's proposed amended petition simply do not meet the requirement that a state that would invoke the Court's original jurisdiction "must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor." *Alabama v. Arizona*, 291 U.S. at 290-91. The threatened injury, if any, is not "clearly shown to be of serious magnitude and imminent." *Id.* at 292.

---

[14] Indeed, it does not allege that Nebraska has been shorted of water for irrigation by anything yet done in Wyoming or Colorado. It pleads only that it fears that certain things proposed to be done in Wyoming might have such effect.

[15] Wyo. Mot. for Summ. Judg. 29 (Sept. 11, 1987) (affidavit of Michael K. Purcell).

More fundamentally, the interest of Nebraska and its citizens in the preservation of the whooping crane and the other species that use the federally designated area of critical habitat along the Platte River is legally no different from that of any other state and its citizens. The whooping crane for whose particular benefit the Platte River habitat is designated is migratory. Any individual crane that may, at one time, be on the Platte River may, at another, be in northern Canada or southern Texas, or anywhere in between. On the central flyway, areas of critical habitat have been designated for the whooping crane in the Northwest Territory, Alberta, Kansas, Oklahoma and Texas, as well as in Nebraska. 50 C.F.R. § 17.95 (1986 at p. 157). Such areas have also been designated in Idaho, Colorado, and New Mexico. *Id.* Congress declares in the Endangered Species Act that "these species . . . are of esthetic, ecological, educational, historical, recreational, and scientific value *to the Nation and its people*," and that "*the United States has pledged itself as a sovereign state* in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [several listed treaties and conventions] and other international agreements." 16 U.S.C. § 1531(a)(3), (4) (emphasis supplied).

The interest of Nebraska and its citizens in preserving the whooping crane and other endangered species that visit the Platte River habitat[16] is no

---

[16] Nebraska says in its brief in support of its motion to amend that: "In the North Platte and Platte River valleys, this legislation [the Endangered Species Act and other acts of Congress for the protection of the environment and wildlife] has been directed, in part, to some 230 species of migratory birds which

greater or more particularized than the interest of the Nation and all its citizens. Nebraska is not *parens patriae* to all of the people of the Nation and cannot stand in judgment for them.

As stated above, Nebraska has not specifically alleged that anything that has been done or is proposed to be done has or will in fact cause injury to the Platte River habitat area. All developments in Wyoming and Colorado must comply with the requirements of the Endangered Species Act, including that they not "result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). Just as Nebraska and its citizens have no peculiar interest in the preservation of the whooping crane or any of the other endangered species that use the federally designated Platte River critical habitat, they would suffer no peculiar injury if the welfare of such species were threatened by the degradation of the habitat. Actions that would put the survival of any of these species at risk, regardless of where taken, would injure the Nation and all its citizens equally. Nebraska and its citizens would be injured no more and no differently by the extinction of the whooping crane than, for example, would be

---

inhabit the area, six of which are endangered or threatened." Neb. Br. in Supp. of Mot. to Amend Pet. 2 (Jan. 11, 1988). The other threatened or endangered species referred to are the Eskimo Curlew, the Bald Eagle, the Peregrin Falcon, the Piping Plover, and the Least Tern. *See* 50 C.F.R. § 17.11 (1986 at pp. 83, 84, 87, 88). All of these species are widely dispersed and no critical habitat has been designated for any of them. *Id.* The Platte River critical habitat, while it may be visited by the other species referred to, is designated exclusively for the whooping crane. 50 C.F.R. § 17.95 (1986 pp. 157-58).

North Dakota, South Dakota, Kansas, Oklahoma and Texas and their citizens.

Unlike areas designated as parks, wild and scenic rivers, and wilderness, critical habitat is not designated for the sake of preserving the lands and waters of the areas, as such, in their natural state, but for the sake of protecting the endangered species that visit the areas. Apart from the endangered species that inhabit them, areas of critical habitat have no function, and Nebraska and its citizens have no more interest in or responsibility for the endangered species that inhabit the federally designated area of critical habitat on the Platte River than any other state or its citizens.

Conclusion

For the foregoing reasons, Basin Electric respectfully submits that Nebraska's motion to amend its petition should be denied.

Respectfully submitted

EDWARD WEINBERG
(Counsel of Record)
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER
& PEMBROKE, P.C.
1615 M Street, NW
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Counsel for Basin Electric Power Cooperative

APPENDIX

HINKLE, COX, EATON, COFFIELD & HENSLEY
Attorneys at Law
218 Montezuma
Post Office Box 2868
Santa Fe, New Mexico 87504-2065
(503) 982-4554

January 8, 1988

FEDERAL EXPRESS

OWEN L. OLPIN, Esquire
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899

Re: *Nebraska v. Wyoming*, Original No. 108

Dear Mr. Olpin:

As I explained over the telephone on Tuesday, the State of Nebraska has decided to seek leave to file an amended petition. Predicated on the belief that the protection of stream flows for the maintenance of critical wildlife habitat is a burden that must be borne by each of the basin states, we are seeking to modify the 1945 Decree to the extent necessary to complete the equitable apportionment of the waters of the North Platte River.

The pleadings went to our printer last night. They will be completed and signed on Sunday and forwarded by Federal Express on Monday.

Sincerely,

/s/ RICHARD A. SIMMS
RICHARD A. SIMMS

RAS:rlr
cc: Michael Jess
The Honorable Charles Fried
Andrew F. Walch
The Honorable Joseph B. Myer
Dennis Cook
Duane Woodard
Wendy C. Weiss
Charles N. Woodruff
Able David Lowell
Peter J. Kirsch
Joseph N. Onek
Tom Watson
Edward Weinberg

Supreme Court, U.S.
FILED
MAR 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

IN THE

Supreme Court of the United States

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S REPLY BRIEF TO BRIEFS AND THE MEMORANDUM FILED IN OPPOSITION TO NEBRASKA'S MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF DECREE

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capital
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS,
Assistant Attorney General

RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General
HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

March 4, 1988

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
REPLY TO WYOMING'S AND COLORADO'S STATEMENTS OF THE CASE	2
REPLY TO BASIN ELECTRIC'S AND THE UNITED STATES' FILINGS	8
POINTS OF LAW	8
I. THE COURT'S RULES OF PROCEDURE AND CONTROLLING CASES AUTHORIZE AMENDMENT OF THE PETITION	8
A. THE FEDERAL RULES OF CIVIL PROCEDURE STRONGLY FAVOR GRANTING LEAVE TO AMEND THE PETITION	9
B. THE INTERSTATE WATER CLAIMS ASSERTED IN NEBRASKA'S AMENDED PETITION CONSTITUTE A JUSTICIABLE CONTROVERSY PROPERLY WITHIN THE COURT'S EXCLUSIVE ORIGINAL JURISDICTION	14
II. PARAGRAPH XIII OF THE DECREE AUTHORIZES THE RELIEF FOR WILDLIFE HABITAT WATER USES REQUESTED IN NEBRASKA'S AMENDED PETITION	18
III. THIS COURT'S DECREE PERMITS THE ASSERTION OF NEBRASKA'S WILDLIFE HABITAT CLAIMS, AND FEDERAL ENVIRONMENTAL LEGISLATION DOES NOT PREEMPT THOSE CLAIMS	21
CONCLUSION	26

TABLE OF AUTHORITIES

Page

Cases

Artman v. International Harvester Co., 355 F. Supp 476 (W.D.Pa. 1972) 13

Arizona v. California, 460 U.S. 605 (1953) 13, 19, 20, 21

Boileau v. Bethlehem Steel Corp., 730 F.2d 929 (3d Cir. 1984) 12

Colorado v. New Mexico, 459 U.S. 176 (1982) 22

Conley v. Gibson, 355 U.S. 41 (1957) 8

Cuffy v. Getty Refining & Marketing Co., 648 F.Supp. 802 (D.Del. 1986) 12, 13

Duchon v. Cajon Co., 791 F.2d 43 (6th Cir. 1986) 11

Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co. Inc., 804 F.2d 787 (2d Cir. 1986) 12

Foman v. Davis, 371 U.S. 178 (1962) 9, 10, 14

Goodman v. Mead Johnson & Co., 534 F.2d 566 (3d Cir. 1976) 12

Heyl & Patterson International, Inc. v. F.D. Rich Housing of Virgin Islands, Inc., 663 F.2d 419 (3d Cir. 1981).....12, 13

Idaho ex. rel. Evans v. Oregon, 444 U.S. 380 (1980) 16, 17, 22

Idaho ex. rel. Evans v. Oregon, 462 U.S. 1017 (1983) 9, 10

Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279 (9th Cir. 1986); *cert. dismissed*, _____ U.S. _____, 107 S.Ct. 450 (1986) 11

Johnson v. Oroweat Foods Co., 785 F.2d 503 (4th Cir. 1986) ... 11

Kansas v. Colorado, 206 U.S. 46 (1907) 15

Maryland v. Louisiana, 451 U.S. 725 (1981) 14

TABLE OF AUTHORITIES (continued)

Page

Cases

Nebraska v. Rural Electrification Administration, 12 ERC 1156 (D. Neb. 1978), *appeal vacated and dismissed*, 594 F.2d 870 (8th Cir. 1979) 10

Nebraska v. Wyoming, 325 U.S. 589 (1945) 3

Nebraska v. Wyoming, 325 U.S. 665 (1945) 1, 3, 17, 18, 19, 20, 21, 22

Nebraska v. Wyoming, 345 U.S. 981 (1953) 1

North Eastern Mining Co. v. Dorothy Coal Sales Inc., 108 F.R.D. 657 (S.D. Ind. 1985) 11

Ohio v. Kentucky, 410 U.S. 641 (1973) 9, 10

United States v. Texas, 339 U.S. 707 (1950) 15

Verhein v. South Bend Lathe, Inc., 598 F.2d 1061 (7th Cir. 1979) 13

STATUTES AND COURT RULES

Colo. Rev. Stat. § 37-92-102(3) (Cum. Supp. 1987) 22

Electric Consumer Protection Act of 1986 16 U.S.C. §§ 791(a), 797(e) (1982 and Supp. IV) 22

Fed. R. Civ. P. 15 ..... 9, 10, 12

Fed. R. Civ. P. 56 ..... 7, 13

Fish and Wildlife Conservation Act of 1980 16 U.S.C. § 2901 *et seq.* (1982) 22

Neb. Rev. Stat. § 46-2, 108 (Cum. Supp. 1986) 22

Sup. Ct. R. 9.2 9

TREATISES

3 J.W. Moore, *Moore's Federal Practice*, Para. 15.10 (2d ed. 1987) 13

No. 108, Original

IN THE

Supreme Court of the United States

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

NEBRASKA'S REPLY BRIEF TO BRIEFS AND THE MEMORANDUM FILED IN OPPOSITION TO NEBRASKA'S MOTION TO AMEND PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF DECREE

INTRODUCTION

Nebraska invokes the Court's retained jurisdiction under Paragraph XIII of the North Platte River Decree of October 9, 1945, 325 U.S. 665, as modified and supplemented by the Decree of June 15, 1953, 345 U.S. 981, (hereinafter referred to individually and collectively as "the Decree"), to enforce the equitable balance of the North Platte River and its tributaries (hereinafter referred to as "the North Platte system") established by the Decree. Nebraska's initial petition, filed on January 20, 1987, seeks to enforce the Decree and to place restrictions on Wyoming's new and expanded uses of North Platte system waters which violate Nebraska's irrigation apportionment. Nebraska's amended petition realleges Wyoming's violation of Nebraska's irrigation apportionment and further asserts Nebraska's claims for protection of water uses for wildlife habitat in the North Platte system that are and will be adversely affected by new and expanded uses of system waters in Wyoming and Colorado. The

wildlife habitat water uses that Nebraska seeks to protect have existed since the entry of the Decree and their existence has been based upon on the North Platte system flow regimen established by the Decree.

Specifically, Nebraska's amended petition seeks to:

1. Enforce the status quo or equitable balance of the North Platte system established by the Decree and thereby protect Nebraska's apportionment for irrigation uses by imposing restrictions on Wyoming's current and proposed enlargement of water uses which violate the equitable apportionment of the North Platte system;

2. Recognize and establish an equitable apportionment for existing wildlife habitat uses in Nebraska and in the other states in the North Platte system through either construction or modification of the Decree;

3. Establish and impose restrictions on Wyoming's new and enlarged uses of North Platte system waters which reduce or adversely affect the availability of North Platte system waters for wildlife uses in Nebraska;

4. Establish and impose restrictions on Colorado's new or enlarged uses of North Platte system waters which reduce or adversely affect the availability of North Platte system waters for wildlife habitat uses in Nebraska and the other states; and

5. Establish and impose restrictions on the United States' authorization of new storage projects on the North Platte system which reduce or adversely affect the availability of North Platte system waters for wildlife habitat uses in Nebraska and the other states.

REPLY TO WYOMING'S AND COLORADO'S STATEMENTS OF THE CASE

Although the Decree expressly apportioned waters of the North Platte system among the states for irrigation purposes, Nebraska submits that its water use claims for wildlife habitat purposes asserted in the amended petition arise from or were an existing

component of the stream flow regimen established by the Decree. Accordingly, Nebraska does not seek to enlarge its use of North Platte system waters through the relief requested in the amended petition or to disturb or reduce Wyoming's or Colorado's current equitable apportionment. The relief requested in the amended petition simply seeks to enforce the Court's irrigation apportionment as well as to facilitate the perpetuation of the existing but currently unprotected wildlife habitat water uses. Simply stated, the amended petition seeks to maintain the status quo of water uses on the North Platte system resulting from the Decree.

The claims in the amended petition involve water supply shortages that are similar to or greater than the shortages that existed when the Court entered its Opinion and Decree in *Nebraska v. Wyoming*, 325 U.S. 589 and 325 U.S. 665 (1945). In the initial phase of this case, the Court rejected Colorado's motion to dismiss based on the contention that Nebraska had only asserted a potential threat of injury at an indefinite future time. The Court recognized that "deprivation of water in arid or semi-arid regions cannot help but be injurious" and concluded that a justiciable controversy is properly raised under the Court's original jurisdiction where states assert conflicting claims for present uses and projected future uses to the waters of the over-appropriated stream system. *Id.* at 610. Because of the existing over-appropriation of the North Platte system, each of the North Platte system states is a necessary and essential party to the reopening of this case so that the Court can fashion a Decree that protects the equitable balance of the river and recognizes and protects the environmental uses that are part of that equitable balance.

In the amended petition and in Nebraska's supporting brief, Nebraska cites a representative sample of federal environmental legislation enacted since 1945. These legislative enactments are used to illustrate the federal interest in environmental protection which has developed since the entry of the Decree. Nebraska maintains that this federal environmental policy, as well as its own state environmental policy, dictate that existing wildlife habitat uses must be a part of the Court's determination in any reconsideration of the

equitable apportionment of the North Platte system. Consequently, in the amended petition, Nebraska seeks to protect its existing wildlife habitat water uses which are threatened by any disturbance in the status quo of the North Platte system. The relief requested for habitat areas is consistent with fundamental state, regional, national and international environmental objectives.

Nebraska does not seek to enforce the federal environmental legislation cited in its amended petition and supporting brief. The claims asserted in the amended petition concern the apportionment of water rights and not the enforcement of federal environmental statutes. Nebraska's claims for wildlife habitat water uses depend on the stream system regimen established by the Decree. The environmental statutes are not intended to apportion or otherwise establish water rights among states on an interstate stream system.

Wyoming's and Colorado's primary objection to Nebraska's motion for leave to amend its petition is that Nebraska now seeks to expand the intitial petition to include environmental or wildlife issues that were not previously raised. In support of their opposition to the amended petition, Wyoming and Colorado rely on statements made in Nebraska's brief opposing intervention by the Platte River Trust and National Audubon Society, and they claim that Nebraska has abruptly changed its position in the case.

Nebraska acknowledges its past and present opposition to intervention by the Platte River Trust and National Audubon Society. Nebraska objected to intervention by the Platte River Trust and the National Audubon Society because the interests of those organizations were subsumed within the state's exercise of authority *parens patriae*. Nebraska asserts that the environmental interests raised in the Trust's and Audubon's complaints in intervention are interests which were necessarily implicated in the initial petition because they are part of the status quo or equitable balance of water uses in Nebraska established by the Decree. Accordingly, the interests asserted by those organizations were already represented by the state.

Both Colorado and Wyoming ignore the environmental interests raised in the initial petition. In Nebraska's initial brief in support of its motion for leave to file petition, Nebraska asserts the "State of Wyoming's unlawful actions will cause the State of Nebraska to suffer substantial economic, *ecological*, and *environmental injuries.*" Nebraska's Brief in Support of Motion for Leave to File Petition at 2 (emphasis added).

Wyoming and Colorado cannot deny the existence of significant and substantial wildlife habitat uses in Nebraska that are based on the regimen of the North Platte system established by the Decree. Nor can they deny that existing wildlife habitat uses in Nebraska will be adversely affected and may eventually be eliminated by new or expanded uses of North Platte system waters in Wyoming and Colorado. Accordingly, Wyoming and Colorado want the Court to limit the scope of Nebraska's petition to the impact of Wyoming's new and expanding uses on Nebraska's irrigation apportionment and to ignore the impact of those uses and any new and expanded uses in Colorado on the survival of existing wildlife habitat uses in Nebraska. This narrow approach serves Wyoming's and Colorado's interests because it allows them to establish new and expanded uses of North Platte system waters at the expense of existing wildlife habitat uses. Nebraska maintains that the equitable balance of the river should not allow the upstream states to establish such new and expanded uses and that any such expansion necessarily depletes existing irrigation and habitat uses.

Wyoming and Colorado also fail to acknowledge that Nebraska's initial petition concerns uses of North Platte system water for wildlife purposes in Nebraska. For instance, the Inland Lakes dispute involves wildlife habitat water uses. In addition, Nebraska's claims in the initial petition regarding Grayrocks Reservoir concern the release of waters from that reservoir to create minimum stream flows for wildlife habitat uses in Nebraska, and Nebraska seeks to protect the instream right created by the Grayrocks settlement against Wyoming's adverse claims. Wyoming has asserted that it is not a party to the Grayrocks agreement and that it may approve new

appropriations to divert the waters released from Grayrocks Reservoir for use in Wyoming. These threatened actions by Wyoming would undermine the minimum instream flows established by the Grayrocks agreement and would result in injury to wildlife habitat in Nebraska. Accordingly, the claims in the initial petition regarding Inland Lakes and Grayrocks Reservoir belie Wyoming's and Colorado's contentions that the amended petition somehow unduly or unnecessarily expands the scope of this case.

Nebraska's amended petition asserts claims regarding existing irrigation and wildlife habitat uses against both Wyoming and Colorado because Wyoming's answer to Nebraska's initial petition contends that the Decree does not restrict the current and proposed new and enlarged uses at issue in this case. Colorado makes similar claims with respect to the Laramie River and is in a similar position to Wyoming with respect to the relationship of Paragraphs X and XIII of the Decree. *See* Colorado's Brief in Opposition to Motion to Amend at 13-16. Both Colorado and Wyoming must be parties for Nebraska to receive complete relief on the issues raised in the initial petition, as well as for Nebraska to receive complete relief on the wildlife habitat issues raised in the amended petition.

Nebraska has sought relief against the United States in its capacity as a party in the amended petition because of the United States' involvement with the operation of existing and proposed projects on the North Platte system and also because of the United States' overriding interest in environmental protection issues. Although the specific water uses that support an apportionment of North Platte system waters for wildlife habitat purposes are located principally in Nebraska and to a lesser degree in the other states, the United States should be afforded an opportunity to participate in this case based on the multi-state or federal interests involved in the protection and maintenance of wildlife habitat.

Finally, Nebraska is constrained to respond to misleading statements in Wyoming's brief concerning the pending motion for summary judgment. Wyoming improperly attempts to create the impression that Nebraska has been dilatory in responding to Wyo-

ming's motion and brief. Contrary to those assertions, Nebraska and the other parties have been directed by the Special Master not to respond to Wyoming's motion or brief until a decision is reached on the pending motions to intervene. Nebraska will dispute and contest the factual matters asserted and legal arguments raised in Wyoming's motion and brief. Nebraska will also establish the existence of genuine issues of material fact that preclude summary judgment and it will vigorously oppose the legal arguments raised by Wyoming.

Wyoming's protestations regarding its summary judgment motion are patently self-serving. Beyond the fact that there is ample precedent to support the proposition that the timing of a motion to amend can never be dispositive in itself, Wyoming neglects to make clear the procedural posture and status of its Rule 56 motion. Wyoming seems to argue that it has already won its motion, and that Nebraska has capitulated and not responded to the motion, instead choosing the route of moving to amend its petition. The fact is that Wyoming's motion is being held in abeyance by order of the Master. Once the Master rules on the various intervention motions, Nebraska will have sixty days to respond to the summary judgment motion. Nebraska is fully prepared to show that Wyoming's motion does not make a *prima facie* showing of entitlement to judgment as a matter of law, that genuine issues of material fact exist, and that Wyoming's contentions are deficient at every level of analysis. As a result, the procedural status of this case is a far cry from those situations where a party, instead of opposing a summary judgment motion, chooses to move to amend, thereby explicitly or implicitly acknowledging the force of the summary judgment motion. Nebraska is not constrained under Rule 15 to await rulings on the intervention motions and the summary judgment motion before raising its additional arguments.

In summary, Nebraska's amended petition seeks to preserve the delicate balance of the North Platte system established by the Decree through enforcing Nebraska's irrigation apportionment, through restricting Wyoming's current and threatened new and enlarged water uses, through establishing and protecting the water uses of the North Platte system for wildlife habitat purposes, and through placing

restrictions on new or expanded water uses in Wyoming and Colorado that would interfere with and adversely affect Nebraska's irrigation and existing wildlife habitat uses. Accordingly, the amended petition raises a justiciable controversy among the states that is properly within the Court's exclusive original jurisdiction.

REPLY TO BASIN ELECTRIC'S AND THE UNITED STATES' FILINGS

Nebraska does not respond in this brief to the motion for leave to respond and the response in opposition filed by Basin Electric Power Cooperative and the Memorandum filed by the United States. It is improper for Basin Electric Power Cooperative to file a response to Nebraska's motion for leave to file an amended petition because the Court's Order of January 25, 1988, specifically states that responses may be filed by the defendants in the case. The Court did not invite responses from the potential intervenors, and, therefore, Basin Electric's pleadings have been improperly filed with the Court. Nebraska takes no position with respect to the matters discussed in the United States' Memorandum, though it does not object to the course of action proposed in that Memorandum.

POINTS OF LAW

I.

THIS COURT'S RULES OF PROCEDURE AND CONTROLLING CASES AUTHORIZE AMENDMENT OF THE PETITION.

This Court's procedural rules, coupled with Federal Rule of Civil Procedure 15(a), permit the amendment of Nebraska's petition to facilitate the presentation and final determination of this case on the merits. *See Conley v. Gibson,* 355 U.S. 41, 48 (1957) (pleadings are not an end in themselves but rather are mechanisms for promoting "a proper decision on the merits"). Wyoming's and Colorado's opposition to the proposed amendments is not supported by modern procedural policy or precedent. Nebraska's motion, however, is con-

sistent both with the established procedures and the cases interpreting those procedures. Moreover, the notion that the justiciability doctrine may be used to avoid complex disputes between states is unsound both under the Constitution and under the Court's recent decisions *See, e.g., Idaho ex rel. Evans v. Oregon,* 462 U.S. 1017 (1983).

A.

THE FEDERAL RULES OF CIVIL PROCEDURE STRONGLY FAVOR THE COURT'S GRANTING LEAVE TO AMEND THE PETITION.

Absent unusual circumstances, the procedural principles governing a lower federal court's consideration of a motion to amend serve as a guide to the Court's exercise of its original jurisdiction. While the Court is not required to apply the Federal Rules of Civil Procedure, it nonetheless has made express provision for resort to the federal rules. *See* Supreme Court Rule 9.2.

The policy of liberal amendment underlying Rule 15(a), coupled with ample precedent in the federal courts, support the amendment of Nebraska's petition. Rule 15 itself states that "leave [to amend] *shall* be freely given when justice so requires." Fed.R.Civ.P. 15(a). In *Foman v. Davis,* 371 U.S. 178, 182 (1962), the Court declared that "this mandate is to be heeded." The Court pointed out that the movant need not prove the final sufficiency of its claim as a predicate for amendment: "If the underlying facts or circumstances relied upon by a plaintiff *may be* a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."[1] *Id.* at 182 (emphasis

---

[1]The Court's decision in *Ohio v. Kentucky,* 410 U.S. 641 (1973), is not to the contrary. There the dispositive fact was that Ohio's proposed amendment was defective as a matter of law. Ohio's long acquiescence in the location of its border with Kentucky compelled one result. Accordingly, the Court concluded it need not approve an exercise in futility. This is precisely the same approach a federal trial court will take when a proposed amendment is facially defective. But such action is the procedural exception rather than the rule. It is enough for the movant to state a

added). In the present case, the issue of maintaining the existing stream flow regimen to protect wildlife habitat water uses not only may be a proper subject for relief, but is a proper subject for relief in the context of the equitable apportionment of the waters of an interstate stream. *See Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017. Under Rule 15 and *Foman v. Davis*, 371 U.S. 178 (1962), Nebraska need not plead and prove as a threshold exercise every element of its claims.

Nebraska's proposed amendments fit within the established legal standards for approval of a motion to amend. In *Foman*, the Court pointed out that leave to amend should be freely given in the absence of reasons "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." 371 U.S. at 182. None of these criteria applies to what Nebraska proposes. On the contrary, Nebraska will be substantially prejudiced if it is not allowed to raise and litigate the wildlife habitat issues.

Nebraska's amendments are timely and cannot be characterized as the product of undue delay. Thise case is still in the initial pleading stage, regardless of Wyoming's premature motion for summary judgment. The primary parties are awaiting the Master's decision on certain intervention motions, after which Nebraska has been directed to respond to Wyoming's motion, and discovery will proceed in the case. As discussed previously, Nebraska has reconsidered the issues that the Platte River Trust and National Audubon Society sought to raise in their proposed intervention petitions, and it has decided to

---

colorable claim. Moreover, Nebraska's amendments bear no resemblance to the facts or legal standards discussed in *Ohio v. Kentucky*. There can be no doubt that the maintenance of interstate stream flows for environmental purposes is an issue of critical importance and will remain so well into the next century. *See Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978), *appeal vacated and dismissed*, 594 F.2d 870 (8th Cir. 1979). As a result, Wyoming's reliance on *Ohio v. Kentucky* is inapposite in the present dispute. Environmental concerns would inevitably be part of any new interstate decree and must be recognized as part of the present administration of the North Platte Decree.

seek leave to raise those issues. Significant wildlife habitat interests in Nebraska will ultimately be extinguished by new and expanding uses of North Platte system waters in the upstream states, and Nebraska is therefore compelled to amend its petition to protect those habitat uses. In light of the procedural status of the case, Nebraska has not delayed unduly in raising these claims; the alternative of not raising those claims could result in the far more drastic and irreversible loss of important wildlife habitat in Nebraska and the North Platte and Platte River region in general.

Moreover, delay alone is never enough to deny leave to amend; there must be additional compelling negative factors present that require denial. *See, e.g., Duchon v. Cajon, Co.*, 791 F.2d 43 (6th Cir. 1986); *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279 (9th Cir. 1986), *cert. dismissed*, _____ U.S. _____, 107 S.Ct. 450 (1986). The issue of delay inevitably relates to the question of undue prejudice to the party opposing the motion to amend. This is because undue prejudice primarily arises in situations where the movant seeks to amend at or shortly before trial. *See Johnson v. Oroweat Foods Co.*, 785 F.2d 503 (4th Cir. 1986) (the element of prejudice applies essentially where the amendment is offered shortly before or during trial). As the court indicated in *North Eastern Mining Co. v. Dorothy Coal Sales, Inc.*, 108 F.R.D. 657 (S.D. Ind. 1985), virtually every amendment of a complaint results in some degree of prejudice to the defendant. While discovery will be delayed, the delay is insufficient to deny the motion to amend. *Id.* Prejudice warranting denial of the motion to amend must be undue and of the sort that occurs on the eve of trial when a litigant seeks to inject a wholly unexpected legal claim that has not been the subject of discovery.[2] Because limited discovery

---

[2]The facts of the case do not present a situation of unfair surprise to the opposing parties. Nebraska raised environmental concerns in its initial brief. Secondly, the Inland Lakes dispute implicitly involves wildlife habitat concerns. Third, the Grayrocks Stipulation came into existence because of Nebraska's concerns that minimum instream flows be protected. It is Wyoming's express intention to contravene the Grayrocks Stipulation and its environmental covenants that prompted Nebraska's initial Grayrocks claim. Finally, in the permitting process for Wyoming's Deer Creek project, Nebraska has been actively involved in

has been had in this case, there can be no undue delay or prejudice from any change in the scope of discovery. *See Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 569 (3d Cir. 1976) (the necessity for defendant to conduct further discovery is insufficient to show prejudice).

The legal meaning of prejudice, moreover, does not encompass mere inconvenience, and Wyoming's reliance on inconvenience as a means of demonstrating prejudice is also an improper objection to amendment of pleadings. Indeed, the analysis of prejudice is the central focus for whether an amendment is permissible. Wyoming, however, distorts the terms of that analysis. Federal courts acknowledge that prejudice to the non-moving party is the "touchstone" for the denial of a proposed amendment. *See, e.g., Heyl & Patterson International, Inc. v. F.D. Rich Housing of Virgin Islands, Inc.*, 663 F.2d 419, 425 (3d Cir. 1981). Many courts translate the liberality of Rule 15(a) into a general presumption in favor of allowing amendment. *See Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984). In turn, this presumption can be overcome only by a showing that the amendment will be prejudicial. *Id.* Prejudice is not a concept of unlimited flexibility. To the contrary, prejudice is determined strictly. In *Cuffy v. Getty Refining & Marketing Co.*, 648 F.Supp. 802 (D. Del. 1986), the court stated as follows:

> Prejudice does not mean inconvenience to a party. Moreover, it is obvious that an amendment, designed to strengthen the movant's legal position, will in some way harm the opponent. In the context of a 15(a) amendment, prejudice means that the nonmoving party must show that is was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely.

---

raising environmental issues associated with the depletion of flows put to wildlife habitat uses. As a result of these factors, none of the opposing parties can claim unfair surprise. *See Esquire Radio & Electronics, Inc. v. Montgomery Ward & Co., Inc.*, 804 F.2d 787 (2d Cir. 1986) (party cannot claim unfair surprise from amendment when it has been provided with notice of the subject matter of the amendment well in advance of the actual motion to amend).

Id. at 806. *See also Heyl & Patterson International, Inc. v. F.D. Rich Housing of Virgin Islands, Inc.*, 663 F.2d 419. Wyoming makes no showing that it is unfairly disadvantaged or that it will be incapable of presenting rebuttal evidence. Wyoming's basic contention is that the amendments will prove troublesome in carrying out its program of expanding water use on the North Platte system that depletes Nebraska's irrigation apportionment and existing wildlife habitat water uses. Consequently, Wyoming's resort to notions of delay and inconvenience is legally defective.

Wyoming's reliance on the fact that Nebraska's motion to amend was filed after Wyoming's summary judgment is equally unavailing. In general, the timing of a motion to amend is not dispositive. *See Cuffy v. Getty Refining & Marketing Co.*, 648 F.Supp. 802. There are numerous decisions showing that the fact that a motion to amend is made after a motion for summary judgment is filed does not require denial of the motion to amend. *See Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929; *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7th Cir. 1979). ("A party is free to move for leave to amend, even after a motion for summary judgment has been made by the opposing party, and the ordinary standards of Rule 15(a) ... apply to the court's determination whether to allow amendment."); *Cuffy v. Getty Refining & Marketing Co.*, 648 F.Supp. 802; *Artman v. International Harvester Co.*, 355 F.Supp. 476, (W.D. Pa. 1972); 3 J.W. Moore, *Moore's Federal Practice* Para. 15.10 (1987). The fact that Wyoming's motion for summary judgment has been held in abeyance pending action by the Master on the intervention motions is an additionl indication that Wyoming will suffer no undue prejudice from amendment. Thus the weight of authority, along with the procedural realities surrounding Wyoming's Rule 56 motion, establish that the timing of Nebraska's motion to amend is not a dispositive factor. Wyoming's misplaced reliance on the proposed amendment coming after its summary judgment motion is of no legal consequence and should be rejected by the Court.

In sum, the applicable legal standards for the amendment of pleadings demonstrate the propriety of Nebraska's proposed amend-

ments. The Court's promulgation of a liberal standard in Rule 15(a), coupled with the decision in *Foman v. Davis*, establish a framework favoring amendment. None of the bases for denial of leave to amend is present in this case. Nebraska has neither delayed unduly in proposing its amendments, nor will Wyoming be denied the opportunity to present facts and evidence in opposition to Nebraska's claims. No discovery deadline, pretrial order, or trial setting yet exists in this proceeding. All parties will have a full and fair opportunity to address the additional claims and conduct the discovery associated with those claims. Any "inconvenience" incurred by Wyoming is necessary to implement the Court's declared objective that technical pleading be discarded and that complete adjudication of a case on the merits is the purpose of our procedural system. Wyoming has simply failed to demonstrate any valid reason for denying the proposed amendment of Nebraska's petition.

B.

THE INTERSTATE WATER CLAIMS ASSERTED IN NEBRASKA'S AMENDED PETITION CONSTITUTE A JUSTICIABLE CONTROVERSY PROPERLY WITHIN THE COURT'S EXCLUSIVE ORIGINAL JURISDICTION.

The issue of establishing and protecting wildlife habitat water uses in Nebraska and other North Platte system states raises serious and important concerns of federalism that are properly within the purview of the Court's original jurisdiction. *Cf. Maryland v. Louisiana*, 451 U.S. 725, 744 (1981). Wyoming and Colorado portray the Court's exercise of original jurisdiction as one in which the Court timidly seeks to avoid involvement in "complicated" disputes between states. Not only is their argument legally untenable, it also ignores the Court's long-standing commitment to resolve controversies involving sovereign states within our system of federalism.

As a necessary correlative of discharging its original jurisdiction obligations, the Court liberally permits the development of the facts in interstate disputes. This broad-based development of the facts is an additional reason supporting Nebraska's motion to amend its

original petition. *See, e.g., United States v Texas*, 339 U.S. 707, 715 (1950), in which the Court stated that "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance [the Court] has always been liberal in allowing full development of the facts." In interstate controversies, the starting point for the Court must be the full development of the facts, rather than Wyoming's vision of a limited proceeding in which hypertechnical pleading requirements prevent sovereign states from having their claims decided on the merits.

The Court has been willing to provide a forum for the vindication of the rights and justifiable expectations of the states. In particular, the interstate water disputes in the arid and semi-arid western states have consistently been viewed by the Court as presenting issues of great importance. Thus, in what is now the seminal expression of the Court's views, the Court declared in *Kansas v. Colorado* that:

> [W]henever ... the action of one State reaches through the agency of natural laws into the territory of another State, *the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them*, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

206 U.S. 46, at 97-98 (emphasis added).

Wyoming's and Colorado's narrow views of what constitutes a justiciable dispute between two or more states ignores the applicable precedent in interstate water disputes and seeks to create an improper criterion for denying leave to amend. As stated above, the proper criteria for assessing the motion exist under the Rules of Civil Procedure and the relevant federal precedent. Consequently, beyond the deficiencies of Wyoming's and Colorado's proposed additional procedural standard, their justiciability arguments ignore the Court's willingness to permit the full adjudication of interstate water disputes.

The complexity of issues presented in interstate disputes is not a proper rationale for limiting or denying the exercise of original jurisdiction. The Court has rejected that general proposition in several recent cases, as well as rejecting a similar contention in the original phase of this litigation forty years ago. In *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, for example, the Court refused to accept the contention that complexity in the formulation of interstate decrees is a justification for not issuing an equitable decree. That case involved novel questions regarding the preservation of certain fish species with an interstate habitat. Those questions were not directly related to the traditional issues of priority and apportionment of the waters of an interstate stream. Both the majority and dissenting opinions in the case, however, concluded that the unfamiliar issues were susceptible to treatment under the equitable apportionment doctrine. The Court stated that "[a]lthough the computation [regarding interstate apportionment of the fish] is complicated and somewhat technical, that fact does not prevent the issuance of an equitable decree." *Id.* at 1027; *see also id.* at 1038 (O'Connor, J., dissenting) "... the difficulty of providing equitable relief has never provided an excuse for shirking the duty imposed on us by the Constitution.") Indeed, the Court questioned the Special Master's apparent reluctance to engage in the preparation of equitable relief addressing those difficult issues in an earlier phase of the same litigation. *See Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 390 n.7 (1980) ("The Special Master also implied that he felt dismissal was warranted because of the complexity of apportioning runs of anodromous fish and because the Court might have to retain continuing jurisdiction over the management of the fisheries in the Columbia and Snake Rivers.") The Court expressly rejected the Master's proposed basis for dismissal and referred to the original North Platte decree as an expression of its willingness to address complicated and protracted interstate disputes. *Id.*

Significantly, the Court returns again and again to that earlier expression in this case, 325 U.S. 589, of its policy with regard to continuing jurisdiction over complex disputes:

> There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province ... A genuine controversy exists ... The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.

Id. at 616. Thus, Wyoming's arguments that the justiciability doctrine requires that the Court avoid complex and long-term problems are disingenuous in light of the Court's prior determination of the existence of a genuine controversy not subject to easy resolution. Furthermore, Nebraska disputes that the claims for existing wildlife habitat water uses will be any more complex, technical, or time consuming than the claims for the irrigation apportionment.

Finally, both the majority and dissenting opinions in *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, make clear that the novelty of issues affecting interstate relationships is no barrier to the exercise of original jurisdiction. The majority pointed out that as in a classic water dispute, upstream and downstream states are related by principles of cause and effect. The Court then recognized the analogy to traditional water disputes by stating that "[a] dispute over the water flowing through the Columbia-Snake River system would be resolved by the equitable apportionment doctrine; *we see no reason to accord different treatment to a controversy over a similar natural resource* of that system." *Id.* at 1025. As a result, what Nebraska proposes is consistent with this view of original jurisdiction. *See also id.* at 1031 n.1 (O'Connor, J., dissenting) ("Disputes between sovereigns over migratory wildlife typically give rise to diplomatic solutions," and similar interstate disputes are therefore "particularly appropriate for resolution by this Court in the exercise of its original jurisdiction.") Wyoming's and Colorado's justiciability arguments are plainly at odds with the Court's prior decisions. If the mainte-

nance or regulation of instream flows for the protection of wildlife habitat is in fact an important interstate or federal interest, any complexity that might be attributed to such an interstate apportionment is insignificant in terms of the exercise of the Court's jurisdiction.

II.

PARAGRAPH XIII OF THE DECREE AUTHORIZES THE RELIEF FOR WILDLIFE HABITAT WATER USES REQUESTED IN NEBRASKA'S AMENDED PETITION.

Paragraph XIII of the Decree provides the necessary authority for Nebraska's amended petition seeking enforcement, construction and modification of the Decree. Paragraph XIII recognizes that the Court's future involvement might be necessary to resolve problems on the North Platte system. It contemplates the need for ongoing flexibility in the Decree's administration by empowering the Court to retain "jurisdiction of this suit for the purposes of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." 325 U.S. at 671. Paragraph XIII states that "[a]ny of the parties may apply at the foot of this decree for its amendment or for further relief," *id.*, and includes "[a]ny change in conditions making modification of the decree or the granting of further relief necessary or appropriate" as well as additional specific questions as "[m]atters with reference to which further relief may hereafter be sought." *Id.* at 671-672.

Wyoming insinuates that Nebraska's amended petition constitutes an abuse of Paragraph XIII. Wyoming Brief in Opposition to Motion to Amend Petition at 19. Yet the Special Master and the Supreme Court in *Nebraska v. Wyoming* specifically intended that the parties to the equitable apportionment have the ability to seek further relief or modification of the decree if circumstances on the North Platte system changed. They regarded a provision for retention of jurisdiction as an essential component of the Decree. Special Master Michael J. Doherty recommended to the Court:

> (1) A present decree effecting a water distribution by means of the imposition of a minimum of restriction and by the simplest possible method that will serve present and near future purposes. (2) Retention by the Court of jurisdiction to amend the decree if and when it shall be made to appear that important changes of condition have occurred or that any assumption or forecast as to the future upon which the decree was based has by subsequent experience proved erroneous, and that by reason of such changes of condition or errors of prediction equity requires amendment of the decree. Report of Special Master at 122.

In explaining why a decree containing a retention of jurisdiction provision was preferable to a decree providing for "final or unalterable distribution of the water or benefits of the river", Report at 121-122, the Master stressed the "uncertainty and impermanence in the present situation." Report at 121.

Viewing the North Platte system situation realistically, the Court adopted the Special Master's recommendation that it retain jurisdiction to address future problems on that system. *Nebraska v. Wyoming*, 325 U.S. at 655. It declared that "the decree which is entered must deal with conditions as they obtain today." *Id.* at 620. It observed that "[i]f they substantially change, the decree can be adjusted to meet the new conditions," *id.* at 620, and that the Decree was not "necessarily . . . for all time." *Id.* at 623.

Paragraph XIII embodies the Special Master's and Court's realistic awareness that conditions on the North Platte system might change and that the Court needed to have the flexibility to address these changes. Nebraska's amended petition draws to the Court's attention changes of condition on the North Platte River that threaten to disrupt the long-established regimen of stream flow established by the Decree. Those changes have been repeatedly recognized in national and state legislation designed to protect environmental interests that were of little concern in 1945. Thus, Nebraska invokes Paragraph XIII for precisely its intended function.

In *Arizona v. California*, 460 U.S. 605 (1963), the Court stated that its "purpose in retaining jurisdiction in [original actions] can be

gleaned from the respective reports of the Special Master, which note the need for flexibility in light of changed conditions and questions which could not be disposed of at the time of an initial decree." *Id.* at 624, citing to the Special Master's Report in *Nebraska v. Wyoming* as an example. *Id.* at 624 n. 17. Accordingly, the Court found that it was appropriate to use a retention of jurisdiction provision for the "consideration of new issues and changed circumstances." *Id.* at 625. Unlike the United States and the Tribes in *Arizona v. California*, Nebraska is not using a retention of jurisdiction provision to relitigate a previous factual determination. Rather, Nebraska properly invokes Paragraph XIII to seek enforcement, construction, and modification of the Decree in view of changed circumstances on the North Platte system. These changed circumstances involve actual and threatened development and its concomitant environmental effects. Wyoming's current and threatened expansion of water uses places an unprecedented stress on the North Platte system's water supply. This expansion includes the increased usage of Laramie River waters, the proposed construction and operation of the Corn Creek and Deer Creek Projects, and adverse legal claims against the water supply of the Inland Lakes. If Colorado, like Wyoming, interprets Paragraph X of the Decree as a blanket exemption for municipal water development on the North Platte River, Colorado's expanded municipal water uses also pose a threat to the apportionment effected by the Decree. In response to these threats to its irrigation apportionment, Nebraska asks the Court to enforce the Decree and to restrict new and expanded uses of North Platte system waters.

The new or expanded uses of North Platte system waters also threaten the wildlife habitat water uses that the Court has already established through the stream flow regimen in the Decree. Nebraska seeks formal recognition of these wildlife habitat water uses through construction or amendment of the Decree before upstream development on the North Platte system results in their elimination. This formal recognition by the Court would comport with the policy of environmental protection embodied in the myriad of environmental laws that Congress has passed since 1945.

Finally, the relief requested in Nebraska's amended petition would promote certainty of water rights on the North Platte system. The Court has determined that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. at 620. Nebraska's amended petition does not seek to undo what the 1945 Decree in *Nebraska v. Wyoming* accomplished by relitigating previously decided issues. Rather, faced with conditions on the North Platte system that are changing due to new development, Nebraska requests the Court to enforce the irrigation apportionment and to construe or modify the Decree to allow for the recognition of sufficient water to protect existing wildlife habitat uses. This approach will prevent piecemeal determinations that could further confuse the already uncertain status of water rights on the North Platte. A comprehensive decree recognizing wildlife habitat uses would ensure certainty of water rights by formalizing what has previously been implicit. Such a decree would enable each basin state to manage existing water uses and to plan new water development.

III.

THIS COURT'S DECREE PERMITS THE ASSERTION OF NEBRASKA'S WILDLIFE HABITAT CLAIMS, AND FEDERAL ENVIRONMENTAL LEGISLATION DOES NOT PREEMPT THOSE CLAIMS.

Nebraska's amendments request an apportionment of the waters of the North Platte system to protect wildlife interests and to provide full judicial recognition of the wildlife habitat uses that depend on the regimen of the river established by the Decree. Those habitat uses constitute environmental interests that require the attention of this Court as the arbiter of this interstate dispute.

The flexibility insisted upon by the Court in the original Decree permits the rejection of a rigid adherence to discredited federal water policies. This flexibility must respond to the effects of additional projects or storage "not now existing," Para. XIII(b) and (c), and respond to "[a]ny change in conditions", Para. XIII(f). *Nebraska v. Wyoming*, 325 U.S. at 671-672. As a result, the Decree

encompasses all water uses that are necessary to maintain the economic and environmental interests of each state.

Since 1945, there has been a greater recognition and emphasis on the importance of environmental resources in this country. The importance of preserving water quality and instream flows for environmental purposes, now firmly entrenched in the nation's public policy, was nonexistent at the time the Decree was entered. *See id.* at 596. Federal legislation, requiring that wildlife conservation receive "equal consideration" and be coordinated with all other features of water resource development programs, recognized the use of water for wildlife habitat as a valid beneficial use. *See e.g.*, Fish and Wildlife Conservation Act of 1980, 16 U.S.C. § 2901 *et seq.* (1982); Electric Consumer Protection Act of 1986, 16 U.S.C. §§ 791(a), 797(e) (1982 & Supp. IV 1986) Both Nebraska and Colorado have enacted laws dealing with appropriations of instream flows. *See* Neb. Rev. Stat. § 46-2, 108 (Cum. Supp. 1986) and Colo. Rev. Stat. § 37-92-102(3) (Cum. Supp. 1987). This Court has recognized that the Decree is an evolving instrument requiring "delicate adjustment of interests" and "the exercise of an informed judgment on a consideration of many factors." *Nebraska v. Wyoming*, 325 U.S. at 618; *see also Colorado v. New Mexico*, 459 U.S. 176 (1982). Environmental concerns are now a necessary component of the Court's apportionment of interstate streams. *See generally, Idaho ex. rel. Evans v. Oregon*, 462 U.S. 1017. To ignore them would ignore the modern reality of federal and multi-state interests in interstate waters.

Wyoming and Colorado previously objected to the modification provision in Paragraph XIII of the Decree. Colorado, as it does today, contended that the provisions would result in an "administrative burden" requiring continued supervision by the Court. Wyoming also sought to foreclose future considerations of the proper apportionment. The Court rejected both states' attempts to impede the Court's supervision of the North Platte Decree and determined that these claims were "no justification for us to refuse to perform the important function entrusted to us by the Constitution." *Nebraska v. Wyoming*, 325 U.S. at 616.

Nebraska does not seek to apply or enforce in this case the examples of federal environmental legislation cited in its amended petition and supporting brief. The claims asserted by the proposed amendments concern the equitable apportionment of interstate waters and not the enforcement of federal environmental statutes. Nebraska's claims for wildlife habitat water uses depend on the stream system regimen established by the Decree and by nearly a half century of the Decree's administration. Nebraska is cognizant of the fact that the environmental statutes are not intended to apportion or otherwise establish water rights among states on an interstate stream system. Nebraska's citations to representative federal statutes merely show the national interest in environmental protection and provide an additional compelling policy reason for this Court's examination of the apportionment for non-irrigation beneficial uses.

The Court retains the power to construe and modify the Decree to provide for instream flow regulation of the North Platte system to protect wildlife interests. It is equally plain that the exercise of this power does not transform the Court into a super-adminstrator of existing federal environmental legislation. Nebraska in no way seeks to usurp or bypass the regulatory systems set up under this legislation. Rather, the proposed amendments attempt to insure that the burden of the maintenance of the regimen of the river, including both consumptive and instream beneficial uses, falls equally on all states benefiting from this Court's apportionment.

In their responses to Nebraska's motion, Wyoming and Colorado seek to assure the Court that "without the Court's involvement" existing federal law will fully protect wildlife habitat from any harmful impacts of water development projects in Colorado and Wyoming. These arguments avoid the real impact on present wildlife habitat uses of any apportionment that does not account for those uses. The arguments propounded by Wyoming also fail to acknowledge its actions now and in the past, often under the aegis of the Decree, which have attempted to avoid the effects of federal environmental legislation. These actions include *inter alia*, Wyoming's proposed avoidance of the Grayrocks Stipulation and the re-

prioritization of the Inland Lakes rights. In asking the Court to refuse to account for the present beneficial uses of instream flows to maintain wildlife habitat in Nebraska, Colorado and Wyoming ask this Court to set ecological concerns aside so that these issues may be decided in a piecemeal fashion by federal agencies or lower federal courts that have absolutely no control or authority over the interstate apportionment of water.

A decision by this Court to include non-consumptive uses within the calculus of values to be protected in any apportionment of the North Platte will have a two-fold effect. First, it will clarify the conflict that now exists between the protection of wildlife habitat water uses and the interests expressly recognized in the Decree. For example, in an attempt to discount the need for the Court's consideration of contemporary ecological problems in the North Platte system Wyoming and Basin Electric point to the Platte River Management Joint Study as a cooperative effort involving the federal government, Nebraska, Wyoming, and Colorado. Beyond the fact that this study has no binding effect on any of the participants, however, its own Statement of Purpose points to the perception that the Decree somehow stands in the way of compliance with the Endangered Species Act. The statement encourages federal agencies to proceed "in compliance with the Endangered Species Act while avoiding conflict between the . . . Act and the . . . use of water apportioned to a state pursuant to the compact and decrees concerning waters of the North Platte and its tributaries." In Nebraska's opinion, the Decree must be interpreted as consistent with wildlife habitat water uses.

Secondly, such a decision will send a message to the states bound by the Decree and to the agencies of the United States responsible for water storage and irrigation projects that the Decree cannot be used to undermine federal environmental legislation. The trumping of federal environmental policy by an interstate apportionment that ignores that policy has demonstrable negative consequences:

> [I]t is unlikely that either the federal government or a lower Court will look beyond any water apportionment decrees by this court. . . . For example, if this Court were to hold that Wyoming

> is entitled to certain amounts of the natural flow of the North Platte and can store that water at the Deer Creek Project, it will be very difficult to convince a district court that federal implementation of this Court's decree should be halted, and that the federal government should consider whether to modify the effect of this court's decree because of the possibility of jeopardy to an endangered species.

National Audubon Society Brief in Support of Motion to Intervene at 8, 9. Irrevocable injury will be done to wildlife habitat water uses without the comprehensive apportionment called for by Nebraska's proposed amendments. The complete investigation of the needs for minimum instream flows in the North Platte system will enable the Decree's protection of all the vital federal and interstate interests on the North Platte.

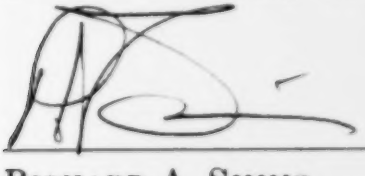
CONCLUSION

Neither the State of Wyoming nor the State of Colorado can deny that there has been a profound change in federal and state interests in the protection of the environment since the Decree was entered in 1945. Nor can either state deny that the Court retained jurisdiction in Paragraph XIII of the Decree in order to clarify, adjust, or modify the decreed apportionment to meet changed conditions. Accordingly, the Court should recognize the public interest in the protection of environmental values and grant Nebraska's motion to amend in order to protect those interests through an effective and thorough interstate apportionment.

Respectfully submitted,

ROBERT M. SPIRE
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

LEROY W. SIEVERS
Assistant Attorney General



RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General

HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

No. 108, Original

IN THE

Supreme Court of the United States

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that three true and correct copies of the foregoing Reply Brief to Briefs and the Memorandum in Filed Opposition to Nebraska's Motion to Amend Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree were served on each of the following parties required to be served, in accordance with United States Supreme Court Rule 9.3, by depositing the same in the United States mail with first-class postage prepaid and addressed on this 4th day of March, 1988 to:

The Honorable Charles Fried
United States Solicitor General
United States Department of Justice
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

Andrew F. Walch
Land & Natural Resources Division
United States Department of Justice
Post Office Box 7415
Washington, D.C. 20004

The Honorable Michael J. Sullivan
Governor of the State of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Wyoming Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82202

The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

Charles N. Woodruff
Moses, Wittemyer, Harrison & Woodruff, P.C.
102 Walnut Street, Suite 300
Boulder, Colorado 80302

Abbe David Lowell
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Joseph N. Onek
Onek, Klein and Farr
2550 M. Street, N.W.
Washington, D.C. 20037

Tom Watson
Crowell & Moring
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Edward Weinberg
Duncan, Weinberg, & Miller, P.C.
1615 M Street, N.W., Suite 800
Washington, D.C. 20036



RICHARD A. SIMMS
Counsel of Record
JEFFREY L. FORNACIARI
Special Assistant Attorneys General
HINKLE, COX, EATON, COFFIELD
& HENSLEY
Post Office Box 2068
Santa Fe, New Mexico 87504-2068
(505) 982-4554

Supreme Court, U.S.
FILED
JUN 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, *et al.*,

Defendants.

OWEN OLPIN, SPECIAL MASTER

FIRST INTERIM REPORT

June 14, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

57pp

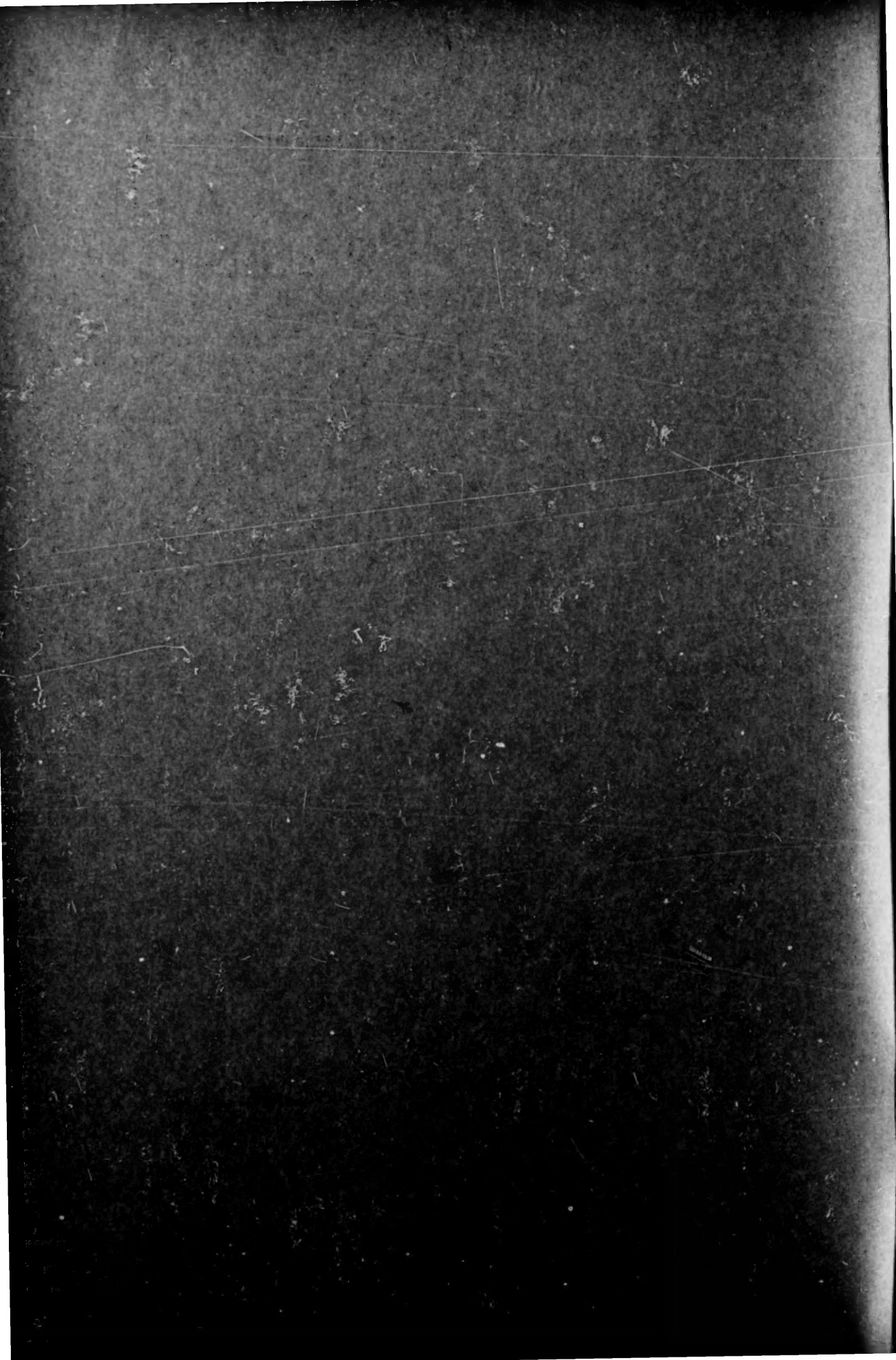


TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. SCOPE OF AUTHORITY	4
III. THE MOTIONS FOR INTERVENTION	6
A. The Platte River Trust and the National Audubon Society	8
B. Basin Electric Power Cooperative	11
C. The Nebraska Districts	13
IV. WYOMING'S MOTION FOR SUMMARY JUDGMENT	14
A. The Inland Lakes Issues	18
B. Tributary Issues	22
1. The Laramie River	22
2. Deer Creek	27
C. Downstream of Tri-State Dam Issues	32
APPENDIX A	
THE NORTH PLATTE PROJECT	1a
APPENDIX B	
GRAYROCKS	9a
APPENDIX C	
THE CORN CREEK PROJECT	12a

TABLE OF AUTHORITIES

CASES	Page
Arizona v. California, 460 U.S. 605 (1983)	14a
California v. Southern Pacific Co., 157 U.S. 229 (1895)	7
California ex rel. State Lands Comm'n v. United States, 457 U.S. 273 (1982)	18
Gelb v. Royal Ins. Co., 798 F.2d 38 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987)	13a
Grayson v. Virginia, 3 U.S. 319 (3 Dall. 320) (1946)	7
Jess v. West, Civ. No. 88-L-308 (D. Neb. filed Aug. 1, 1988)	29
Kentucky v. Indiana, 281 U.S. 163 (1930)	7
Montana v. United States, 440 U.S. 147 (1979)	13a, 14a
Nebraska v. Rural Electrification Admin., 12 Env't Rep. (BNA) 1156 (D. Neb. 1978)	9a
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), 108 S. Ct. 1103 (1988)	1, 3, 6, 23, 26, 29, 30, 31, 33, 36, 2a, 4a
New Jersey v. New York, 345 U.S. 369 (1953)	7, 12
North Carolina R.R. v. Story, 268 U.S. 288 (1925)	13a
Norton v. Larney, 266 U.S. 511 (1925)	13a
Ohio v. Kentucky, 410 U.S. 641 (1973)	18
South Carolina v. Katzenbach, 383 U.S. 301 (1966)	18
Texas v. New Jersey, 379 U.S. 674 (1965)	7
United States v. Nevada, 412 U.S. 534 (1973) (per curiam)	7
United States v. Texas, 339 U.S. 707, *modified*, 340 U.S. 848 (1950)	18
Utah v. United States, 394 U.S. 89 (1969) (per curiam)	7
West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951)	14a
Wyoming v. Colorado, 259 U.S. 419, *modified*, 260 U.S. 1 (1922), 286 U.S. 494 (1932), 298 U.S. 573 (1936), *vacated*, 353 U.S. 953 (1957)	25, 26

TABLE OF AUTHORITIES—Continued

	Page
Wyoming ex rel. Christopulos v. United States, No. 23-12 (Wyo. Dist. Ct. filed Oct. 3, 1986) (removed to U.S. District Court for the District of Wyoming, Case No. C86-0370-B)	20
STATUTES AND RULES	
Exec. Order No. 2116 (1916)	2a
Fed. R. Civ. P. 24	7
Fed. R. Civ. P. 56	17
S. Ct. R. 9.2	17
33 U.S.C. § 1344 (1982)	29
Restatement (Second) of Judgments (1982)	14a
MISCELLANEOUS	
3B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* (2d ed. 1987)	7
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, *et al.*,

Defendants.

OWEN OLPIN, SPECIAL MASTER

FIRST INTERIM REPORT

June 14, 1989

I. INTRODUCTION.

The waters of the North Platte River were apportioned by decree in 1945, after eleven years of litigation involving the States of Colorado, Wyoming and Nebraska and the United States. *Nebraska v. Wyoming*, 325 U.S. 589, 605-06 (1945), *modified*, 345 U.S. 981 (1953), 108 S. Ct. 1103 (1988) ("the Decree"). The heart of that controversy was whether upstream junior appropriators in Wyoming and Colorado were wrongfully depriving senior appropriators in Nebraska of North Platte waters. The Decree generally restricts prospectively developments inhibiting established water uses on the river. Significantly, the Decree recognizes some priorities across state lines, protects established Wyoming and Nebraska uses against certain further Colorado developments, Decree ¶ I, and in turn protects established Nebraska uses against certain further Wyoming developments. *Id.* ¶¶ II, IV.

The Decree's polestar is its allocation of waters in the North Platte mainstem between Guernsey Dam (in Wyoming) and the Tri-State Diversion Dam (just downstream of the Wyoming-Nebraska state line). During the May 1 through September 30 irrigation season, all natural flows in this region of the mainstem are apportioned 75% to Nebraska and 25% to Wyoming. *Id.* ¶ V.

The Decree also contains a "changed conditions" or "reopener" clause. *Id.* ¶ XIII. The Court retains jurisdiction for the purpose of any "order, direction, or modification" of the Decree. The Decree offers changed conditions, *id.* ¶ XIII(f), threatened construction in Wyoming, *id.* ¶ XIII(c), or threatened construction in Nebraska, *id.* ¶ XIII(b), as illustrative of events which might give rise to an "order, direction, or modification."

On October 6, 1986, Nebraska petitioned the Court to enforce the Decree and for injunctive relief. In her petition, Nebraska alleged that Wyoming unlawfully is depleting and threatening to deplete the flows of the North Platte River (i) by her intended administration of the operation of and releases from the Grayrocks Reservoir on the Laramie River, a tributary of the North Platte River, (ii) by her intended construction of additional river pumping, diversion and storage facilities near the confluence of the Laramie and North Platte Rivers, (iii) by her proposed construction of a storage reservoir on Deer Creek, a tributary entering the North Platte River between Pathfinder and Guernsey Reservoir, and (iv) by her efforts to "prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska." [1]

In answering Nebraska's petition Wyoming filed a counterclaim alleging that Nebraska is circumventing the

---

[1] Petition For An Order Enforcing Decree And For Injunctive Relief ¶ 3 (Oct. 6, 1986) ("Nebraska's Petition").

Decree by (i) demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the irrigation requirements of lands entitled to water under the Decree and (ii) demanding both natural flow and storage water from sources above Tri-State Dam and bypassing or diverting it to uses below the dam that are not recognized or authorized by the Decree.[2]

On January 11, 1988, Nebraska moved the Court to amend her petition for the principal purpose of enforcing the Decree, and modifying the Decree if necessary, to protect instream uses of the North Platte River and its tributaries. Nebraska noted that:

> Encouraged and sanctioned by the passage of federal and state legislation since the entry of the Decree in 1945, the principal instream use of the waters of the North Platte and its tributaries has been for the development and protection of critical wildlife habitat.[3]

The Court denied, without explanation, Nebraska's motion to amend.[4]

On June 22, 1987, the Supreme Court referred this matter to me as Special Master in an order stating:

> It is ordered that Owen Olpin, Esquire, of Los Angeles, California be appointed Special Master in this case with authority to fix the time and condi-

---

[2] Wyoming Answer To Petition, Motion For Leave To File Counterclaim And Counterclaim (Mar. 18, 1987) ("Wyoming Answer And Counterclaim") at 8-9.

[3] Brief In Support Of Motion To Amend Petition For An Order Enforcing Decree And For Injunctive Relief (Jan. 11, 1988) ("Nebraska Brief To Amend") at 2.

[4] *Nebraska v. Wyoming*, 108 S. Ct. 1103 (1988)

> The motion of Basin Electric to file a response to plaintiff's motion to amend is granted. The motion of plaintiff to amend petition for an order enforcing decree and for injunctive relief is denied.

> tions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The order also referred to me then-pending motions for intervention. This First Interim Report is submitted to the Supreme Court to describe my interpretation of my authority and my exercise of that authority in these proceedings to date. I have thus far ruled on the motions for intervention and on Wyoming's motion for summary judgment and certain related motions to strike.

II. SCOPE OF AUTHORITY.

Nebraska petitioned to enforce the Decree. Wyoming and *amicus* Basin Electric have contended that, because the matter arose in this manner, my authority is limited. They have repeatedly challenged the exercise of my authority on the basis that this is an enforcement proceeding that can and should be decided on the face of the Decree.[5] Although the Order of Reference expressly gives me "authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and

---

[5] *See, e.g.*, Wyoming Reply Brief In Support Of Motion For Summary Judgment And Wyoming Motion To Strike Affidavits (Sept. 19, 1988) ("Wyoming Reply And Motion To Strike") at 4 (the Special Master "should not allow 'enforce' to be transformed into 'modify' via 'clarification' or 'construction,' and should not permit the issues to be expanded beyond the limited scope of this enforcement proceeding."); Wyoming Motion And Supporting Memorandum Requesting Reconsideration Of Special Master's Tenth Memorandum And Order Denying Summary Judgment (Mar. 29, 1989) ("Wyoming Reconsideration Motion") at 3, *id.* at 5 ("The Special Master apparently assumes that the Court, by appointing a Special Master, expressed its intent to require evidentiary hearings on every issue. Such an assumption is not justified. . . . No trial is necessary to interpret the Court's previous opinion and Decree and to determine the scope of this case.").

such as [I] . . . may deem it neessary to call for," it has been suggested that my decision to take evidence would be beyond the scope of this proceeding:

> [T]o the extent 'facts' in the record are needed to explain ambiguities in the Decree, the opinion, or the Master's Report, the record is available and relevant portions have been pointed out by the parties. . . . Even if the Master determines that he needs to consider additional portions of the record before deciding the summary judgment motion, no trial regarding the record would be necessary or appropriate.[6]

In opposing Nebraska's petition, Wyoming has argued in her summary judgment pleadings, during oral argument, and again in her petition for reconsideration that as a matter of law the Decree is not violated by Wyoming's actions and proposed actions that are the subject of this action. These arguments have been evaluated and rejected both by the Court when it took jurisdiction despite such assertions, and by me in denying summary judgment after a review of the original special master's report and record leading to the 1945 Decree and evidence put into this record by Nebraska and the United States.[7]

I continue to interpret my authority as permitting me to take evidence "on all of the substantive questions that

---

[6] Wyoming Reply And Motion To Strike at 15. *See also* Basin Electric's Reply Memorandum In Support Of Its Petition For Reconsideration Of Its Motion To Intervene And Of Parts Of The Master's Tenth Memorandum (Mar. 29, 1989) at 5-6 ("Nebraska's confident assertion that the Master is authorized to take evidence in aid of construing the decrees IS DEAD WRONG. A decree must be interpreted solely by reference to its terms and to the record on which it is based. Evidence *dehors* the record from which the decree proceeded is incompetent to establish its meaning.").

[7] In my Tenth Memorandum And Order (Mar. 2, 1989) ("Tenth Memorandum") denying summary judgment, I left open the possibility of summary disposition if later discovery and pretrial proceedings suggest further factual development to be unnecessary.

the Court has permitted Nebraska to litigate, and, upon consideration of such evidence, to fashion appropriate recommendations for the Court's consideration of all the possible varieties that were contemplated by the Court in its opinion and in the Decree, including Paragraph XIII." [8]

III. THE MOTIONS FOR INTERVENTION.

The Court's June 22, 1987 Order of Reference specifically referred to me five pending motions for leave to intervene in this matter.[9]

All the motions to intervene were opposed. The intervention issues were fully aired in three rounds of briefing, in oral presentation at a status conference in Salt Lake City, Utah, on October 1, 1987, and during the course of telephone conferences held among the parties and the putative intervenors. For the reasons described below, on April 1, 1988, I denied the motions to intervene, but invited all of the putative intervenors to participate in this action as *amici curiae*. I provided for active involvement in the case by the *amici*, allowing them to present affidavits, file briefs, including reply briefs, as well as the potential to participate more fully respecting key matters in the proceedings upon a showing of good cause. I envisioned the *amici* participating both to preserve their interests and as traditional friends of the court to aid in full exposition of the issues.

---

[8] Tenth Memorandum at 5. Paragraph XIII of the Decree states in relevant part:

> XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

[9] The United States, as an intervenor in the proceedings leading to the 1945 Order and Decree, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), has remained a party to this case.

Bearing in mind that original actions are clothed in a mantle of flexible procedure,[10] while I saw Fed. R. Civ. P. 24 as lending structure to the intervention analysis in this original action, I sought applicable standards in the precedents of other original actions.

Original jurisdiction "should be invoked sparingly." *Utah v. United States*, 394 U.S. 89, 95 (1969) (per curiam). A private party ordinarily has "no right to intervene in an original action," *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam), but may be permitted to intervene if it can satisfy the "burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953). *See also Kentucky v. Indiana*, 281 U.S. 163, 173 (1930). Further, the adjudication at hand must, in practice, adjudicate rights belonging to the intervenor, *Texas v. New Jersey*, 379 U.S. 674, 677 n.6 (1965), and have a *res judicata* effect with respect to those interests.

I also considered policy questions including fairness to non-parties, protection of interests that will be affected by principles of *stare decisis*, collateral estoppel and *res judicata*, full exposition of the issues, and promotion of judicial economy. I balanced these considerations against the need to prevent unnecessary expansion of the scope of the action, to avoid confusion, delay and inefficient administration of justice, and to protect the parties to the action against the prejudice and additional litigation obligations (*e.g.*, discovery, experts and evidence gathering) that might be caused by adding intervenors.[11]

---

[10] *See, e.g., Grayson v. Virginia*, 3 U.S. 319 (3 Dall. 320) (1796); *California v. Southern Pacific Co.*, 157 U.S. 229, 249 (1895).

[11] *See* Fed. R. Civ. P. 24(b); 3B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶24.10[4] (2d ed. 1987).

Although each of the potential intervenors articulated keen interest in the outcome of the case at hand, I concluded that their interests either could be represented by a current party or would not be adjudicated in this proceeding. To the extent that the case might have some impact on the eventual disposition of their interests, I thought it fitting that the *amici* should work closely with the parties to ensure full exposition of the necessary evidence and examination and availability of important witnesses.

A. The Platte River Trust and the National Audubon Society.

Certain reaches of the North Platte River in Nebraska are seasonal habitat for several endangered species of wildlife, including the whooping crane. The Platte River Whooping Crane Critical Habitat Maintenance Trust ("Platte River Trust") was established in 1978 by the Basin Electric Power Cooperative, Inc., as part of a settlement of litigation over the construction of the Grayrocks Dam in Wyoming. The Platte River Trust has a mandate to "protect and maintain . . . the physical, hydrological and biological integrity of [the Platte River] area so that it may continue to function as a life-support system" for migratory bird species.

The Platte River Trust and the National Audubon Society ("Audubon") both requested intervention "to protect and enhance the habitat of migratory birds" [12] by ensuring that there are no "further decreases or regula-

---

[12] Motion Of Platte River Trust For Leave To Intervene As Plaintiff And Memorandum In Support Of Motion And Complaint In Intervention (Mar. 20, 1987) ("Platte Memorandum") at 10. *See also* Motion Of The National Audubon Society For Leave To Intervene Or To Participate As Litigating Amicus Curiae And Brief In Support Of Motion For Leave To Intervene Or To Participate As Litigating Amicus Curiae (Mar. 23, 1987) ("Audubon Motion") at 3-4.

tion of the natural flow" [13] of the North Platte River to the Big Bend reach and that restrictions are imposed on seasonal variation in the North Platte flow at the Wyoming-Nebraska state line.[14] According to the Platte River Trust and Audubon, "[w]ithout a satisfactory pattern of river flows, the habitat . . . will be permanently destroyed," and the apportionment in this case will "have a significant precedential and practical effect upon . . . future ability to pursue regulatory or statutory water rights within or outside the State of Nebraska." [15]

The Platte River Trust and Audubon believe that their interests will not be represented adequately by either the United States [16] or Nebraska.[17] Nebraska, Wyoming and Colorado opposed intervention by the Platte River Trust and Audubon on the grounds that their intervention would enlarge the scope of these original jurisdiction proceedings and that there are other more appropriate forums in which to protect environmental interests. Also, it was argued, Nebraska and the United States could represent those interests.[18]

---

[13] Audubon Motion at 4.

[14] Platte Memorandum at 10.

[15] *Id.; see also* Audubon Motion at 8-9.

[16] Telephone Conference Transcript of Proceedings (Nov. 4, 1987) ("Tel. Cf. Tr.") at 8.

[17] *Id.; see also* Transcript of Proceedings (Oct. 1, 1987) ("Salt Lake Tr.") at 66, 80, 83.

[18] Putative intervenors Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District also argued that intervention by the Platte River Trust and Audubon would expand the scope of the proceedings. *See* Joint Motion Of Nebraska Public Power District And The Central Nebraska Public Power And Irrigation District For Leave To File A Joint Complaint In Intervention And For Leave To Intervene As Plaintiff, Joint Complaint In Intervention, And Brief In Support Of Joint Motion For Leave To File A Joint Complaint In Intervention And For Leave To Intervene As Plaintiffs (Apr. 15, 1987) ("Nebraska Districts Joint Brief") at 20-21.

At that stage in the proceedings, I determined that it did not appear that enforcement of the Decree would *directly* require detailed resolution of the wildlife and environmental issues. Thus, adding the Platte River Trust and Audubon as intervenors unnecessarily could expand the factual issues to be developed. However, I made clear that while decisions concerning appropriations within Nebraska, Wyoming, and Colorado and the protection of wildlife and enivronmental issues primarily belonged in other forums, the resolution of the issues in this case could affect future actions in those forums.

The United States is charged by numerous federal statutes with the responsibility to protect wildlife and environmental values. Although it represents other federal agencies which may have other and sometimes competing interests, the United States has the duty to assess the necessary balance between the various federal concerns. Mr. Andrew Walch, speaking for the United States, recognized downstream wildlife issues [19] and put the United States on record as having the intention to represent these interests:

> We're not asserting any claims or rights at this time in regards to those [wildlife and environmental] matters, but *we will be very diligent*, I think, in presenting evidence and in considering the evidence presented by the parties relative to any potential impacts that a modification or substantial change in the decree might have on those interests. In that regard, I think that since the United States is charged with some responsibilities for endangered species, that the concerns raised by National Aud[u]bon and the Trust will, at least to the best of our ability, be represented in this proceeding[] if we do recognize some threat to those interests.[20]

---

[19] *Id.* at 14-16.

[20] Salt Lake Tr. at 53, 54 (emphasis added). *See also id.* at 111-115; Tel. Cf. Tr. at 24 ("We still think that we can represent all of the interests of the United States in this proceeding.").

I encouraged the United States to cooperate with the Platte River Trust and Audubon in this regard.

The Platte River Trust and the National Audubon Society have continued actively to participate as *amici*, filing briefs, presenting affidavits and appearing at hearings.

B. Basin Electric Power Cooperative.

Basin Electric Power Cooperative ("Basin Electric") is concerned about Nebraska's claims that Wyoming is or would be violating the Decree with respect to her activities or proposed activities at Grayrocks, the Laramie River Station and the Corn Creek Irrigation District. Basin Electric believes that Wyoming cannot adequately represent its interests because Wyoming was not a party to the Settlement Agreement which was the product of earlier Grayrocks litigation between Nebraska, the National Wildlife Federation, Audubon and others on the one hand, and the Rural Electrification Administration, the Omaha District Engineer of the U.S. Army Corps of Engineers and others on the other hand, and because Wyoming might not accord priority to Basin Electric's interests.[21] Wyoming opposed intervention by Basin Electric on the basis of her *parens patriae* role in equitable apportionment proceedings.[22]

---

[21] Motion Of Basin Electric Power Cooperative For Leave To Intervene And Memorandum In Support Of Motion And Answer (April. 13, 1987) ("Basin Memorandum") at 8-9; Salt Lake Tr. at 89-92. Basin Electric also does not believe that the United States can or will represent its interests. *Id.*

[22] Wyoming Memorandum In Opposition To Basin Electric Power Cooperative Motion For Leave To Intervene (Apr. 14, 1987) at 2; *see also* Salt Lake Tr. 42-43 ("Basin's and the State of Wyoming's position are [sic] the same, and that is the Laramie River is exempt from apportionment in the decree.").

I concluded that Basin Electric had not shown a compelling interest in its own right that would not be properly represented by Wyoming.[23] To the extent that Basin Electric has raised issues with respect to Grayrocks and the Laramie River that would be resolved in this case, Wyoming was deemed to represent those interests after declaring herself ready and equipped to do so:

> MR. COOK [Wyoming]: Wyoming has said . . . that as a Wyoming appropriator [Basin] would be administered according to Wyoming water law in priority with other water users, and that is in essence . . . the only position Wyoming can take with Basin. We wanted to defend their water right and defend their ability to use the Laramie River . . . Wyoming intends to regulate and administer water for Basin in priority.[24]

I did, however, see Basin Electric playing a useful role as an *amicus*, both to ensure that Wyoming adequately protects Basin Electric's interests, and to flesh out fully the necessary data for the Court. Indeed, Basin Electric has participated actively in the proceedings to date, filing briefs and appearing at hearings.

On March 29, 1989, Basin Electric petitioned for reconsideration of its motion for leave to intervene or, in

---

[23] I saw Basin's position as comparable to that of the City of Philadelphia in *New Jersey v. New York*, 345 U.S. 369 (1953). The Supreme Court denied the right of intervention to Philadelphia, which asserted unquestioned interest in the use of the Delaware River's water at issue and pointed to its recent grant of Home Rule as justification for its independent participation, on the grounds that the state must be deemed to represent all of its citizens in an original case or "there would be no practical limitations on the number of citizens . . . to be made parties," expanding original actions "to the dimensions of ordinary class actions." *Id.* at 373.

[24] Salt Lake Tr. at 128-29.

the alternative, renewed its prior motion to intervene.[25] This reconsideration request arose out of the position taken by Wyoming during oral argument on Wyoming's motion for summary judgment. Wyoming made clear that, while she intends to administer water released from Grayrocks in compliance with Wyoming law, she does not guarantee that such administration will be consistent with the terms of the Settlement Agreement. *See infra*, pp. 10a-11a. Basin Electric now argues that Wyoming patently cannot be deemed to represent her interests because "Wyoming does not regard Basin's obligation to maintain minimum flows as provided in the Settlement Agreement as being entitled to recognition under Wyoming law." [26]

I have deferred a ruling on Basin's petition for reconsideration or renewal of its intervention motion until Wyoming's position with respect to the minimum flows required by the Settlement Agreement can be firmly established during pretrial proceedings.

C. The Nebraska Districts.

The Nebraska Public Power District and the Central Nebraska Public Power and Irrigation District (collectively the "Nebraska Districts") moved to intervene, arguing that as downstream users they would be directly affected by the resolution of the issues raised by Nebraska in her original petition.[27] Further, "the States cannot adequately represent the Districts' interests because the States are not a licensee. The States have certainly a

---

[25] Petition Of Basin Electric Power Cooperative For Reconsideration Of Its Motion For Leave To Intervene And Of Certain Parts Of The Decision Contained In The Tenth Memorandum Of The Special Master (Mar. 29, 1989) ("Basin Electric Petition For Reconsideration").

[26] Basin Electric Petition For Reconsideration at 5.

[27] Tel. Cf. Tr. at 8.

broader and a different perhaps set of interests." [28] Wyoming opposed intervention by the Nebraska Districts.[29]

I denied intervention to the Nebraska Districts because issues concerning their status and responsibilities as FERC licensees would not be part of this proceeding. With respect to other issues, Nebraska would adequately represent their interests.

Since my denial of their intervention motions, the Nebraska Districts have played no role in this case although I extended to them the opportunity to participate as *amici*.

IV. WYOMING'S MOTION FOR SUMMARY JUDGMENT.

On September 11, 1987, Wyoming moved for summary judgment on all the questions raised by Nebraska's October 6, 1986 petition to enforce the Decree. *See supra* at 2.

Wyoming, in answering Nebraska's petition and filing a counterclaim, took the position that Wyoming has the right to dewater the Laramie River up to its confluence with the North Platte River leaving Nebraska no rights in the Laramie, which Wyoming contends was earlier fully apportioned between Wyoming and Colorado. Further, Wyoming took the position that the Decree on its face precludes a finding that the operation of the Deer Creek Reservoir would violate the Decree. Finally, Wyoming argued that her suit against the United States Bureau of Reclamation to require Bureau compliance with Wyoming law with respect to storage of water in the Inland Lakes does not violate the Decree.

After the Court granted leave to Nebraska and appointed me as Special Master, Wyoming moved for summary judgment raising essentially identical arguments.

---

[28] *Id.*

[29] *Id.* at 14-16.

In her summary judgment motion Wyoming acknowledged that Nebraska accurately described Wyoming's proposed developments on the North Platte River and its tributaries and conceded effects on the North Platte flows. Wyoming contended, nevertheless, that there were no genuine issues of material fact and that the legal issues could be resolved through facial interpretation of the Decree.[30]

Both the United States, which intervened in the 1945 proceedings and is a party in this case,[31] and Nebraska opposed the motion for summary judgment. The Platte River Trust, as *amicus curiae*, also opposed the motion for summary judgment to the extent the State of Wyoming argued that Nebraska's rights are limited, as a matter of law, to water requirements for lands served by canals diverting at or above the Tri-State Dam in Nebraska just downstream of the Wyoming line. *Amicus* Basin Electric supported Wyoming's motion for summary judgment.

The issues raised by the summary judgment motion were fully litigated in a round of briefing, in oral argument at a day-long hearing in Pasadena, California, on November 18, 1988, and in follow-up affidavits and correspondence, and examined in light of a review of the report of Special Master Doherty and the record in the previous proceedings during the 1930's and 1940's. *Amici* the Platte River Trust and Basin Electric participated in the oral argument.

---

[30] Motion Of The State Of Wyoming For Summary Judgment And Brief In Support Of Motion at 81 (Sept. 11, 1987) ("Wyoming Summary Judgment Motion").

[31] Colorado was impleaded as a defendant in the 1945 proceedings, but did not participate in the summary judgment proceedings until the time came to file petitions for reconsideration of my ruling. However, Colorado has been served with all papers and has the ability to participate in any part of these proceedings.

For the reasons described below, I denied Wyoming's motion for summary judgment. I found with respect to each of the issues I considered that there are outstanding genuine issues of material fact. In short, there are factual issues to be explored before a fair adjudication can be reached and, given the crucial importance of these questions to the people of Nebraska, Wyoming and Colorado, and to the United States, I intend to proceed to trial of all of the disputed issues.

Wyoming also filed a counterclaim and, in conjunction with the summary judgment motion, requested a ruling on a question of law implicated in her counterclaim: in the context of this action, can Nebraska assert any claim to North Platte waters other than for irrigation of lands served by canals that divert at or above Tri-State Dam (including the Ramshorn Canal)? For reasons described below, I left this question open for further factual development.

According to an appeal procedure that I set forth in my ruling on summary judgment, Wyoming, Colorado and Basin Electric have all petitioned for reconsideration of portions of that ruling.[32] In addition, the United States has suggested that I should narrow the issue I framed with respect to the downstream of Tri-State reach.[33] The United States agrees, however, that summary adjudication at this time is inappropriate even on its suggested narrower issue.[34]

At a status conference held in Pasadena, California, on May 12, 1989, the parties agreed to proceed with pre-

---

[32] Wyoming Reconsideration Motion; Colorado Petition For Reconsideration (Mar. 29, 1989); Basin Electric Petition For Reconsideration.

[33] Response Of The United States To Motions For Reconsideration Of Wyoming, Colorado And Basir Electric (Apr. 21, 1989) ("U.S. Response To Motions For Reconsideration") at 3-4.

[34] *Id.* at 4.

trial preparation on two issues that have not been expressly challenged, the decisiton to determine in this forum the Inland Lakes water storage rights claimed by the United States and disputed by Wyoming, and the question whether Wyoming's contemplated development and administration of the Deer Creek project threatens to violate the Decree. Wyoming, Colorado and Basin Electric have all petitioned for reconsideration of my decision to allow Nebraska to proceed to show injuries she claims to equities below the Tri-State Dam instead of ruling as a matter of law that the 1945 Decree affords Nebraska no rights to relief for any injuries to any uses other than those irrigation uses initially supplied by diversions into canals at or above Tri-State Dam. Wyoming and Basin Electric have also challenged my finding that outstanding issues of material fact preclude summary judgment on the issues related to the Laramie River.[35] I have denied the petitions for reconsideration for the reasons described below.

In considering Wyoming's motion for summary judgment, I found that the Rule 56 standards have not been satisfied.[36] I left open the possibility of summary ad-

---

[35] During the summary judgment proceedings, Wyoming also moved to strike affidavits and portions of affidavits submitted by those expected to be expert witnesses for Nebraska, the United States and the Platte River Trust. With one exception I denied Wyoming's motion to strike, finding the challenged evidence to be consistent with what is expected under Fed. R. Civ. P. 56(e) and Wyoming's motion to be hypertechnical. My ruling on the motion to strike has not been challenged.

[36] Wyoming asked that the factual development of this case be cut off on the basis that Nebraska and the United States have not presented testimony that would justify taking the matter to trial. Under Rule 56(c), summary judgment would be appropriate if, upon weighing the pleadings, affidavits, and other materials placed before me it is apparent that there is no genuine issue of material fact that should be left for further consideration at trial. Fed. R. Civ. P. 56(c). Rule 56 is a useful source of guidance but is tempered by the context of this original action. *See* S. Ct. R. 9.2;

judication on any issue later in the proceedings. I was mindful of the need for original jurisdiction cases to permit full development of the facts. *United States v. Texas*, 339 U.S. 707, 715, *modified* (for textual accuracy), 340 U.S. 848 (1950). I inferred from the Supreme Court's granting of jurisdiction and referral of the matter to me that the Court had already taken into consideration the sufficiency of Nebraska's allegations. *Cf. California ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 278 (1982) (no special master appointed because "[n]o essential facts" were disputed); *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966) (the Court dispensed with the appointment of a special master "[b]ecause no issues of fact were raised in the complaint"); *United States v. Texas*, 339 U.S. at 715 (no master was needed to resolve factual problems).

Finally, I took notice of the identity of arguments contained in Wyoming's opposition to Nebraska's initial petition for leave to file and her arguments in her summary judgment motion. The Court had already reviewed and considered the arguments later made by Wyoming in her summary judgment motion, but nonetheless took jurisdiction and referred the matter to me. Wyoming has raised no new issues in her petition for reconsideration of my denial of summary judgment. I explain below my reasons for denial of summary judgment concerning the issues in the case as to which there is a dispute.

A. The Inland Lakes Issues.

There have been no express challenges in the reconsideration papers to my determination that the questions raised about the Inland Lakes should be litigated in this forum as part of these proceedings and that those questions presently are not appropriately resolved by summary judgment.

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 10.12, at 495-96 (6th ed. 1986); *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

In 1986, Wyoming brought a lawsuit against the United States Bureau of Reclamation in the United States District Court for Wyoming ("Christopulos Suit") to require the Bureau of Reclamation to obtain a permit for the diversion of storage waters to the Inland Lakes during the non-irrigation season. In her petition to the Supreme Court, Nebraska alleged that Wyoming state officials were taking certain actions to prevent the diversion of storage waters to the Inland Lakes during the non-irrigation season.[37] Wyoming correctly interpreted this allegation as a reference to her Christopulos Suit and argued that the Court should rule summarily "as a matter of law that the Wyoming lawsuit does not violate the Decree."[38] Wyoming has repeatedly insisted that the merits of the Inland Lakes issue are not the subject of the instant proceeding.[39] As Nebraska has pointed out, however, it is "not the suit 'itself' which would violate the Decree, but the relief requested by Wyoming" in the suit.[40]

Despite the initial obfuscation of the issue involved with respect to the Inland Lakes, the parties now agree on the key question to be tried. That question is whether the Inland Lakes enjoy a water priority date under Wyoming law of December 6, 1904, and certain water rights for their historical administration under the Decree, and,

---

[37] Nebraska's Petition ¶ 3(d).

[38] Wyoming Summary Judgment Motion at 102-103; *see also id.* at 98-99; Wyoming Reply And Motion to Strike at 33.

[39] *Id.*; *see also* Hearing For Summary Judgment (Nov. 18, 1988) ("Summary Judgment Tr.") at 47, 160.

[40] Nebraska's Response To Wyoming's Motion For Summary Judgment (Aug. 22, 1988) ("Nebraska's Response") at 52; *see* Nebraska's Petition ¶ 3(d); *see also* Response Of The United States To Wyoming's Motion For Summary Judgment (Aug. 22, 1988) ("U.S. Response") at 47. Nebraska was unequivocal in framing the issue in her petition.

if so, whether the Christopulos Suit is an attempt to circumvent the Court's apportionment in the 1945 Decree through the authority of a lower court decree to which Nebraska is not a party.[41]

In her answer Wyoming argued that the Inland Lakes question was a matter of state, not federal, law, and that the Supreme Court should await the outcome of the Christopulos Suit. In her motion for summary judgment Wyoming again argued that the questions "whether the Bureau [of Reclamation] has proceeded in conformity with Wyoming law and, if not, what it must do to comply with Wyoming law" are state law questions.[42] However, as the Court implicitly acknowledged by accepting jurisdiction of the Inland Lakes questions, this is the appropriate forum, because the Inland Lakes questions are inextricably entwined with the 1945 Decree and its injunctions and with the historic manner in which the North Platte Project has been operated. Also, because the Inland Lakes store water for uses in Nebraska, Nebraska properly must be before a court resolving these issues.[43]

Therefore, I have concluded that the parties should develop the relevant evidence and litigate these questions during these proceedings. During the May 12, 1989 status conference in Pasadena, the parties reached consensus on this manner of proceeding and will be filing discovery

---

[41] The Wyoming lawsuit against the United States Bureau of Reclamation in the United States District Court for Wyoming is captioned *Wyoming ex rel. Christopulos v. United States*, No. 23-13 (Wyo. Dist. Ct. filed Oct. 3, 1986) (removed to U.S. District Court for the District of Wyoming, Case No. C86-0370-B). Nebraska is not a party to the Christopulos Suit.

[42] Wyoming Summary Judgment Motion at 100.

[43] *See* U.S. Response at 49.

memoranda on the Inland Lakes issues by June 30, 1989.[44]

The factual briefings by the parties thus far suggest that Wyoming faces a daunting burden with respect to her Inland Lakes position, but she will be given the opportunity to sustain that burden during these proceedings.[45] When I probed Wyoming about the nature of her potential evidence during the May 12, 1989 Pasadena status conference, it became apparent that at trial Wyoming will rely upon negative evidence—that she has found nothing in the state water records to establish categorically a priority date of 1904:

> THE COURT: So am I getting to the point where, Mr. Cook, you really don't have much in the way of evidence but rather it will be mostly an attack on the basis claimed by the United States for a 1904 right?
>
> MR. COOK [Wyoming]: Essentially, that is correct. But then you need to be able to rebut the evidence that I hear that there is only one status quo in how this system has been administered over time, and that's a matter of disagreement.[46]

The attached Appendix A describes the North Platte Project and the parties' factual showings thus far respecting the Inland Lakes.

---

[44] Wyoming has indicated that she is prepared to proceed now on this issue:

> MR. COOK [Wyoming]: . . . Wyoming would like to move ahead with the Inland Lakes issue. We believe it is separate. Our position in this Court has not been to avoid attacking these issues. It has been a question of for[u]m, and you decided this is the for[u]m to have that discussion.

Pasadena Transcript (May 12, 1989) ("Pasadena Tr.") at 12.

[45] Indeed, the United States believes that summary judgment should be granted now in favor of Nebraska and the United States that the Inland Lakes enjoy a 1904 priority right. Summary Judgment Tr. at 141-42.

[46] Pasadena Tr. at 39.

B. Tributary Issues.

Wyoming's summary judgment motion raises issues respecting two tributaries, Deer Creek, entering the North Platte between Pathfinder and Guernsey Reservoir, and the Laramie River, joining the North Platte in the critical reach between Whalen, Wyoming and the Tri-State Dam. The Deer Creek issues implicate specific language in the Decree that purports to apply generically to tributaries between Pathfinder and Guernsey and language that makes special provision for ordinary and usual domestic, municipal and stock watering purposes and consumption. In the case of the Laramie the concern is with language in the Decree, the Court's opinion, and the record that singles out the Laramie for particularized treatment which Wyoming now interprets as entirely excluding all Laramie flows from consideration in the apportionment effected by the Decree.

For the reasons explained in the following sections I have denied Wyoming's motion for summary judgment on the Deer Creek and Laramie issues and have also denied her motion for reconsideration. In the case of both tributaries I have left open the prospect of future summary adjudication in these proceedings.

The ensuing sections first address the issues implicating the Laramie River and then Deer Creek.

1. *The Laramie River.*

The Laramie River is a tributary which enters the North Platte River in its most critical reach between Whalen, Wyoming and the Tri-State Dam. Special Master Doherty underscored the great importance of this reach:

> [The Whalen to Tri-State section] is the pivotal section of the entire [North Platte] river. Here is focused the main problem of water distribution. In this short 43-mile span there is concentrated a demand for water as great as the entire preceding 415 miles . . . from the interior of North Park [in northern Colorado headwaters] to Whalen.

Report of Michael J. Doherty, Special Master (Sept. 1944) ("Doherty Report") at 53.

Wyoming argued in her opposition to Nebraska's petition for leave to file, in her motion for summary judgment, and again in her motion for reconsideration that summary judgment is appropriate, adopting her contention that the Laramie River was previously fully apportioned between Colorado and Wyoming.[47] This contention is based on a reference in the Decree to the apportionment of Laramie waters between Colorado and Wyoming in the several decisions in *Wyoming v. Colorado* and a similar reference in the decision in *Nebraska v. Wyoming*, 325 U.S. 589, 592 n.1 (1945). I have acknowledged that these references could, if accepted uncritically at face value, be interpreted to apportion all Laramie River flows between Colorado and Wyoming, leaving no room for any claims to Laramie flows beyond its confluence with the North Platte.

However, as I detailed in my ruling denying summary judgment, I found sufficient material factual issues to foreclose such an uncritical interpretation at this juncture and to require the taking of evidence on the Laramie. Most importantly, I found that Special Master Doherty apparently relied on Laramie inflows in fashioning the 1945 Decree and that those inflows have been counted in the 75/25 apportionment of the natural flow in the Whalen to Tri-State reach since the Decree. On the basis of these facts alone, I am unable to rule for Wyoming as a matter of law.

Nebraska and Wyoming have taken polar positions respecting the Laramie River, positions that cannot be harmonized. Wyoming posits that the Laramie's entire flow has been apportioned between Colorado and Wyoming and that the Decree permits Wyoming, therefore, to

---

[47] Basin Electric has made similar arguments in both its motion for summary judgment and its petition for reconsideration.

dewater the Laramie anywhere down to its confluence with the North Platte, while conceding that any surviving Laramie flows actually reaching the confluence become subject to the Decree's 75/25 division of the natural flows during the irrigation season.[48] Nebraska con-

---

[48] Summary Judgment Tr. at 22. *See also* Wyoming Reply And Motion To Strike at 18 ("Wyoming recognizes that the flows of the Laramie River reaching the North Platte River during the May 1 through September 30 irrigation season become a part of the water arriving in the Whalen to Tri-State section that is apportioned by the Decree."). Wyoming has argued, however, that the Decree apportioned the entire flow of the Laramie River between Colorado and Wyoming. A review of the record leading to the Decree does not confirm that the Decree disposed of the flows of the entire Laramie River. Indeed, the record fails to establish that either state sought a complete adjudication concerning the Laramie in 1945.

The record strongly suggests that Special Master Doherty did not intend to add content to the 1922 Laramie Decree ("Laramie Decree"). Doherty, finding little dispute on the Laramie question, failed to analyze the scope of the 1922 Decree in depth, simply stating that, while the 1922 Laramie Decree merely enjoined certain diversions by Colorado, "the underlying basis of the decree was in part the finding and assumption that the limitation upon Colorado's use would leave Wyoming 272,500 acre feet annually for the irrigation of 181,000 acres down to and including the Wheatland Project." Doherty Report at 269. Moreover:

> While Nebraska takes the position generally that not being a party to *Wyoming v. Colorado* it is not bound by the decree, the only specific point made in opposition to the distribution affected by the decree pertains to the Wheatland Project.
>
> . . .
>
> After reviewing the matter I am left in some uncertainty as to Nebraska's position respecting the Wheatland Project and the Laramie River in general. . . . *The other parties appear to take the view that the Laramie is removed from the present case by the decree in Wyoming v. Colorado, except for such contribution as the Laramie may make to the North Platte after any use by Colorado and Wyoming under the terms of that Decree.*

Id. at 269-71 (emphasis added).

Special Master Doherty included Laramie flows in his computation for the Whalen-Tri-State Dam Section from 1931-40. *See*

tends, on the other hand, that the 1922 Supreme Court decree in the proceeding between Colorado and Wyoming ("Laramie Decree"),[49] apportioned the Laramie to the extent of Colorado's entitlement and Wyoming's "Laramie decree entitlement, that is, it[]s right to divert 272,000 acre feet for application on 181,500 acres of specified land down to and including Wheatland."[50] Any remaining flows of the Laramie, according to Nebraska, become part of the natural flow and are divided 75/25 by the 1945 Decree.[51] The United States guardedly endorses Nebraska's position.[52] All parties agree that once any Laramie waters actually enter the mainstem between Whalen and Tri-State they become subject to the natural flow division under the Decree and that the Decree has been so administered.[53]

I found that Wyoming has failed to carry her burden of showing that there is no genuine issue of material fact or to establish the legal grounds for her thesis that she may dewater the Laramie up to the confluence. A review of the original record compiled during the 1930's and 1940's in the proceedings leading to the Decree has failed to tie the knot on this inquiry. Despite some ex-

---

Doherty Report at 67, Table III. *See also* Wyoming Exhibit 170; Record at 17528-39 (Special Master Doherty took evidence on natural and return flows below Wheatland.) Nothing has been found in the record to suggest that the Court intended Nebraska to be foreclosed from concerning herself about the continuation of the Laramie's historic contributions to the North Platte Project.

[49] *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), 286 U.S. 494 (1932), 298 U.S. 573 (1936), *vacated*, 353 U.S. 953 (1957).

[50] Summary Judgment Tr. at 94. In its brief, Nebraska argued that the 1922 Decree did not allocate the Laramie below Wheatland. Nebraska's Response at 28.

[51] Decree ¶ V.

[52] Summary Judgment Tr. at 144.

[53] *Id.* at 22 (Wyoming).

plicit language that facially is susceptible to a broad reading favoring Wyoming's position,[54] a review of the record and the Doherty Report has failed to reveal a clear intent on the part of either Special Master Doherty or the Court with respect to the determinations in the Laramie Decree. Nebraska, which was not party in the 1922 *Wyoming v. Colorado* case, did not, of course, litigate Nebraska's equities there, and the 1922 Court did not address the apportionment of the Laramie beyond the entitlement it accorded to the litigating states, Wyoming and Colorado, at that time. And the 1945 Decree merely validated the Laramie Decree as it stood and did not purport to change or amend it in any way.[55]

Because I did not find the answer to this question in the earlier record,[56] we should proceed to a trial on the operation of the Decree since 1945 and the question whether Wyoming can dewater the Laramie to the confluence of the North Platte under the Decree. I expect to examine the parties' practical construction of the Decree

---

[54] *See, e.g.*, Doherty Report at 8 ("The water of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, 259 U.S. 419, . . . and no redistribution of the waters of those rivers should be undertaken in this suit") (citation omitted); *Nebraska v. Wyoming*, 325 U.S. at 592 n.1 (1945) ("The waters of . . . the Laramie were previously apportioned . . . between Colorado and Wyoming by decree [and are] . . . in no way affected by the decree in this case.") (citation omitted).

[55] XII. This decree shall not affect:

. . .

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River.

Decree ¶ XII; *see Nebraska v. Wyoming*, 325 U.S. at 623-25.

[56] At trial, I expect to receive the assistance of the parties in sorting through and interpreting the original record. The parties have advised me of their intention to have the entire, voluminous original record retyped and made available to the parties and the Office of the Special Master. Attempts to scan the record have apparently proven unsuccessful.

as it has affected the Laramie, including metering activities, accounting procedures, and recording procedures. I will also examine Wyoming's historic and proposed future administration of waters released from the Grayrocks Reservoir and such other matters as seem appropriate.[57]

Nebraska and the United States have shown that Laramie flows have been included in daily flows. *See* Affidavit of J. Michael Jess (Aug. 15, 1988) ("Jess Aff.") ¶ 2 as amended; *Id.* at 4 (Graph); First Affidavit of David G. Wilde (Aug. 15, 1988) ("Wilde Aff. I") ¶¶ 52-56 (including Tables 7 and 8). I have concluded that I need additional factual development respecting any Nebraska equities tied to the remaining Laramie flows and that such factual development will be critical to the resolution of this question.

Nebraska posits that actions of Wyoming in two specific settings may affect Laramie flows to her detriment: the operation of Grayrocks Reservoir on the Laramie River mainstem northeast of Wheatland and the proposed construction of the Corn Creek Project as a diversion from near the confluence of the Laramie and North Platte Rivers for storage at an off-stream reservoir. The Grayrocks and Corn Creek circumstances are briefly described and commented upon in Appendices B and C.

2. *Deer Creek.*

The parties have not challenged expressly my denial of summary judgment on the Deer Creek issue in their reconsideration papers. At the status conference in Pasa-

---

[57] Wyoming has argued strenuously, *see* Wyoming Reconsideration Motion at 4-5, and Basin Electric has echoed even more stridently, *see* Basin Electric Reconsideration Motion at 5-10, that it is not permissible to rely on evidence "*dehors* the record," such as the practical construction inherent in the administration of the Decree for more than four decades. I am not willing at this stage to rule out consideration of such evidence and will deal with that question when it concretely arises in these proceedings.

dena on May 12, 1989, it was agreed that a pre-trial conference will be held on the Deer Creek issues on September 12, 1989, and that discovery will proceed in the interim.

Deer Creek Reservoir is a storage project proposed to be built on a tributary entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, downstream of Casper, Wyoming. It is sponsored by the Wyoming Water Development Commission. Affidavit of Michael K. Purcell ¶¶ 1, 2 (Sept. 2, 1987) ("Purcell Aff.") attached to Wyoming Sumary Judgment Motion. A Wyoming State permit was issued on March 13, 1987, for an appropriation of surface water for Deer Creek. Affidavit of Gordon W. Fassett (Sept. 2, 1987) ("Fassett Aff.") ¶ 2.

Wyoming states that the purpose of the Deer Creek Reservoir is to meet municipal needs in Casper, Wyoming, and other smaller municipalities in Wyoming below Alcova Reservoir but upstream of the mouth of Deer Creek by exchange. Purcell Aff. ¶ 4. Wyoming has stated that, "[u]ntil the full annual yield of Deer Creek Reservoir is needed for those municipal uses, the Commission plans to temporarily allow the water available in excess of the municipal needs to be used for non-municipal purposes." *Id.; see also* Motion Of The State Of Wyoming For Summary Judgment And Brief In Support Of Motion (Sept. 11, 1987) ("Wyoming Summary Judgment Motion") at 94 n.4.

Wyoming estimates that the Deer Creek Reservoir will store approximately 66,000 acre feet of water, yielding a "dependable annual yield for consumptive uses of . . . approximately 6,400 acre-feet to 9,600 acre-feet." Purcell Aff. ¶ 6. In December, 1987, the United States Army Corps of Engineers issued a permit under Section 404 of

the Federal Water Pollution Control Act, 33 U.S.C. § 1344 (1982), for Deer Creek Reservoir's construction.[58]

Wyoming contends that, as a matter of law, developing the Deer Creek Reservoir, although it "will result in certain depletions to the flow of the North Platte River," [59] will not violate the Decree. Wyoming relies on Paragraph X of the Decree, which provides that the Decree "shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption." Decree ¶ X; *see* Wyoming Summary Judgment Motion at 98. I agree with Wyoming that the Decree does not affect purely ordinary and usual domestic, municipal and stock watering uses or diversions, but there are issues of fact to be resolved on whether the Deer Creek Project as presently contemplated is entirely within the Paragraph X exemption.

Wyoming also contends that no restrictions currently apply to tributary development and that, since Nebraska seeks only to "enforce" the earlier Decree, relief must be denied. *Id.* at 93; *see also* Wyoming Brief In Opposition To Motion For Leave To File Petition (Dec. 16, 1986) ("Wyoming Opposition Br.") at 19-21 (identical arguments).[60] The Court, however, expressly retained

---

[58] Nebraska has challenged the issuance of the permit in federal district court in Nebraska. *Jess v. West*, Civ. No. 88-L-308 (D. Neb. filed Aug. 1, 1988); U.S. Response at 28.

[59] Wyoming Summary Judgment Motion at 90.

[60] In the proceedings leading to the 1945 Decree, the United States urged that the Court restrain development of the tributaries between Pathfinder Reservoir and Guernsey Reservoir. *Nebraska v. Wyoming*, 325 U.S. at 624-25. Special Master Doherty concluded that such regulation was then unnecessary, and the Court, finding no record evidence of a threat at that time to tributary inflows, agreed but retained jurisdiction specifically to address, among other things, the effect of the construction or threatened con-

jurisdiction for the purpose of examining "the effect of the construction or threatened construction of storage capacity not now existing on tributaries . . . between Pathfinder Reservoir and Guernsey Reservoir." Decree ¶ XIII(c). The United States and Nebraska have introduced evidence concerning the potential effects of the operation of Deer Creek on the Decree's equitable apportionment, making clear that there are outstanding issues of material fact in this regard.

I find that Nebraska has satisfied her burden of presenting sufficient facts to cast doubt upon Wyoming's contention that no genuine issues of material fact are involved. Both Nebraska and the United States have introduced evidence to show that the North Platte River breaks down into two parts at times of the year, with a new river arising downstream of Pathfinder Dam until the reservoir fills. The reservoirs downstream of Pathfinder, including the Inland Lakes, nonetheless can store water during such times largely because of tributary inflows. I found that, with this evidence of potential harm to her equities, Nebraska should have the opportunity to present her case in tandem with her case regarding Inland Lakes to attempt to show that Deer Creek's potential interference with tributary flows could prejudice Inland Lakes storage rights and in consequence harm equities in Nebraska and for Nebraska appropriators. I also found that the United States should be allowed to present its case on harms to federal reclamation and wildlife interests at the Inland Lakes.

The United States offered evidence to show that the inflows of Deer Creek historically have been used in part to fill the Inland Lakes during the non-irrigation season, the storage rights at Guernsey Reservoir and Glendo Reservoir, and the irrigation requirements from Whalen to Tri-State. Wilde Aff. I ¶¶ 64, 65, Table 11. The

---

struction of storage capacity not then existing. Decree ¶ XIII(c); *see* 325 U.S. at 625.

United States has also introduced evidence tending to show that Deer Creek inflows are needed to meet federal reclamation project requirements in drought years. *Id.* ¶¶ 67, 68.

Wyoming concedes that Deer Creek Reservoir will result in certain depletions to the flow of the North Platte River. Wyoming Answer To Petition, Motion For Leave To File Counterclaim And Counterclaim ¶ 3(c) (Mar. 18, 1987) ("Wyoming Answer And Counterclaim"); *see* Wyoming Summary Judgment Motion at 90. Despite Wyoming's protestations to the contrary,[61] I find this issue material to the question of injury. *See* Affidavit of H. Lee Becker ¶¶ 4-6, 8 (Aug. 12, 1988) ("Becker Aff. I") attached to Nebraska's Response To Wyoming's Motion For Summary Judgment (Aug. 22, 1988) ("Nebraska's Response"); Wilde Aff. I ¶¶ 64-80. The Court retained jurisdiction precisely in case "such threat [to the water supply from the tributaries] appears and it promises to disturb the delicate balance of the river." *Nebraska v. Wyoming*, 325 U.S. at 625. At the summary judgment stage, I found that Nebraska and the United States had met their burden to show sufficient facts to be allowed to attempt to prove that Deer Creek is not soley an exempt municipal project and then to prove that operation of Deer Creek Reservoir would upset the delicate balance established by the Decree.

There are also facts that cast doubt on whether Deer Creek is exclusively an ordinary and usual municipal project. Wyoming has admitted that non-municipal uses will precede municipal uses under a broad and open-ended test of municipal needs for "the full annual

---

[61] *See* Wyoming Summary Judgment Motion at 91:

> Here, Wyoming has a right under the Decree to construct Deer Creek Reservoir regardless of the precise amount and timing of its depletions to the North Platte River. Any dispute about these depletions therefore is not material to this case.

yield." Purcell Aff. ¶ 4; *see* Wyoming Summary Judgment Motion at 94 n.4; Affidavit of Ann. S. Bleed (Aug. 15, 1988) ("Bleed Aff.") ¶ 6 attached to Nebraska's Response; Hearing For Summary Judgment (Nov. 18, 1988) ("Summary Judgment Tr.") at 82; Wyoming Reply Brief In Support Of Motion For Summary Judgment And Wyoming Motion To Strike Affidavits (Sept. 19, 1988) ("Wyoming Reply And Motion To Strike") at 6 ("the *primary* use of Deer Creek Reservoir allowed by its state permit is municipal use") (emphasis added). The meaning of the exemption contained in Paragraph X of the Decree and the determination whether Deer Creek fits entirely within that exemption as defined could well have an impact on the outcome of this case.

Accordingly, I found summary judgment to be inappropriate on the Deer Creek Reservoir question. Sufficient conflicting evidence is floating about to require a trial on this issue.

C. Downstream of Tri-State Dam Issues.

As previously indicated, the downstream of Tri-State Dam issues initially were raised in Wyoming's counterclaim. In particular, Wyoming complained that Nebraska is circumventing the Decree by (i) demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the irrigation requirements of lands entitled to water under the Decree and (ii) demanding both natural flow and storage water from sources above Tri-State Dam and bypassing or diverting it to uses below the dam that are not recognized or authorized by the Decree.[62]

While Wyoming acknowledges that her entire counterclaim is not ready for summary judgement, she requested in her summary judgment motion a partial summary

---

[62] Wyoming Answer And Counterclaim at 8-9.

judgment ruling in order to simplify the issues for trial. Wyoming asked for a ruling that under the Decree Nebraska's rights "are limited to use on lands irrigated by water diverted from the North Platte at or upstream of Tri-State Dam." [63] For the reasons set forth below, I have denied Wyoming's request for partial summary judgment and also Wyoming's motion for reconsideration on this issue.

Nebraska acknowledges, as she must, that the section of the North Platte below Tri-State Dam was not included in the 1945 apportionment. *Nebraska v. Wyoming*, 325 U.S. at 654-55. Nebraska initially had sought an apportionment as far downstream as Grand Island, Nebraska, but subsequently conceded that all lands east of Bridgeport, Nebraska, some sixty miles east of the Wyoming-Nebraska state line, reasonably could be satisfied out of local supplies. *Id.* at 607. Special Master Doherty and the Court concluded, however, that even the lands between Tri-State Dam and Bridgeport were "adequately supplied from return flows and other local sources," and accordingly those lands were not included in the apportionment effected by the Decree. *Id.* at 654; *see also* Doherty Report at 92.

Nebraska also admits, as she must, that the apportionment itself does not extend below Tri-State Dam. Indeed, the Court took pains to assure that relief would be available should Nebraska attempt to circumvent the Decree by securing direct flow water from above Whalen, Wyoming for the use of Nebraska water users diverting below Tri-State. In that event the Court assured the United States "application for appropriate relief may be made at the foot of the decree." *Nebraska v. Wyoming*, 325 U.S. at 629.

Despite these concessions, Nebraska insists that Wyoming is not entitled to the partial summary adjudica-

[63] Wyoming Summary Judgment Motion at 80-81.

tion she seeks concerning the downstream of Tri-State issues. It is Nebraska's position that, while there is no 1945 Decree apportionment downstream of the canals diverting at or above Tri-State Dam (including the Ramshorn Canal), Nebraska should be given the opportunity to seek redress for all injuries she may suffer that depend on the apportionment. Nebraska has yet to specify exactly what injuries she apprehends, but she nonetheless insists:

> MR. SIMMS [Nebraska]:
>
> . . . We have to be able to present to the Court the injury to all equities that rely on the apportionment, and many of those equities have developed as a result of the regimen of the river created by the apportionment.

Pasadena Transcript (May 12, 1989) ("Pasadena Tr.") at 98.

Wyoming's position also remains somewhat unclear, but in essence she asserts that the Decree affords no protection for any uses or reuses downstream in Nebraska beyond the irrigation of the very lands initially irrigated by the diversions into the canals at and above Tri-State Dam. The point is best made in the following exchange:

> MR. WOODRUFF [Wyoming]:
>
> . . .
>
> I disagree with Mr. Simms that Wyoming wants to limit Nebraska to one use. Of course, we don't want to do that. We are in a semi-arid area, and maximum benefits [sic] use, I think, operates throughout this region.
>
> But first use is fine and use of return flows to get back to the stream is fine. But those—
>
> THE COURT: . . . [B]ut showing an injury to those [uses subsequent to the first irrigation use], Wyoming would argue, affords no relief whatever under the terms of the decree.

> The only question Wyoming would allow to be asked is was the primary right to divert at the above Tri-State safeguarded.
>
> MR. WOODRUFF: You bet, Judge.

Id. at 101-02. In sum, Wyoming contends that any injury beyond that to the primary irrigation right would be so far as the Decree is concerned, *damnum absque injuria.*

Nebraska seeks the opportunity to demonstrate injury as a result of threats to the apportionment without the narrowing constraint that Wyoming would impose. Nebraska recognizes that it is her responsibility in an original case to prove injury, and she has undertaken to develop her injury case, which apparently will include environmental injuries as well as other injuries grounded in "the regimen of the river created by the apportionment." *Id.* at 98. The United States has made the cogent point that it is difficult to rule on the question on which Wyoming seeks a summary adjudication until Nebraska's injury claims are fully articulated.[64] I agree with the United States and for that reason have declined Wyoming's motion for partial summary adjudication in con-

---

[64] Illustrative of the sorts of things that require clarification by Nebraska is whether Nebraska now claims that her apportionment under the Decree has been enhanced over time by "excess flows that have gotten past the Tri-State [D]am." Pasadena Tr. at 100. Wyoming seems to apprehend that such is exactly the position Nebraska seeks to establish. Nebraska is, however, not clear at all on that, and it would be quite reasonable of Wyoming to expect Nebraska to provide clarity when she comes forward with her claims of injury.

My summary judgment ruling on the downstream of Tri-State issues was particularly disconcerting to Colorado which had, until my ruling, played essentially a bystander role in the case. Colorado states that she saw in my ruling reasons to fear that indeed Nebraska has an eye on upstream of Whalen enhancements to her apportionment. Should Nebraska's attempted showing of injury confirm Colorado's worst fears, Colorado is, of course, free to take up an active role as a party and seek to protect her interests.

nection with her counterclaim. I do so, of course, without prejudice to future requests for summary adjudication following Nebraska's showing of injury and further briefing on these issues.

One other matter has caused confusion on the downstream of Tri-State issues. The Court denied without explanation Nebraska's motion to amend her petition to include downstream of Tri-State wildlife interests.[65] That denial has spawned wide speculation as to what was intended, ranging from the contentions by Wyoming and Basin that the denial demands a ruling in favor of Wyoming on the summary adjudication she seeks regarding her counterclaim, *see* Wyoming Reconsideration Motion at 4; Basin Electric Reconsideration Motion at 5-10, to the position taken by the Platte River Trust that the denial occurred simply because all of the downstream environmental issues were already within the scope of Nebraska's initial petition and that, therefore, granting Nebraska's requested amendment would have been superfluous. *See* Summary Judgment Tr. at 111-14. Nebraska's more measured view of the matter is that the denial had the effect of eliminating any possibility of articulating the new apportionment that she had sought in her petition to amend. The following colloquy occurred during argument on Wyoming's summary judgment motion:

> SPECIAL MASTER OLPIN: . . . As a result of the Supreme Court's denial [of Nebraska's petition to amend], do I lack jurisdiction to concern myself with the environmental issues downstream of Tri-State?
>
> MR. SIMMS: I don't think so. . . . I don't think your jurisdiction is in any way upset by the decision in that case. *I don't think you can now articulate a*

---

[65] *Nebraska v. Wyoming*, 108 S. Ct. 1102 (1988).

> *new apportionment for wildlife purposes*, but that certainly does not mean that you cannot recognize that those equities depend upon the apportionment and the regiment [sic] of the river created by the apportionment in this decree.

Summary Judgment Tr. at 104-05 (emphasis added). I believe Nebraska's reading is correct, but, of course, stand ready to receive any clarification that the Court may wish to offer.

For the reasons stated, however, I have simply declined to grant the summary adjudication sought by Wyoming in connection with her counterclaim. I believe it is necessary to take evidence on Nebraska's injury claims in order to determine whether those claims are cognizable under the Decree.

* * *

As noted in this report, I am moving forward with pretrial proceedings, and I anticipate submitting further reports as appropriate.

Los Angeles, California,
June 14, 1989.

OWEN OLPIN
Special Master

APPENDICES

APPENDIX A

THE NORTH PLATTE PROJECT

The North Platte Project was authorized shortly after passage of the 1902 Reclamation Act. The project provides irrigation water for large areas in eastern Wyoming and western Nebraska. It furnishes a full irrigation supply to about 226,000 acres in Nebraska and Wyoming, and a supplemental supply to about 107,000 acres. Wilde Aff. I attached to Response Of The United States To Wyoming's Motion For Summary Judgment (Aug. 22, 1988) ("U.S. Response").

There are several components to the project: (1) Pathfinder Reservoir in Wyoming with a capacity of 1,016,507 acre-feet and a 1904 priority date; (2) Guernsey Reservoir, also in Wyoming, with an additional storage capacity of 45,612 acre-feet and a 1923 priority date, used both for auxiliary storage and regulation; (3) the Whalen Diversion Dam in Wyoming which diverts water into two canals, the Interstate Canal on the north side of the North Platte River, supplying water to the Pathfinder Irrigation District during the irrigation season and to the Inland Lakes for storage in the non-irrigation season, and the Fort Laramie Canal on the south side; (4) the Inland Lakes, four off-stream reservoirs in Nebraska that are supplied by the Interstate Canal: Lake Alice, Little Lake Alice, Lake Minatare and Lake Winters Creek, with a combined storage capacity of about 75,000 acre-feet; (5) a drainage system; and (6) a power plant at Guernsey Dam.

Historically, the Interstate Canal has supplied water to the Inland Lakes during part of the non-irrigation season, that is the months of October, November, and April, for storage and later use for irrigation during the irrigation season.[1] This pattern permitted Special Master Doherty in the prior proceeding to reduce the amounts of

---

[1] Wilde Aff. I ¶¶ 5-9.

water to be charged against the Interstate Canal during the irrigation season. Historic operation of the Inland Lakes from 1920-87 followed this regular pattern. Wilde Aff. I ¶ 19.

There is a priority date of December 6, 1904, for both Pathfinder Reservoir [2] and the Interstate Canal,[3] constructed with Pathfinder Reservoir to carry water downstream for irrigation purposes.

Although initially developed under the engineering design for the North Platte Project for storage, the Inland Lakes have acquired other uses. By executive order of President Woodrow Wilson in 1916, the Inland Lakes were reserved "and set apart for the use of the Department of Agriculture as a preserve and breeding ground for native birds." [4] The 5,047 acre refuge, including Lake Alice, Lake Winters Creek and Lake Minatare, is currently managed to provide a winter habitat for the bald eagle and many species of migratory water fowl. Affidavit of Royce R. Huber (Aug. 8, 1988) ("Huber Aff.") ¶¶ 3, 4 attached to U.S. Response. Since 1964, the Nebraska Game and Parks Commission also has managed a fishing and recreation area at Lake Minatare. *Id.* ¶ 4. During October and November, before the canal freezes, the Bureau of Reclamation diverts sufficient water through the Interstate Canal to carry the refuge through the winter. Wilde Aff. I ¶ 75.

The United States and Nebraska have placed in the record evidence tending to show that the Inland Lakes have a priority dating back to that of the Interstate Canal (and, incidentally, of the Pathfinder Reservoir), December 6, 1904. While Wyoming has not yet adduced evidence

---

[2] *Nebraska v. Wyoming*, 325 U.S. at 602; Wilde Aff. I ¶ 16.

[3] Doherty Report at 204; Wilde Aff. I ¶¶ 8, 15.

[4] Exec. Order No. 2116 (1916) (attached to Huber Aff. attached to U.S. Response.)

to the contrary,[5] Wyoming has indicated her wish and intent to do so. Summary Judgment Tr. at 46-49. The United States and Nebraska also have put into the record convincing evidence of potential injury to establish equities if the claimed 1904 priority were to be impaired or changed.[6] Indeed, the evidence placed into the record by

---

[5] Wyoming's evidence to this point shows only that, in recent years, Wyoming has protested the absence of an official, separate priority for storage in the Inland Lakes under Wyoming law. *See e.g.*, Fassett Aff. ¶¶ 3-6 attached to Wyoming Summary Judgment Motion. The "purpose of Wyoming's lawsuit [in federal district court] is to define the United States' right to divert natural flow to storage in the Inland Lakes." Wyoming Reply And Motion To Strike at 34. Wyoming contends that "it's clear that although the Inland Lakes are federal reservoirs and were mentioned by the Master at one point or another in his report and by the Court in its opinion, the Inland Lakes were not provided protection until the decree. They were certainly not afforded a priority equal to Pathfinder Reservoir." Summary Judgment Tr. at 46. The Special Master and Mr. Cook (Wyoming) had the following exchange:

> MR. COOK: . . . The question that we have asked, can Wyoming proceed to a judicial determination of the Inland Lakes water right, and we need to have that to be able to administer the rights of the North Platte for both the Bureau of Reclamation and any other Wyoming appropriator on that river.
>
> SPECIAL MASTER OLPIN: Mr. Cook, are you suggesting there was chaos before this discovery in the 1980's?
>
> MR. COOK: There has been chaos as a result of it, and this lawsuit is the culmination of many, many years of efforts to come to grips with this question of the Inland Lakes, and as I suggest, Wyoming will be put to its proof at some point and will maintain the burden at that time.
>
> This is a problem that Wyoming has perceived from the 1920's, quite frankly, and has made well known to the United States and since the 1945 decree has made known to the State of Nebraska.

Id. at 49. Wyoming apparently did not raise the issue in the earlier litigation.

[6] *See* Wilde Aff. I ¶¶ 44, 45, Table 4, ¶ 47, Table 5, ¶¶ 48-51, Table 6, Table 7, ¶¶ 73-82, 89(c) and (d).

Nebraska and the United States strongly suggests that the Inland Lakes are an integral element of the concept and engineering design of the Interstate Canal. Therefore, it arguably has never been necessary to define an independent priority for the Inland Lakes.

Wyoming has conceded that the Inland Lakes are part of the North Platte Project and that the United States has the right to move water stored initially in either the Pathfinder or Guernsey Reservoirs down to the Inland Lakes for restorage in the Inland Lakes. *Id.* at 44. In the earlier proceedings there appeared to be no controversy over the manner the Inland Lakes would be employed. Wyoming fully acknowledged their role:

> This defendant admits that in addition to the Pathfinder and Guernsey Reservoirs, the North Platte Project includes Lake Minatare and Lake Alice, storage reservoirs with capacities, respectively of 60,000 and 11,000 acre feet; that both said reservoirs are supplied through the Interstate Canal and are the only reservoirs of substantial capacities in the State of Nebraska heretofore constructed and used for the purpose of storing the waters of the North Platte and the Platte rivers in said state.

Answer Of Wyoming To Colorado Cross-Bill at 7; *see also Nebraska v. Wyoming*, 325 U.S. at 594-95 ("The Project also includes two small reservoirs in Nebraska—Lake Alice and Lake Minatare." Also, the Interstate Canal is part of the "North Platte Project."); Doherty Report at 30. However, Wyoming now contends "that as part of the North Platte project, they [the Inland Lakes] have not retained a right to store water on their own initially stored from the flows of the North Platte River." Summary Judgment Tr. at 44.

As Nebraska pointed out, the resolution of this question hinges on whether the evidence ultimately adduced will support Nebraska's interpretation that the Inland Lakes "have been administered as part of the North

Platte project with the priority of 1904," *id.* at 73, as a matter of history, of engineering design, of the functional operation of the North Platte Project over many years, and of the practical construction of the Decree.[7] "Since April 1913, the natural flow of the North Platte River has been diverted through the Interstate Canal during the non-irrigation season to the Inland Lakes for later use. . . ." Wilde Aff. I ¶ 19. Indeed, the Inland Lakes apparently were so administered as part of the North Platte Project without comment until the minutes of the Natural Flow and Ownership meeting held in Wyoming on April 9, 1985, the first record evidence of the problem raised by Wyoming.[8] Wyoming, however, has professed a willingness to offer additional evidence in this proceeding and will have the opportunity to do so.[9]

During the prior proceedings, Colorado, Wyoming, Nebraska and the United States litigated the use and requirements of the Inland Lakes. *See, e.g.*, Record at 208,

---

[7] *See, e.g.*, Wilde Aff. I ¶¶ 15, 16; Second Affidavit of David G. Wilde ¶ 5 and attached exhibits (excerpt from History of the North Platte Project, Nebraska—Wyoming (1913)) (Jan. 23, 1989) ("Wilde Aff. II") attached to U.S. Response; Nebraska's Response at 57-58; Summary Judgment Tr. at 136-37.

[8] Wilde Aff. I ¶ 30 ("Since then, the storage accounting procedures reflect that no agreement has been reached as to storage in or for the account of the Inland Lakes.")

[9] SPECIAL MASTER OLPIN: . . . [D]on't you hope I agree it ought to go back to the Wyoming District Court?

MR. COOK: That's the point. I guess the point is I want a trial on the question, present my evidence—

SPECIAL MASTER OLPIN: Would you rather have that trial to be in the Wyoming District Court?

MR. COOK: I will have it here. I have no problem with that. . . . [W]e'll present evidence to the contrary at the proper time.

Summary Judgment Tr. at 162-63.

Later, Mr. Cook added that the Special Master should "pick a place and we'll be there." *Id.* at 165.

480-81, 1182, 26151-53, 26227-28, 26760-83. Because the Inland Lakes hold water for use during the irrigation season on Nebraska lands, and because they are not operated by Nebraska, they were a significant issue at trial. *Id.* The Inland Lakes usefully served to reduce the flow requirements of the Interstate Canal necessary during the high demand season and that concept was therefore courted by Wyoming and Colorado. Both states tried to maximize the quantity of water to be stored in the Inland Lakes during the rainy season for later irrigation use by drawing on non-irrigation season flows in order to reduce the demand of the Interstate Canal during the irrigation season. Record at 26755-83; Doherty Report at 60-61. Specifically, Wyoming and Colorado claimed that the Inland Lakes should be allocated 73,000 acre feet of water capacity. Doherty Report at 60-61. Nebraska countered with a suggestion of 36,700 acre feet, a number much closer to the historical mean. *Id.* at 60. The Master ultimately settled on 46,000 acre feet. *Id.* at 61. Wyoming Exceptions To The Report Of The Special Master, Number VI, p. 5.

Special Master Doherty recognized that the Inland Lakes were an integral part of the Interstate Canal, and, significantly, deducted from the overall Interstate Canal requirement the 46,000 acre feet he recommended be charged against Lake Alice and Lake Minatare, underscoring the integral relationship between the Interstate Canal and the Inland Lakes. He stated:

> During the months of October, November, and April, the Interstate Canal diverts at Whalen and transports to the inland reservoirs in Nebraska—Lake Alice and Minatare—variable quantities of water which are released in the following irrigation season for use on the lands of the Pathfinder Irrigation District. *Such storage water reduces the irrigation season demand of the canal on the river at Whalen.* . . . My conclusion is that 46,000 acre feet should be adopted as the charge against the Interstate seasonal

> requirement for water storable in Lake Alice and Minatare. *This deducted from the total Interstate requirement* of 419,000 acre feet leaves a net seasonal requirement of that canal at Whalen of 373,000 acre feet, and reduces the total net seasonal requirement of all canals diverting in the Whalen—Tri-State Dam section to 1,027,000 acre feet.

Doherty Report at 60-61 (emphasis added) (footnote omitted).[10] Further, Special Master Doherty recommended that, "[s]hould it be found in the future that a dependable winter supply of more than 46,000 acre feet is divertable to Alice and Minatare, the seasonal demand on the river of Interstate should be accordingly reduced." *Id.* at 61 n.3.[11]

---

[10] It is important to note, that in calculating the Interstate Canal's demand during 1931-40, Special Master Doherty emphasized that the calculation included flows to the Alice and Minatare reservoirs. Doherty Report at 76, Table VII. Moreover, despite the fact that the record contains obvious conflicts in the basic specifications of the Inland Lakes, *compare* U.S. Exhibit 132 (listing three lakes, with Minatare constructed in 1915) *with* Doherty Report at 30 (two lakes, Minatare completed in 1914), these conflicts were not examined seriously by the parties or Special Master Doherty, lending additional support to the conclusion that the sole real Inland Lakes issue was the extent of their putative supply to the overall North Platte Project scheme.

[11] *See also* General Statement at 1 attached as Exhibit A to Wilde Aff. I ("It is proposed to store all the unappropriated waters of the North Platte River, and application is made for all such unappropriated water, which, however, may be taken direct from the river at the headgates of any of the canals constructed by the Government of the United States . . . or may be stored, as appears to the best interests and of the greatest benefit to said reservoir canals and the users of water thereunder."); *id.* at 2 ("It is expected to construct numerous small reservoirs along the lines of the several canals, in order to meet the demand for large amounts of water during the short period of maximum use. These reservoirs have not been definitely located."); Affidavit of Robert Green (Aug. 17, 1988); ("Green Aff.") ¶ 6 attached to U.S. Response ("The Inland Lakes and supporting diversions, canals, and dams were constructed

Wyoming now needs to counter this rather compelling evidence.

Should a 1904 priority be proven, Wyoming insists that it would then be necessary to establish the other detailed characteristics of the water right in order to enable Wyoming to administer the right along with other Wyoming water rights.[12] The point made is a persuasive one to which Nebraska and the United States likely will ultimately be obliged to respond.

---

by the Bureau of Reclamation as off-stream reregulating reservoirs to serve irrigated lands in Nebraska. As part of the North Platte Project, water has been diverted from the North Platte River since 1909 by the Whalen Diversion Dam . . . into the Interstate Canal, and . . . to the Inland Lakes . . . . The delivery of water prior to the irrigation season is necessary since the canal's capacity is not sufficient to meet irrigation demands during the peak usage months of July and August.").

[12] *See* Pasadena Tr. at 14.

APPENDIX B

GRAYROCKS

Grayrocks Reservoir was completed on the Laramie River in 1980 pursuant to Wyoming permits. It has an April 23, 1979, Wyoming priority to store 104,109.6 acre-feet of water from the Laramie. Grayrocks supplies the Laramie River Station, a large coal-fired steam electric power generating plant. Both the reservoir and the power plant were constructed by the Missouri Basin Power Project, a consortium of consumer and publicly owned utilities suppling power in eight states, including Nebraska and Wyoming. *Amicus* Basin Electric operates the power plant and reservoir.[13]

In 1978, Nebraska joined a lawsuit filed by environmental interests in the United States District Court in Nebraska challenging loan guarantees by the Rural Electrification Administration and issuance of a dredge and fill permit by the Army Corps of Engineers. The parties to that suit sought an injunction against construction of the reservoir and power plant on grounds of noncompliance with the National Environmenal Policy Act of 1969 and the Endangered Species Act of 1973. Following the United States District Court's grant of injunctive relief,[14] and while the case was pending on appeal to the United States Court of Appeals for the Eighth Circuit, the parties entered an Agreement of Settlement and Compromise dated December 4, 1978 ("Settlement Agreement") (attached to Wyoming Summary Judgment Motion). Nebraska and Basin Electric signed the Settlement Agreement but Wyoming, as a non-party to that suit, did not.

---

[13] *See* Memorandum In Support Of Motion Of Basin Electric Power Cooperative For Leave To Intervene at 3 (Apr. 13, 1987); Summary Judgment Tr. at 52-53.

[14] *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep. (BNA) 1156 (D. Neb. 1978).

The Settlement Agreement limited the "maximum annual consumptive use by the power plant at the Laramie River Station . . . to 23,250 acre-feet per year," [15] specified the order of the utilization of water for the project,[16] limited water intake structures in design and implementation for project purposes,[17] called for the measurement of releases and flows from Grayrocks Reservoir,[18] established a trust to set up *amicus*, The Platte River Whooping Crane Habitat Maintenance Trust, and ensured compliance with the Endangered Species Act of 1973, as amended.[19] Nebraska's objections to the loan guarantees and dredge and fill permit were thereupon withdrawn.[20]

In her brief opposing Nebraska's motion for leave to file the petition, Wyoming argued that, even if Nebraska does have some rights to Laramie waters, it is "estopped to now claim that construction or operation of Grayrocks Reservoir consistent with the settlement agreement violates its rights." [21] Wyoming, however, while affirming her intent to administer waters released from the Grayrocks Reservoir in compliance with Wyoming law, has not guaranteed unequivocally that this will be done in accordance with the Settlement Agreement:

> Wyoming has stated, and reiterates here, that it has administered, and will in the future administer, the water rights for Grayrocks Reservoir according to Wyoming law. . . .

---

[15] Settlement Agreement at A-24.

[16] *Id.*

[17] *Id.* at A-25.

[18] *Id.* at A-25, A-26.

[19] *Id.* at A-28, A-29.

[20] *Id.* at A-29.

[21] Wyoming Opposition Br. at 17; *see also* Wyoming Summary Judgment Motion at 86-87.

> Nebraska's argument implies that there is a direct conflict between Wyoming law and the provisions of the Settlement Agreement. Wyoming disagrees, but even assuming such a conflict exists, Wyoming water officials are not free to ignore Wyoming law.[22]

Thus, although Basin Electric has agreed to maintain the minimum flows in accordance with the Settlement Agreement, Wyoming has left herself room to take the positions that the Grayrocks water rights do not include these minimum flows and that she may deplete Laramie flows notwithstanding the Settlement Agreement.[23]

---

[22] Wyoming Summary Judgment Motion at 87-88; *see also* Fassett Aff. ¶¶ 7, 8.

[23] Wyoming Summary Judgment Motion at 88 ("The Decree has nothing to do with the Grayrocks Reservoir or the Settlement Agreement. The Decree expressly does not affect the Laramie River and it leaves Wyoming free to administer Laramie River water rights as her law requires."); *see also* U.S. Response at 26.

APPENDIX C

THE CORN CREEK PROJECT

The Corn Creek Project, planned but not yet constructed,[24] would be located in Goshen County, Wyoming, above the confluence of the Laramie and North Platte Rivers. The proposed project includes a surface water diversion system, a pump station at the confluence, an offstream storage reservoir, and a pipeline distribution system. It is intended to irrigate lands currently used for dryland farming and grazing. The primary sources of water supply for Corn Creek would be storage water from the Glendo Reservoir on the North Platte and storage water from Grayrocks Reservoir on the Laramie, "with additional supplies contemplated from the natural flows of the Laramie River." U.S. Response at 27; *see also* Wyoming Opposition Br. at 7-8; Affidavit of Stanley K. Hathaway (Aug. 24, 1987) ("Hathaway Aff.") attached to the Wyoming Summary Judgment Motion ¶ 3; Wilde Aff. I ¶¶ 62, 63.

Nebraska objected to the petition for the formation of Corn Creek Irrigation District,[25] and the Wyoming District Court gratuitously in response opined that Nebraska "has no right to the waters in the Laramie River under the authority of the cases of *Wyoming v. Colorado* . . . [and] *Nebraska v. Wyoming*." Exhibit C to the Affidavit of Dorothy W. Fritz (Aug. 20, 1987) ("Fritz Aff."). Wyoming argues that Nebraska is bound by this prior state court judicial determination of a decade ago of the meaning of the Court's Laramie Decree. That state court judgment was not appealed. Wyoming Summary Judgment Motion at 88-89; Wyoming Opposition Br. at 8-9.

---

[24] Wilde Aff. I ¶ 62; Fassett Aff. ¶¶ 9-11; U.S. Response at 27.

[25] *See generally* Nebraska's Objection To Petition For Formation Of Irrigation District ("Nebraska's Objection"), reprinted as Exhibit B to Affidavit of Dorothy W. Fritz (Aug. 20, 1987) ("Fritz Aff.") attached to Wyoming Summary Judgment Motion.

I found that collateral estoppel principles did not apply for several reasons. First, collateral estoppel applies only to a "right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction." *Montana v. United States*, 440 U.S. 147, 153 (1979). Issues which need not have been adjudicated in the first proceeding are not directly determined for purposes of the second proceeding.[26] The state court was asked to decide only whether there was "enough water available in the Laramie River . . . to meet the total requirements . . . of the project and the proposed irrigation district."[27] The Corn Creek project represented only a fraction of the Laramie's total flow; the state court's sweeping *dictum* regarding apportionment of the entire river, therefore, does not estop Nebraska from raising the Laramie issues that she has raised here.[28]

Even a disposition of part of the Laramie waters between Nebraska and Wyoming would leave open questions. This is because the state court decision applied only to the parties before that court and not to *others*

---

[26] *See North Carolina R.R. v. Story*, 268 U.S. 288, 294 (1925); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44-45 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987).

[27] Nebraska's Objection To Petition For Formation Of Irrigation District at 52 (Dec. 29, 1977) ("Nebraska's Objection"), reprinted as Exhibit B to Fritz Aff.

[28] *See North Carolina R.R.*, 268 U.S. at 294; *Gelb*, 798 F.2d at 44-45; *see also Norton v. Larney*, 266 U.S. 511, 515-16 (1925). Indeed, the pleadings indicate that the parties did not urge such a broad resolution. *See* Nebraska's Objection at 50-52 (focusing only on the Corn Creek waters; no demand for entire Laramie); Petition For Formation Of Irrigation District (Nov. 17, 1977) at 39, reprinted as Exhibit A to Fritz Aff. attached to Wyoming Summary Judgment Motion ("Your Petitioners desire to provide for the irrigation of approximately fifteen thousand acres . . . ."); *id.* at 40-41 (requesting only 33,100 total acre feet of water).

involved in this original action who were not before the Wyoming state court, such as the United States and Colorado. Because these other equities merit consideration, any Wyoming "victory" in state court merely raises rather than retires Laramies fact issues.[29]

---

[29] Even if the record insufficiently demonstrates that the state court had before it only a fraction of the Laramie, such uncertainty only raises more fact questions inviting testimony regarding the issues actually joined in that case. Restatement (Second) of Judgments ¶ 27 Comment (g) (1982). Further, if the state court purported to allocate the entire Laramie, it clearly exceeded its jurisdiction. An issue resolved by a Court acting beyond its jurisdiction has no collateral estoppel effect. *See Montana v. United States*, 440 U.S. at 153; *Arizona v. California*, 460 U.S. 605, 619 (1983). A state "cannot be its own ultimate judge in a controversy with a sister state." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Therefore, the state court lacked the authority to determine the Laramie's fate beyond the 33,100 acre feet actually at issue in that case.

Supreme Court, U.S.
FILED
OCT 10 1991
OFFICE OF THE CLERK

(9)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS, AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

October 9, 1991

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

APPENDIX

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

The State of Nebraska hereby moves for leave to file its amended petition for an equitable apportionment of the unapportioned, non-irrigation season flows of the North Platte River, to assert new claims against the State of Wyoming and the United States in relation to violations of the Decree entered in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), for an order continuing and enforcing the Decree, and for injunctive relief against the State of Wyoming and the United States.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS

Counsel of Record
Special Assistant Attorney General
JAMES C. BROCKMANN
JAY F. STEIN
Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

The State of Nebraska hereby petitions the Court for: Count I) An amended decree equitably apportioning the previously unapportioned, non-irrigation season flows of the North Platte River, *i.e.*, those occurring between October 1 and April 30, and for injunctive relief against the State of Wyoming; Count II) an order construing and enforcing the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and for injunctive relief against the State of Wyoming; and Count III) an order construing and enforcing the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and for injunctive relief against the United States.

The Court has jurisdiction of this controversy pursuant to U.S. CONST. art. III, § 2, which provides: "In all Cases . . . in which a State shall be a Party, the Supreme Court shall have original jurisdiction," and 28 U.S.C. § 1251(a)(1988), which provides: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." In addition, the Court

expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but not be limited to, the following:
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

COUNT I

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), completely apportioned the natural flows of the North Platte River between the states of Nebraska and Wyoming during the irrigation season and partially apportioned the natural flows of the river during the non-irrigation season.

2. The Decree specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season.

3. The decision and the Decree partially apportioned the natural flows of the North Platte River during the non-irrigation season by regulating the storage or accrual of natural flow by:

a. Enjoining Wyoming from storing more than 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Dam during each water year, *i.e.*, October 1 through September 30;

b. Enjoining Colorado from storing more than 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, during each water year;

c. Enjoining Wyoming from storing water out of priority with respect to specified reservoirs, excepting out of priority storage or releases from Seminoe Reservoir for the generation of electricity if such storage or releases do not materially interfere with irrigation by the French and State Line canals;

d. Enjoining Colorado from exporting more than 60,000 acre feet of water out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, in any period of 10 consecutive years; and

e. Apportioning the accrual of 46,000 acre feet during the months of October, November, and April to Nebraska for storage in the Inland Lakes for the irrigation of 10,748 acres of land.

4. Except as specified in ¶ 3, *supra*, the decision and the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), do not equitably apportion the non-irrigation season flows of the North Platte River, notwithstanding that the Court sought to balance the equities among Nebraska, Wyoming, and Colorado to provide certainty and resolve future disputes.

5. In *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), the Court exercised its jurisdiction over the waters of the North Platte and Platte rivers from North Park, Colorado, to Grand Island, Nebraska.

6. The North Platte Project, a United States Bureau of Reclamation project located in the North Platte River Basin in Wyoming and Nebraska, consists of several storage reservoirs and a series of canals for the purpose of irrigating lands in Nebraska and Wyoming. *See* Appendix 1. It was built in the early 1900's for the reclamation and irrigation of large tracts of land. As the reservoirs began storing

water, the historical regimen of the river changed. The reservoirs provide storage water which is transported through canal systems for direct diversion on irrigated land. Additionally, large quantities of return flows are derived from Project irrigation.

7. Return flows from the North Platte Project created a new regimen of the river downstream from Tri-State Dam, a diversion dam located in Nebraska near the Nebraska-Wyoming state line, in the approximate amount of 700,000 to 750,000 acre feet annually. *See* Appendix 1.

8. Based upon the regimen of the river resulting from the return flows from the North Platte Project, as well as the construction of the Tri-County (Lake McConaughy) and Sutherland projects downstream of Bridgeport, Nebraska, the State of Nebraska withdrew its claim to direct flows during the irrigation season for irrigators with diversions between Bridgeport and Grand Island, Nebraska, in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953). *See* Appendix 1.

9. Because there were adequate "local supplies," consisting principally of return flows from the North Platte Project, Special Master Doherty and the Court in *Nebraska v. Wyoming*, 325 U.S. 589, *modified*, 345 U.S. 981 (1953), denied an apportionment to Nebraska for direct flows during the irrigation season between Tri-State Dam and Bridgeport. *See* Appendix 1. Consequently, direct flows below Tri-State Dam were not expressly apportioned to Nebraska during the irrigation season.

10. The unapportioned, non-irrigation season flows of the North Platte River which have historically flowed into Nebraska are of major importance to the State of Nebraska downstream of Tri-State Dam.

11. Unapportioned, non-irrigation season flows and undiverted irrigation season flows of the North Platte River are collected in Lake McConaughy. Lake McConaughy is located on the North Platte River in western Nebraska above the confluence of the North Platte and South Platte

rivers. *See* Appendix 1. Lake McConaughy was expressly designed to capture return flows from the North Platte Project in order to irrigate farmland and to generate hydropower.

12. Between water years 1946-1987, the average annual inflow into Lake McConaughy was 1,105,000 acre feet.

13. Flows entering Lake McConaughy during the seven month non-irrigation season have averaged 455,000 acre feet or 41% of the total water supply to Lake McConaughy, 1946-1987.

14. Flows entering Lake McConaughy during the five month irrigation season have averaged 650,000 acre feet or 59% of the total water supply to Lake McConaughy, 1946-1987.

15. On an average annual basis, 1946-1987, 347,500 acre feet of water have historically entered Nebraska from Wyoming in the form of undiverted, inchannel natural flows passing Tri-State Dam.

16. On an average annual basis, 1946-1987, 736,000 acre feet of return flows have historically entered the North Platte River in Nebraska between Tri-State Dam and Bridgeport, derived from direct diversions for irrigation at or above Tri-State Dam.

17. The unapportioned, non-irrigation flows and the undiverted, irrigation season flows which enter Lake McConaughy are subsequently used for irrigation of crops during the irrigation season, generation of hydroelectric power, municipal use, and for fishing, hunting, boating, and waterfowl, fish, and other wildlife habitat. These uses are made possible principally through the operation of Lake McConaughy and other associated projects owned by Central Nebraska Public Power and Irrigation District ("CNPPID") and the Nebraska Public Power District ("NPPD") located between Lake McConaughy and the return of CNPPID's canal system below Lexington, Nebraska. The projects have given rise to post-Decree uses of those flows between Lake

McConaughy and Grand Island, Nebraska. In addition to the habitat along the river, these uses include wildlife habitat throughout both districts' systems, whose features include Lake McConaughy, Kingsley Hydro, Sutherland Reservoir, Gerald Gentleman Station, Lake Maloney, North Platte Hydro, Jeffrey Reservoir, Jeffrey Hydro, Central Lake, Johnson Lake, Johnson Hydros #1 and #2, Canaday Station, and numerous other lakes and wetlands along the supply canals and laterals.

18. Since the entry of the Decree, the unapportioned, non-irrigation season flows of the North Platte River have been and continue to be relied upon by equitable interests in the State of Nebraska, including irrigation, hydroelectric power production, water cooled electric power production, municipalities, recreation, and fish and wildlife, including federally endangered and threatened species.

19. Wyoming has numerous proposals for upstream development in the North Platte River Basin which would utilize and consume the unapportioned, non-irrigation season flows.

20. It is necessary to apportion the unapportioned, non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows.

21. The resolution of the issues presently pending in this action will necessarily affect the unapportioned, non-irrigation season flows of the North Platte River.

22. In the pending original action, *Nebraska v. Wyoming*, No. 108, Original, the State of Nebraska alleges that Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by:

a. Depleting the flows of the North Platte River by the operation of Grayrocks Reservoir on the Laramie River, a tributary of the North Platte River;

b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

23. Because of the hydrologic continuity that exists on the North Platte River, actions in Wyoming which deplete the water supply and violate the Decree during the irrigation season also deprive downstream equities in Nebraska of non-irrigation season water upon which they rely and to which the State of Nebraska is equitably entitled.

24. The State of Wyoming is presently depleting and threatens further depletions of the unapportioned, non-irrigation season flows of the North Platte River to which Nebraska is equitably entitled by:

a. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

b. Claiming the right to dry up the Laramie River at its mouth year-round;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal

for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska; and

e. Seeking to restrict Nebraska to arbitrary limitations on the application of North Platte waters to beneficial use on lands in Nebraska served by canals diverting at or above Tri-State Dam.

25. The Laramie River is a tributary of the North Platte River which enters the North Platte between Whalen Dam and Tri-State Dam. *See* Appendix 1. The average annual contribution of the Laramie River to the North Platte River during the non-irrigation season has been 39,600 acre feet, 1946-1987. The Grayrocks Project and the proposed Corn Creek Project are both in the Laramie River Basin and are subjects of Nebraska's pending petition.

26. In regard to the Grayrocks Project, as part of the Agreement of Settlement and Compromise dated December 4, 1978, entered into to settle *Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978), *appeal dismissed*, 594 F.2d 870 (8th Cir. 1979), Basin Electric, the operator of the Grayrocks Project, guaranteed certain non-irrigation season, minimum instream flow releases on the Laramie River, down to its confluence with the North Platte River, for wildlife protection in exchange for Nebraska and other plaintiffs withdrawing their objections to the Project. Although encouraged to participate in order to resolve outstanding issues, Wyoming did not become a party to the litigation or to the Agreement of Settlement and Compromise.

27. As a non-party to *Nebraska v. Rural Electrification Administration*, the State of Wyoming has repeatedly asserted that it is not bound by the Agreement of Settlement and Compromise and that it is not obligated to honor the Agreement. Additionally, Wyoming state law cannot facilitate the protection of the releases provided by the Agreement. Wyoming maintains that it has the right to dry up the Laramie River at its mouth. Wyoming claims this right during the irrigation season, as well as during the non-

irrigation season, encompassing the guaranteed minimum releases to Nebraska required by the Agreement of Settlement and Compromise. Such circumstances and actions threaten Nebraska's equities and preclude certainty in the use of the non-irrigation season flows of the North Platte River.

28. The Corn Creek Project is a new irrigation project which has been proposed and planned for the Laramie River Basin in Wyoming. The project would deplete substantial quantities of water from the Laramie River, including non-irrigation season flows which currently flow into Nebraska, which are relied upon by Nebraska's equitable interests, and which are a part of Nebraska's equitable entitlement during the non-irrigation season.

29. Deer Creek is a tributary of the North Platte River and enters the North Platte between Pathfinder Dam and Guernsey Dam. *See* Appendix 1. Wyoming has proposed the construction of the Deer Creek Project and Nebraska has objected in its pending petition.

30. The proposed Deer Creek Project would deplete non-irrigation season flows upon which downstream equities in Nebraska currently rely and to which Nebraska is equitably entitled, as well as the irrigation season flows which Nebraska has addressed in the pending petition.

31. With regard to the Inland Lakes, since the entry of the Decree, the State of Nebraska has relied on the already apportioned, non-irrigation flows to the Inland Lakes for irrigation, recreation, and for waterfowl, fish, and other wildlife habitat. Wyoming's attempt to curtail the Inland Lakes' apportionment in the pending action could adversely affect the non-irrigation season flows into Nebraska.

32. The State of Nebraska relies upon the direct diversion of water by canals which divert at or above Tri-State Dam nearing historical quantities in order to maintain adequate return flows for subsequent use below Tri-State Dam. Wyoming's attempt to restrict the diversions to arbitrary limitations in the pending action threatens down-

stream equities in Nebraska which have historically relied upon such return flows, including flows during the non-irrigation season to which Nebraska is equitably entitled.

33. In addition to the need for an equitable apportionment of non-irrigation season flows caused by the threat of upstream development on downstream equities currently relying upon the water, and by the effect of the resolution of the pending issues on unapportioned, non-irrigation season flows, conditions which the Court anticipated may change have in fact changed, further necessitating the apportionment of non-irrigation season flows.

34. Based upon drought conditions, Special Master Doherty and the Court recognized that an average of at least 81,700 acre feet of inchannel natural flows would continue to pass Tri-State Dam as unavoidable operational loss during the irrigation season, all of which would be utilized in satisfaction of then existing downstream requirements.

35. Although a predicate of the Decree, 81,700 acre feet of inchannel natural flows will not continue to pass Tri-State Dam during the irrigation season, except for releases for flood control, due to a retrofit of the diversion dam in 1989 to prevent leakage and seepage losses.

36. The loss of inchannel natural flows which have historically passed Tri-State Dam during the irrigation season has deprived Nebraska's downstream equities of water upon which they have historically and until recently relied.

37. The current and imminent actions of the State of Wyoming, including the pending claims before the Court, as well as Wyoming's claimed but unspecified right to develop future uses, infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

38. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and has continued in this suit to assert its alleged right to infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

39. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

40. The State of Nebraska has no effective remedy at law to enforce its equitable rights against the State of Wyoming. A determination of each state's equitable share and injunctive relief is necessary to restrain further infringement by Wyoming on Nebraska's equitable share of the North Platte River.

WHEREFORE, the State of Nebraska prays that the Court equitably apportion the unapportioned, non-irrigation season flows of North Platte River between Nebraska and Wyoming, and that the Court enjoin the State of Wyoming from depleting Nebraska's equitable share of the North Platte River during the non-irrigation season.

COUNT II

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), completely apportioned the natural flows of the North Platte River between the states of Nebraska and Wyoming during the irrigation season and partially during the non-irrigation season. The Court's decision and Decree were premised upon certain legal and physical conditions that existed at the time of the original litigation. The equitable apportionment recommended by Special Master Doherty and adopted by the Court necessarily would be altered by subsequent changes to those legal and physical conditions, unless appropriate offsetting measures were taken. Since the entry of the Decree in 1945, the State of Wyoming has initiated and allowed changes in the legal and physical environment and has allowed the effects of subsequent changes to adversely affect the equitable apportionment made to Nebraska.

2. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the decision and Decree by:

a. Depleting or permitting the depletion of natural flows of the North Platte River by adopting the so-called surplus water statutes in 1945, WYO. STAT. §§ 41-4-318 to 324 (1977), which permit the application of up to two cubic feet per second of water for 70 acres instead of the one cubic foot per second for 70 acres that had been the law prior to the original litigation and upon which the Special Master and the Court expressly relied in formulating the Decree;

b. Depleting or permitting the depletion of natural flows of the North Platte River by allowing ground water which is hydrologically related to the North Platte River to be used to irrigate land which, when combined with land irrigated by direct surface water diversions, exceeds the requirements for 168,000 acres of irrigated land during any one irrigation season;

c. Depleting or permitting the depletion of storage water for uses not authorized by the Decree;

d. Failing to prepare and maintain complete and accurate records of the total area of land irrigated and the storage of waters of the North Platte River and its tributaries;

e. Depleting or permitting the depletion of return flows reaching the North Platte River; and

f. Depleting or permitting the depletion of natural flows by allowing additional consumption on tributaries entering the North Platte River below Alcova Reservoir.

3. The current and imminent actions of the State of Wyoming contravene the Court's decision and the Decree and invalidate the equitable balance of the North Platte River established by the Decree.

4. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and it continues to violate the Decree.

5. The State of Wyoming's present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

6. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the State of Wyoming.

WHEREFORE, the State of Nebraska prays that the Court enter its order construing the Decree and requiring the State of Wyoming to comply with the provisions of the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and enjoining the State of Wyoming from increasing its depletion of the storage water and natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

COUNT III

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), completely apportioned the natural flow of the North Platte River between the states of Nebraska and Wyoming during the irrigation season and partially during the non-irrigation season.

2. The United States is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the decision and Decree by:

a. Contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir; and

b. Allocating natural flows among its contractors in designated water-short years. The Bureau of Reclamation allocates the total water supply, *i.e.*, storage and natural flows, contrary to ¶¶ V, VI, and XII.

3. The current and imminent actions of the United States contravene the Court's decision and the Decree and invalidate the equitable balance of the North Platte River established by the Decree.

4. Despite the efforts of the states of Nebraska and Wyoming to resolve these matters, the United States has refused to alter its actions and it continues to violate the Decree.

5. The United States' present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

6. The State of Nebraska has no effective remedy at law to enforce its rights against the United States. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the United States.

WHEREFORE, the State of Nebraska prays that the Court enter its order construing the Decree and requiring the United States to comply with the provisions of the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and enjoining the United States from increasing its depletion of the storage water and natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

The allegations of each count of this amended petition are hereby incorporated and adopted by reference, as appropriate, for each other count.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS

Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

October 9, 1991

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
JURISDICTION	2
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	5
1. The North Platte River was only partially apportioned during the non-irrigation season	5
2. The geographical scope of the irrigation season apportionment was limited to the area above Tri-State Dam because of the abundance of return flows below the dam	7
3. The unapportioned, non-irrigation season flows entering Nebraska from Wyoming are fundamental to equitable reliance in Nebraska	9
4. The flows entering Nebraska during the irrigation season which are derived from the regimen of the North Platte River created by the Decree are fundamental to equitable reliance in Nebraska	11
ARGUMENT	11
I. THE APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS IS AN APPROPRIATE ACTION IN THE COURT'S ORIGINAL JURISDICTION	11
1. Conflicting claims between states to an over-appropriated river create a justiciable original action	14
2. The threat to downstream equities by upstream development is the basis for the exercise of the Court's original jurisdiction	16

TABLE OF CONTENTS (Continued)

Page

3. In order to fully resolve interrelated issues in the pending action, the unapportioned, non-irrigation season flows must be apportioned 21

   a. Development on the Laramie River, in the form of Grayrocks Reservoir, Corn Creek Reservoir, and other future development, has and will continue to deplete non-irrigation season flows upon which Nebraska relies and to which it is equitably entitled 22

   b. The proposed Deer Creek Project will deplete non-irrigation season flows which are currently relied upon in Nebraska and to which Nebraska is entitled 25

   c. Wyoming's attempt to curtail storage of non-irrigation season flows to the Inland Lakes affects and depletes Nebraska's non-irrigation season water supply 28

   d. The resolution of the pending counterclaim will affect non-irrigation season flows in Nebraska 29

II. EQUITABLE APPORTIONMENT PRESENTS A JUSTICIABLE CONTROVERSY 30

III. THE SOLE FORUM TO RESOLVE EQUITABLE APPORTIONMENT ISSUES IS THE SUPREME COURT 32

IV. THIS MOTION IS DISTINCT FROM NEBRASKA'S FIRST MOTION TO AMEND PETITION 36

TABLE OF CONTENTS (Continued)

Page

V. THE STATE OF WYOMING AND THE UNITED STATES ARE VIOLATING THE DECREE BY DEPLETING THE STORAGE WATER AND NATURAL FLOWS OF THE NORTH PLATTE RIVER 37

VI. EXERCISE OF THE COURT'S ORIGINAL JURISDICTION IS NECESSARY TO PREVENT SEVERE PREJUDICE TO THE CITIZENS OF NEBRASKA AND WYOMING 39

CONCLUSION 42

APPENDIX 1

TABLE OF AUTHORITIES

Cases	Page
Alabama v. Arizona, 291 U.S. 286 (1934)	31
Andrews v. Government of Virgin Islands, 132 F.R.D. 405 (D. Virgin Islands 1990)	41
Arizona v. New Mexico, 425 U.S. 794 (1976)	14, 32
Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)	32
Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)	32
Colorado v. Kansas, 320 U.S. 383 (1943)	30, 39-40
Colorado v. New Mexico, 459 U.S. 176 (1982)	12, 13, 16, 30, 31
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	14, 30
Cornell & Co., Inc. v. Occupation Safety and Health Review Comm'n, 573 F.2d 820 (3d Cir. 1978)	40
Cuffy v. Getty Refining & Marketing Co., 648 F. Supp. 802 (D. Del. 1986)	40, 41
D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942)	32-33
Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980)	40
Diduck v. Kaszycki & Sons Contractors, Inc., 737 F. Supp. 792 (S.D.N.Y. 1990)	41
Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981)	40
Evans Products Co. v. West American Ins. Co., 736 F.2d 920 (3d Cir. 1984)	41
Foman v. Davis, 371 U.S. 178 (1962)	37-38
Gaffney v. Silk, 488 F.2d 1248 (1st Cir. 1973)	38
Granus v. North American Philips Lighting Corp., 821 F.2d 1253 (6th Cir. 1987)	38

TABLE OF AUTHORITIES (Continued)

Cases	Page
Hinderlider v. La Plata & Cherry Creek Irr. Co., 304 U.S. 92 (1938)	32
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	14, 32
In Re Glaser, 198 U.S. 171 (1905)	21
In Re Massachusetts, 197 U.S. 482 (1905)	21
Jenn-Air Products Co. v. Penn Ventilator, Inc., 283 F. Supp. 519 (E.D. Pa. 1968)	38
Jones ex rel. Louisiana v. Bowles, 322 U.S. 707 (1944)	12
Kansas v. Colorado, 185 U.S. 125 (1902)	13, 31, 33, 39
Kansas v. Colorado, 206 U.S. 46 (1907)	31, 32, 39
Kansas v. Colorado, No. 105, Original	40, 42
Leased Optical Departments-Montgomery Ward, Inc. v. Opti-Center, Inc., 120 F.R.D. 476 (D.N.J. 1988)	40
Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968)	38
Massachusetts v. Missouri, 308 U.S. 1 (1939)	14
Middle Atlantic Utilities Co. v. S.M.W. Development Corp., 392 F.2d 380 (2d Cir. 1968)	38
Missouri v. Illinois, 200 U.S. 496 (1906)	30
Nebraska v. Rural Electrification Administration, 12 E.R.C. 1156 (D. Neb. 1978)	23
Nebraska v. Rural Electrification Administration, 594 F.2d 870 (8th Cir. 1979)	23
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953)	1, 2, 3, 5, 6, 7, 8, 9, 11, 14, 15, 16, 31, 37, 40
Nebraska v. Wyoming, No. 108, Original	40
New Jersey v. New York, 283 U.S. 336 (1931)	14
New Jersey v. New York, 345 U.S. 369 (1953)	35
New York v. New Jersey, 256 U.S. 296 (1921)	30

TABLE OF AUTHORITIES (Continued)

Cases	Page
New York v. Illinois, 274 U.S. 488 (1927)	12
North Dakota v. Minnesota, 263 U.S. 365 (1923)	30
Ohio v. Kentucky, 410 U.S. 641 (1973)	30
Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938)	11, 12
Oklahoma v. Atchison, T. & S.F.Ry. Co., 220 U.S. 277 (1911)	12
Oklahoma v. Texas, 253 U.S. 465 (1920)	39
Oklahoma & Texas v. New Mexico, No. 109, Original	42, 43
Ozark Air Lines, Inc. v. Delta Air Lines, Inc., 63 F.R.D. 69 (N.D. Ill. 1974)	40
P.S.G. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 417 F.2d 659 (9th Cir. 1969)	38
Pilotti v. Mobil Oil Corp., 565 A.2d 1227 (Pa. Super. 1989)	41
Procter & Gamble Co. v. Nabisco Brand, Inc., 125 F.R.D. 405 (D. Del. 1987)	40
R.E.B., Inc. v. Ralson Purina Co., 525 F.2d 749 (10th Cir. 1975)	38
Sperberg v. Firestone Tire & Rubber Co., 61 F.R.D. 78 (N.D. Ohio 1973)	38
Texas v. Florida, 306 U.S. 398 (1939)	11
Texas v. New Mexico, 482 U.S. 124 (1987)	42
Toth v. USX Corp., 883 F.2d 1297 (7th Cir. 1989)	38
United States v. Nevada, 412 U.S. 534 (1973)	14
United States v. Texas, 162 U.S. 1 (1896)	39
United States v. Texas, 339 U.S. 707 (1950)	39
United States v. United States Smelting Co., 339 U.S. 186 (1950)	15

TABLE OF AUTHORITIES (Continued)

Cases	Page
Universe Tankships, Inc. v. U.S.A., 528 F.2d 73 (3d Cir. 1975)	41
Verhein v. South Bend Lathe, Inc., 598 F.2d 1061 (7th Cir. 1979)	38
Washington v. General Motors Corp., 406 U.S. 109 (1972)	14
Washington v. Oregon, 297 U.S. 517 (1936)	16, 30, 31
Wyoming v. Colorado, 259 U.S. 419 (1922)	14, 16, 31, 40
Wyoming v. Colorado, 286 U.S. 494 (1932)	40
Wyoming v. Colorado, 298 U.S. 573 (1936)	40
Wyoming v. Colorado, 309 U.S. 572 (1940)	40
Constitutions	
U.S. CONST. art. III, § 2	2, 11, 14
Statutes and Court Rules	
28 U.S.C. § 1251(a) (1988)	2, 33
Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1989)	23, 34
Federal Power Act of 1920, 16 U.S.C. §§ 792-828c (1988 & Supp. 1989)	34
FED. R. CIV. P. 15(a)	37, 40
National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1989)	23, 34
NEB. REV. STAT. §§ 46-2, 107 to 2, 119 (Reissue 1988)	34
NEB. REV. STAT. §§ 46-233, *et seq.* (Reissue 1988)	34
SUP. CT. R. 17.2	40
WYO. STAT. § 41-2-112 (1977)	19

TABLE OF AUTHORITIES (Continued)

Cases **Page**

Miscellaneous

3 J.W. Moore, R.D. Freer, MOORE'S FEDERAL PRACTICE ¶ 5.08 [2] (2d ed. 1991) 38

Report of Michael J. Doherty, Special Master, *Nebraska v. Wyoming*, 1943 ..... 7, 8, 9, 11

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

INTRODUCTION

In 1986, the State of Nebraska moved for leave to file its petition to reopen *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), in order to address violations of the Decree by Wyoming. Subsequently, the Court granted the motion for leave to file, the parties have undertaken discovery, the State of Wyoming filed a motion for summary judgment which was denied by the Special Master in his First Interim Report of Special Master, dated June 14, 1989, and Nebraska, Wyoming, Colorado, and the United States have filed cross-motions for summary judgment which are pending resolution before the Special Master.

Through the development of the proceedings, however, two unanticipated matters have become apparent. First, the equitable interests in Nebraska which have historically relied on the over-appropriated and unapportioned flows of the North Platte River are threatened by currently planned and future upstream development in Wyoming. Second, the resolution of the pending issues affects the unapportioned,

non-irrigation season flows which were left out of the Court's Decree in 1945. Nebraska therefore seeks to amend its petition to apportion the unapportioned, non-irrigation season flows of the North Platte River.

Additionally, events occurring subsequent to the filing of the original petition in October, 1986, have confirmed violations of the Decree by Wyoming and the United States. Also, discovery has uncovered violations of the Decree by Wyoming of which Nebraska was not previously aware. Therefore, Nebraska also seeks to amend its petition to allege that Wyoming is violating and threatening to violate the Decree by depleting or permitting the depletion of storage water and natural flows of the North Platte River by administering the river in a manner that circumvents certain injunctions in the Decree and by undermining the legal and physical conditions upon which the Decree is based. Further, Nebraska seeks to amend its petition to allege that the United States is violating and threatening to violate the Decree by depleting or permitting the depletion of storage water and natural flows of the North Platte River through its role in the administration of the river.

JURISDICTION

The Court has jurisdiction of this controversy pursuant to U.S. CONST. art. III, § 2, which provides: "In all Cases . . . in which a State shall be a Party, the Supreme Court shall have original jurisdiction," and 28 U.S.C. § 1251(a) (1988), which provides: "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." The Court also retained jurisdiction over this suit "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." 325 U.S. at 671. More specifically, the Court retained jurisdiction to consider any "change in conditions making modification of the decree or the granting of further relief necessary or

appropriate." *Id.* at 672. The motion for leave to amend the petition is predicated on such changes in conditions.

STATEMENT OF THE CASE

This litigation began in 1934 when Nebraska alleged that Wyoming was violating the rule of priority of appropriation interstate, thereby depriving Nebraska of water to which it was equitably entitled. *Id.* at 591-92. Nebraska sought an adjudication of the priorities of appropriations in both states, a determination of the equitable shares of each state, and an injunction restraining diversions in contravention of the priorities. *Id.* at 592. The Court ultimately resolved the matter by apportioning the natural flows of the North Platte River for irrigation uses during the irrigation season and, to ensure irrigation season water supplies, partially apportioning the North Platte River during the non-irrigation season by placing certain restrictions on water use and administration.[1] *Id.* at 665-72. The irrigation season is May 1 to September 30, and the non-irrigation season is October 1 to April 30.

Nebraska filed its motion for leave to file its petition to reopen this case on October 6, 1986. Nebraska alleged that Wyoming was then violating and was threatening to violate Nebraska's equitable apportionment established by the Decree by depleting the flows of the Laramie River, by constructing the proposed Deer Creek Project, and by actions of Wyoming officials to prevent the continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska.[2] The

---

[1] The Court did not apportion storage water but instead left its administration to be governed by existing contracts. 325 U.S. at 621, 630, 639, 669, ¶ VI.

[2] *See* Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support *(cont'd)*

Court granted Nebraska's motion and on March 18, 1987, Wyoming filed its answer and a counterclaim.[3] The case was referred to Mr. Owen Olpin as Special Master on June 22, 1987.

Four motions for intervention were filed in 1987. Each was denied by the Special Master in his Seventh Memorandum, issued on April 1, 1988, in which the movants were allowed to participate as *amici curiae*.

Wyoming filed a motion for summary judgment on September 11, 1987, seeking a summary resolution of the entire case, except its counterclaim. Shortly after Wyoming's motion was filed, the Special Master effectively stayed the matter until the pending motions for intervention were decided. In August of 1988, Nebraska, the United States, and the Platte River Whooping Crane Critical Habitat Maintenance Trust ("Platte River Trust") filed responses opposing Wyoming's motion for summary judgment. On March 2, 1989, the Special Master issued his Tenth Memorandum denying each element of Wyoming's motion. The Special Master reported his decisions regarding intervention and summary judgment to the Court in his First Interim Report of Special Master, dated June 14, 1989. Wyoming did not file exceptions to the Report, and the Court accepted it for filing without modification.

While Wyoming's motion for summary judgment was pending, Nebraska filed a motion for leave to file an amended petition to seek an express apportionment for fish and wildlife interests below Tri-State Dam.[4] *See infra* p. 36-

---

of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, October 6, 1986.

[3] *See* Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim, March 18, 1987.

[4] *See* Nebraska's Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modifi-
(cont'd)

37. The Court denied Nebraska's motion on March 7, 1988. This motion to amend bears no relation to the motion of January 11, 1988.

Between 1989 and 1991, extensive discovery was conducted by all parties. The complete evidentiary record of the original litigation in *Nebraska v. Wyoming*, involving 24 trial segments between 1936 and 1941, was reviewed. The original transcript was computerized as a result of the joint efforts of Nebraska, Wyoming, and the United States. Original files were also retrieved from various state and federal agencies and archives. Original litigation materials included correspondence, attorney notes, expert witness draft materials, transcripts, pleadings, and exhibits.

Based on the review of the historical data, cross-motions for summary judgment were filed by Nebraska, Wyoming, Colorado, and the United States in March, 1991, relating to all aspects of the case. Oral argument was heard on June 7 and 8, 1991, and the cross-motions for summary judgment are under consideration by the Special Master.

STATEMENT OF FACTS

1. The North Platte River was only partially apportioned during the non-irrigation season.

The equitable apportionment accomplished in 1945 pertained only to irrigation uses. 325 U.S. at 591. The Decree was designed to provide Nebraska, Wyoming, and Colorado each with its equitable share of the North Platte River during the irrigation season. However, to ensure the irrigation season supply, some injunctions had to be placed on activities during the non-irrigation season. In fashioning the relief, the Court completely apportioned the natural flows of the North Platte River between the states of Nebraska

---

cation of the Decree, and Brief in Support of Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief, January 11, 1988.

and Wyoming during the irrigation season and partially apportioned the North Platte during the non-irrigation season. The Court specified the State of Colorado's apportionment in its entirety, covering both the irrigation and non-irrigation seasons.

Specifically, in relation to the non-irrigation season, the Court enjoined Wyoming against storing or permitting the storage of more than 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Reservoir between October 1 of any year and September 30 of the following year.[5] *Id.* at 665-66, ¶ II(b). On a year-round basis, Wyoming was also enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova, and Glendo reservoirs other than in accordance with their relative storage rights established in the Decree.[6] *Id.* at 666, ¶ III, *modified*, 345 U.S. at 983-84, ¶ 3(c).

Colorado is enjoined against storing or permitting the storage of more than 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year. 325 U.S. at 665, ¶ I(b). Colorado is also restricted from exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins, more than 60,000 acre feet of water in any period of ten consecutive years reckoned in a continuing progressive series. *Id.*, ¶ I(c).

---

[5]October 1 of one year to September 30 of the following year is considered one water year.

[6]The Decree does allow water to be impounded or released from Seminoe Reservoir contrary to the stated priority to generate electric power when such storage or releases will not materially interfere with the administration of water for irrigation purposes according to the priorities decreed for the French Canal and the State Line Canals. 325 U.S. at 666, ¶ III, *modified*, 345 U.S. at 983-84, ¶ 3(c).

Finally, during certain months of the non-irrigation season, Nebraska was adjudged, as part of its entitlement to the waters of the North Platte River for the North Platte Project, the right to accrue and to store 46,000 acre feet of natural flow during the months of October, November, and April, with a priority of December 6, 1904.[7] 325 U.S. at 595, 604, 612-13, 615, 625, 629, 646, 649; Report of Michael J. Doherty, Special Master ("Doherty Report") at 30, 34, 60-61, 66, 86-87 (Table XVII), 101.

2. The geographical scope of the irrigation season apportionment was limited to the area above Tri-State Dam because of the abundance of return flows below the dam.

The geographical scope of the original litigation involved the entire North Platte River flowing through Colorado, Wyoming, and Nebraska. *See* Appendix 1. It also involved a section of the Platte River in Nebraska, 180 miles in length, for a combined total river length of nearly 820 miles. Doherty Report at 20. The hydrology of the entire river and the history of the changes in the river were carefully analyzed because both were critical to the question of an adequate water supply for irrigation in the various river sections.

The Special Master and the Court recognized the importance of the North Platte Project for its impact on the hydrology of the river. First, the North Platte Project completely altered the natural regimen of the North Platte and Platte rivers. Second, it captured and utilized natural flows, originating principally from snow melt, and flood flows for use during the irrigation season. Third, the North

---

[7]The Inland Lakes' apportionment is at issue in the pending action. However, Special Master Olpin has indicated that he has tentatively decided to rule in favor of Nebraska's and the United States' motions for summary judgment with respect to the Inland Lakes. Both motions sought to clarify the rights of the Inland Lakes for non-irrigation season storage.

Platte Project provided vast quantities of return flows downstream. The Court found that downstream "return flows increased from a negligible quantity in 1911 to 700,000 acre feet in 1927."[8] 325 U.S. at 596; *see also* Doherty Report at 32-33.

In addition, there were two projects further downstream that influenced the water supply in the lower river, *viz.*, the Sutherland Project and the Tri-County (Lake McConaughy) projects. *See* Appendix 1. Sutherland Reservoir stores irrigation water for 75,000 acres. The Tri-County Project was designed to hold 2,000,000 acre feet of water and to irrigate 205,000 acres of land in Nebraska. 325 U.S. at 597; *see also* Doherty Report at 36.

Although Nebraska originally sought an adjudication of priorities and an apportionment downstream to Grand Island, Nebraska, it later withdrew its initial claim for direct diversions of natural flows for irrigation uses below Bridgeport, Nebraska. 325 U.S. at 607; *see also* Doherty Report at 92. This change in position was attributable to two things: The abundant return flows which entered the North Platte River in Nebraska which resulted from direct diversions at and above Tri-State Dam and the construction of the Tri-County and Sutherland projects which were believed to provide adequate water for irrigation uses downstream from their location. Doherty Report at 92 n. 2. Even though Nebraska eventually withdrew some of the downstream aspects of its claim, the Master heard extensive evidence on the Tri-County Project and its prospective operation. *Id.* at 96-99. He concluded that with the new project in place there would be adequate water for irrigation uses downstream of Lake McConaughy. *Id.* at 99.

---

[8] Recent history supports the accuracy of the Court's analysis. Between 1946 and 1987, 736,000 acre feet of return flows have entered the North Platte River on an average annual basis between Tri-State Dam and Bridgeport, Nebraska.

There was still a dispute, however, regarding the Tri-State Dam to Bridgeport section. Nebraska claimed that upstream water was needed to supply canals in that reach with adequate irrigation water. Special Master Doherty disagreed with Nebraska and concluded that the canals in that section were "so well supplied from return flows and other local sources that the section [could] be omitted from any consideration of interstate distribution." *Id.* at 92.

Nebraska took exception to the Master's conclusion. The Court upheld the Master's finding that there was an adequate water supply between Tri-State Dam and Bridgeport for irrigation and that users in this reach could not call on upstream water. 325 U.S. at 607, 654-55. The Court agreed with the Master that in addition to adequate water from return flows and other local sources, at least 81,700 acre feet would continue to pass Tri-State Dam during the irrigation season. *Id.*; *see also* Doherty Report at 96. In sum, the North Platte River below Tri-State Dam was excluded from the irrigation season apportionment because of the return flows that resulted from the North Platte Project.

3. The unapportioned, non-irrigation season flows entering Nebraska from Wyoming are fundamental to equitable reliance in Nebraska.

During the non-irrigation season, all of the currently unapportioned water in the river below Guernsey Dam flows into Lake McConaughy.[9] The reservoir has a capacity of nearly 2,000,000 acre feet, and is located in western Nebraska above the confluence of the North Platte and South Platte rivers. Kingsley Dam, which forms Lake McConaughy, was completed in 1941. The dam and reservoir were expressly planned and designed to capture the non-

---

[9] Guernsey, along with Glendo, Alcova, Pathfinder, and Seminoe reservoirs, normally close their gates during the non-irrigation season in order to store natural flow for use during the irrigation season. Therefore, most of the accurals to the river above Guernsey Reservoir are captured by upstream reservoirs.

irrigation season flows, the return flows of the North Platte Project, and any other unused flows that were transported to that reach of the river. The average annual inflow into Lake McConaughy between 1946 and 1987 was 1,105,000 acre feet. Kingsley Dam is a structure through which all subsequent downstream flows are controlled. When Lake McConaughy does not have a sufficient water supply, downstream equities are adversely affected.

The primary sources of water entering Lake McConaughy are the inchannel natural flows from Wyoming that pass Tri-State Dam, the diversion dam just downstream of the Wyoming-Nebraska state line, and the return flows between Tri-State Dam and Bridgeport that result from the diversion of irrigation water above Tri-State Dam. The inchannel natural flows passing Tri-State Dam are primarily accretions to the river below Guernsey Reservoir. The return flows which enter the river between Tri-State Dam and Bridgeport are derived primarily from diversions to canals at or above Tri-State Dam. When water is applied to farmland upstream during the irrigation season, part of the unused water percolates into the ground as part of the hydrologic cycle. The unconsumed water reappears in the river system downstream at a later point in time and is called return flow. During the non-irrigation season the inchannel flows averaged 197,400 acre feet for the years 1946-1987. Return flows in the Tri-State Dam to Bridgeport section of the river during the non-irrigation season were 342,400 acre feet on an annual average basis, 1946-1987. Thus the non-irrigation season inflow to Nebraska from Wyoming averaged 539,800 acre feet annually, 1946-1987.

4. The flows entering Nebraska during the irrigation season which are derived from the regimen of the North Platte River created by the Decree are fundamental to equitable reliance in Nebraska.

During the irrigation season the inchannel natural flows passing Tri-State Dam averaged 150,100 acre feet between 1946 and 1987, a period including numerous years of high flow. When the original suit was litigated, Special Master Doherty and the Court recognized that at least 81,700 acre feet of natural flow, calculated during the drought period, 1931-1940, would continue to pass Tri-State Dam during the irrigation season due to circumstances beyond anyone's control. 325 U.S. at 607, 655; *see also* Doherty Report at 95-96. However, Nebraska now faces the loss of these flows. In 1989, a retrofit of the Tri-State Dam was completed which resulted in essentially stopping all irrigation season natural flows passing Tri-State Dam, with the exception of flood flows.

Also during the irrigation season direct diversions to canals at or above Tri-State Dam have resulted in 393,600 acre feet of net return flows below Tri-State Dam on an annual average basis during the irrigation season, 1946-1987. In sum, 543,700 acre feet of inflows have entered Nebraska from Wyoming during the irrigation season 1946-1987.

ARGUMENT

POINT I

THE APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS IS AN APPROPRIATE ACTION IN THE COURT'S ORIGINAL JURISDICTION

To invoke the Court's original jurisdiction under U.S. CONST. art. III, § 2, Nebraska must establish that it is not a nominal party and that the amended petition presents a justiciable "case or controversy." *See, E.g., Texas v. Florida*, 306 U.S. 398 (1939); *Oklahoma ex rel. Johnson v. Cook*, 304

U.S. 387, 392-93 (1938); *New York v. Illinois*, 274 U.S. 488, 490 (1927).

It should be clear that Nebraska is not a "nominal" party, actually representing private interests. *See Jones ex rel. Louisiana v. Bowles*, 322 U.S. 707 (1944); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Oklahoma v. Atchison, T. & S.F.Ry. Co.*, 220 U.S. 277 (1911). Nebraska's interests embrace agricultural, municipal, industrial, recreational, environmental, and fish and wildlife uses along the North Platte and Platte rivers. Moreover, the Court has been extremely liberal in recognizing the quasi-sovereign interests of a state in equitable apportionment actions. In its most recent decision on the subject, the Court permitted an equitable apportionment action predicated on a water right owned by a single corporation within the plaintiff state.[10] *See*

---

[10] The Court held:

> New Mexico also contends that Colorado is improperly suing directly and solely for the benefit of a private individual — C.F. & I. — in violation of the Eleventh Amendment, and that Colorado's suit is barred by laches. We find no merit to these claims.
>
> Because the State of Colorado has a substantial interest in the outcome of this suit, New Mexico may not invoke its Eleventh Amendment immunity from federal actions by citizens of another State. The portion of the Vermejo River in Colorado is owned by the State in trust for its citizens. Colo. Const., Art. XVI, § 5. While C.F. & I. will most likely be the primary user of any water diverted from the Vermejo River, other Colorado citizens may jointly use the water or purchase water rights in the future. In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State. Faced with a similar set of circumstances in *Kansas v. Colorado*, 206 U.S. 46, 99 (1907), we concluded that "[t]he controversy rises . . . above a mere question of local private right and involves a matter of state interest and must be considered from that standpoint."

Colorado v. New Mexico, 459 U.S. at 182 n.9.

Colorado v. New Mexico, 459 U.S. 176 (1982). The initial decision in this case makes it clear that Nebraska is not a nominal party in this case.

The question of whether an interstate dispute over conflicting rights in an interstate stream presents a justiciable case or controversy in the original jurisdiction of the Supreme Court was answered in the first Arkansas River dispute. *See Kansas v. Colorado*, 185 U.S. 125 (1902). In that case Kansas filed suit against Colorado to enjoin the diversion of water historically flowing across the state line. *Id.* at 145-46. The jurisdiction of the Court was disputed by Colorado. The Court held:

> Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one State of the Union to wholly deprive another of the benefit of water from a river rising in the former and, by nature, flowing into and through the latter, and that, therefore, this court, speaking broadly, has jurisdiction.

Id. at 145.

The same principle has guided the Court's other decisions in accepting equitable apportionment cases. As the Court summarized in *Colorado v. New Mexico*:

> Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream. *Kansas v. Colorado*, 206 U.S. 46, 98 (1907); *Connecticut v. Massachusetts*, 282 U.S. 660, 670-671 (1931). It is a flexible doctrine which calls for "the exercise of an informed judgment on a consideration of many factors" to secure a "just and equitable" allocation. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

Colorado v. New Mexico, 459 U.S. at 183. Nebraska's amended petition falls squarely within this precedent.

The second question is whether the Court should exercise it original jurisdiction. Original jurisdiction is exercised "sparingly." *United States v. Nevada*, 412 U.S. 534, 538 (1973). It is limited to "appropriate cases." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972); *see also Arizona v. New Mexico*, 425 U.S. 794 (1976). Perhaps the best statement of the Court's determination of an "appropriate case" is when "recourse to that [original] jurisdiction . . . is necessary for the States' protection." *Washington v. General Motors Corp.*, 406 U.S. 109, 113 (1972), quoting *Massachusetts v. Missouri*, 308 U.S. 1 (1939). Arguably, such a condition is met solely by a well pleaded petition for equitable apportionment. *See Nebraska v. Wyoming*, 325 U.S. 589 (1945); *New Jersey v. New York*, 283 U.S. 336 (1931); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Wyoming v. Colorado*, 259 U.S. 419 (1922). The Court should exercise its original jurisdiction in this instance to protect the State of Nebraska's interests.

The Court should grant Nebraska's motion for leave to file and take jurisdiction over this equitable apportionment controversy for any one of the following three, independent bases: 1) The North Platte River is over-appropriated; 2) there is downstream reliance jeopardized by actual and threatened development in Wyoming; and 3) the pending original action requires jurisdiction over non-irrigation flows to fully resolve related issues.

1. Conflicting claims between states to an over-appropriated river create a justiciable original action.

In *Nebraska v. Wyoming*, the Court indicated that conflicting claims between states to a fully appropriated river in and of itself created a justiciable controversy under U.S. CONST. art. III, § 2:

> But *Wyoming v. Colorado, supra*, indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. If there were a surplus of unappropriated water, different considerations would be applicable. Cf. *Ari-*

> *zona v. California*, 298 U.S. 558. But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States, we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

325 U.S. at 610. The holding could well be construed as law of the case, applicable to future proceedings under the Court's retained jurisdiction. *Id.* at 672; *compare United States v. United States Smelting Co.*, 339 U.S. 186, 198-99 (1950).

Downstream equities in Nebraska have not had an adequate water supply for some time, and competition is intense for the limited supply that is available. Ongoing litigation between agricultural interests and environmental interests within the State of Nebraska demonstrates the severity of the problem. *See infra* p. 34-35. For nearly ten years, operators of Lake McConaughy and environmental groups have battled over the use of flows stored in Lake McConaughy which are derived from unappropriated, non-irrigation season flows, undiverted irrigation season natural flows passing the state line, and return flows. Nearly $20 million have been spent by litigants contesting the administration and use of the finite downstream water supply. The level of Lake McConaughy is nearing an all time low. Environmental interests claim that their needs have not been met in 48 out of the last 50 years. Irrigators using natural flows have experienced water shortages and resulting economic impacts, and they are threatened with further shortfalls.

In addition to the downstream intrastate competition for water, upstream developments threaten to lessen the available supply. Proposed developments in Wyoming would reduce the water coming into Nebraska, further exacerbating the problem. Less water is entering the state, thus reducing

McConaughy inflows, and increased demands are being made on the water which is available.

Both Nebraska and Wyoming claim the right to use the non-irrigation season water supply without limit. There is not sufficient water to satisfy all existing demands, quite aside from proposed new depletions. Accordingly, the polar claims of the states of Nebraska and Wyoming over the over-appropriated, non-irrigation season flows of the North Platte provide an independent basis for the exercise of original jurisdiction.

2. The threat to downstream equities by upstream development is the basis for the exercise of the Court's original jurisdiction.

Wyoming's actual and threatened depletions of the unapportioned flows of the North Platte River present the classic equitable apportionment conflict, *i.e.*, the threat to downstream equities posed by upstream development. *See Colorado v. New Mexico*, 459 U.S. 176 (1982); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Washington v. Oregon*, 297 U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922). The best statement appears in *Wyoming v. Colorado*:

> The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right.

Wyoming v. Colorado, 259 U.S. at 466.

In this case, Nebraska possesses a broad spectrum of equities dependent on non-irrigation season flows. They are jeopardized by actual and threatened developments in Wyoming. Traditional economic uses and fish and wildlife uses have developed in Nebraska based upon the unapportioned, non-irrigation season flows and the regimen of the North Platte River established by the Decree. Equities in Nebraska which rely on Lake McConaughy for their water supply are many. From an economic stand-point, the most important is irrigation. The water that is stored in the reservoir is used during the irrigation season to supplement or fully irrigate 230,000 acres of land each year.[11] The associated annual economic benefits to the State of Nebraska are a $16.1 million increase in net returns to the irrigators and a $53.7 million increase in economic activity resulting from the sale of additional agricultural production.

The hydroelectric power revenues which are generated from water stored behind Kingsley Dam and subsequent reuse of McConaughy waters are also economically significant. Power production occurs during the irrigation season and during the non-irrigation season. There is a series of generating units, including Kingsley Hydro, North Platte Hydro, Jeffrey Hydro, and Johnson Hydros #1 and #2. Together, these hydroelectrical power units generate an annual average of 550,000 megawatt hours of power that is worth $8.2 million to electric consumers in Nebraska.

Municipal water use of the North Platte and Platte rivers is also critical in Nebraska. Various municipalities have well fields in the alluvium of the river that draw water on an annual basis. Because of increasing ground water contamination in areas where municipal well fields used to be located, more and more towns and cities are turning to the river for a fresh and uncontaminated water supply. Re-

---

[11] Both the Central Nebraska Public Power and Irrigation District and the Nebraska Public Power District have lands served by water from Lake McConaughy.

cently, the cities of Grand Island and Kearney have located well fields in the river alluvium to avoid otherwise contaminated water. Flows in the river are needed to assure dependable water supplies for municipalities. The unapportioned, non-irrigation season flows are an important component of the water supply for municipal and domestic uses.

Recreational uses also rely on the currently unprotected flows of the North Platte River and the regimen of the river as it presently exists during the irrigation season. In the summer, there are stream-based and reservoir-based recreational activities along the North Platte and Platte rivers. Nearly a dozen reservoirs fill from water previously impounded in Lake McConaughy. Camping, boating, and fishing are all primary summer activities that take place at aquatic areas. Fall recreation is primarily hunting and fishing. Recreation related to the North Platte and Platte rivers and associated reservoirs is estimated to have generated 7.8 million visitor days per year. Platte River Valley recreation is valued by recreationalists at $34 million annually and produces new spending within Nebraska of $16.2 million a year. Further, monies received from visitors who come to Nebraska to witness the annual waterfowl and bird migrations are substantial. The Platte River is a major stop-over in the central flyway for scores of migratory birds during the spring and fall migrations. These events have been successfully promoted and the region has received national and international recognition. It is estimated that 80,000 people came to the Central Platte region to view the crane and waterfowl spring migration in 1991. Estimated direct economic benefit from these visitors was about $15 million and the economic activity generated by this spending is estimated to be $40.5 million.[12]

---

[12] Economic Impact of Crane-Watching in Central Nebraska, Lingle Gary, Platte River Whooping Crane Maintenance Trust, 6th Crane Workshop, Oct. 2, 1991.

Finally, in an area in which it may be difficult to assign economic values, fish and wildlife are a beneficiary of unapportioned, non-irrigation season flows and the irrigation season regimen of the North Platte River. All water which currently flows into Nebraska is important to support minimum stream flows for the Platte River. The riparian habitat within a three-mile corridor within the reach between Lexington and Denman, Nebraska, has been declared as critical habitat for the federally endangered whooping crane. In addition, a larger, 150 mile stretch along the Platte River provides an important habitat for six other federally endangered or threatened species, as well as the staging area and migratory habitat for 80% of the world's sandhill crane population.[13] Decreased flows will cause habitat degradation and could cause the extinction of some species.

The average annual value of the equities in Nebraska that rely on the unapportioned, non-irrigation season flows and the irrigation season regimen of the North Platte River include: $16.1 million in increased net returns to irrigators, $34 million in recreation benefits, $8.2 million in hydropower benefits, and an increase in state economic activity of nearly $70 million per year from the spending associated with irrigation and recreation. The equities are many, and the associated loss from the reduction of flows below Tri-State would be great.

Nebraska's equities are threatened by Wyoming's proposals for upstream development which would utilize and consume non-irrigation season flows. Wyoming has a state funded Water Development Program administered by the Wyoming Water Development Commission. An express purpose of the program is to "develop and preserve Wyoming's water . . . ." WYO. STAT. § 41-2-112 (1977). To guarantee the success of the program, the State of Wyo-

---

[13] Endangered and threatened species include the Whooping Crane, Bald Eagle, Least Tern, Piping Plover, American Burying Beetle, Eskimo Curlew, and the Western Prairie Fringed Orchid.

ming assured that the program is well-funded. The program is funded through general appropriations and an excise tax on coal, oil and gas. Total revenues since 1977 exceed $433,000,000, and total expenditures exceed $255,000,000. The program presently has $67,000,000 available for appropriation, and the Development Commission has recommended expenditures of $24,000,000. With these abundant resources, the Commission has done an aggressive job of promoting water development projects in Wyoming in the North Platte River Basin, including the Laramie River.

Through formal discovery, Nebraska has become aware of numerous water development projects in Wyoming in the North Platte River Basin. Projects identified by Wyoming inciude the Bates Creek Project, Deer Creek Project, Box Elder Creek Project, Wagonmound Creek Project, LaBonte Creek Project, Horseshoe Creek Project, Corn Creek Project, McIntosh Project, Rawlins Project, Seminoe Enlargement, Robertson-McConnell Project, Edgerton Midwest Project, Sandy Lakes Project, Casper-Alcova Project, Horse Creek Project, Natrona County Regional Project, Tisthammer Project, and the Wy Coal Gas Project. Further, Wyoming identified seven general water planning/development reports, seven reports related to the proposed Deer Creek Project, three reports related to the Seminoe Enlargement, five reports related to the Edgerton Midwest Project, three reports related to the Corn Creek Project, one report related to Sandy Lakes, three reports related to the Casper Alcova Project, one report related to the Horse Creek Project, one report related to the Natrona County Project, two reports related to the Tisthammer Reservoir, and one report related to the Wy Coal Gas Project. Wyoming describes the status of these projects as "under construction," "construction pending," "planning," "feasibility," "idea," "on hold," or "inactive." Some of these projects are the subject of the pending action and others are being watched closely by Nebraska. However, from the volume of proposed projects in the North Platte

River Basin in Wyoming, the reason for Nebraska's apprehension is apparent.

The present conflict between the downstream equities currently relying on non-irrigation season water and the proposed and threatened upstream water developments in Wyoming makes the need to equitably apportion the unapportioned, non-irrigation season flows immediate and critical.

3. In order to fully resolve interrelated issues in the pending action, the unapportioned, non-irrigation season flows must be apportioned.

The pending issues regarding irrigation season flows and violations of the Decree must be examined by the Court in relation to the availability and use of non-irrigation season flows. *Cf. In Re Glaser*, 198 U.S. 171 (1905); *In Re Massachusetts*, 197 U.S. 482 (1905). There is an integral hydrologic continuity between the flows of the non-irrigation season and the irrigation season. Likewise, there is a hydrologic continuity between water use upstream and residual flows downstream. Nearly five decades have passed since the Decree was entered, and downstream equities are relying on the regimen of the river created by the Decree and the unapportioned, non-irrigation season flows. All of Wyoming's activities that Nebraska alleges violate the Decree during the irrigation season also have resulting impacts during the non-irrigation season. In order to fully resolve the pending issues, it is necessary to apportion the unapportioned flows of the North Platte River.

In its pending petition, Nebraska alleges that Wyoming is violating and threatens to violate the Decree through actions Wyoming is taking in relation to the Laramie River, the proposed Deer Creek Project, and Nebraska's Inland Lakes apportionment. In its counterclaim, Wyoming placed in dispute Nebraska's use of natural flow for Nebraska's canals in the Whalen/Tri-State Dam reach of the North Platte River. The resolution of each of these four issues will have a significant effect on the non-irrigation season flows.

a. Development on the Laramie River, in the form of Grayrocks Reservoir, Corn Creek Reservoir, and other future development, has and will continue to deplete non-irrigation season flows upon which Nebraska relies and to which it is equitably entitled.

In relation to the Laramie River, the State of Nebraska alleges in its pending petition that Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by depleting the flows of the North Platte River by the operation of Grayrocks Reservoir and by depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers. While the petition asserts that Grayrocks and Corn Creek are depleting or potentially depleting Laramie River flows, Wyoming answered generally by stating that Nebraska has no right to Laramie waters at all and if it had a right it is estopped from asserting it. Accordingly, as defined by Wyoming's answer, the Laramie issue is broader than the project-specific allegations in the complaint.

The basic issue framed by the pleadings is whether Nebraska was apportioned 75% of the Laramie River's contribution to the North Platte River under conditions prevailing in 1945 or whether Wyoming can dewater the Laramie at its mouth. The Laramie River has contributed an average of 62,050 acre feet annually to the North Platte River during the irrigation season, 1946-1987. In addition, the average annual contribution of the Laramie River to the North Platte River during the non-irrigation season has been 39,600 acre feet, 1946-1987. Because a significant amount of water from the Laramie River flows into the North Platte River, the resolution of the issue that is currently before the Court, *i.e.*, each state's entitlement to the Laramie, will have a major impact on the equities in

Nebraska which rely on upstream, non-irrigation season flows.

The pending Laramie River issues implicate the non-irrigation season flows in several ways. One relates to the Grayrocks Dam and Reservoir. On November 24, 1976, the State of Nebraska filed suit in the United States District Court for the District of Nebraska against the Rural Electrification Administration and two individuals. In April of 1977, the National Wildlife Federation, the National Audubon Society, and the Nebraska Wildlife Federation intervened as plaintiffs. Additional plaintiffs intervened in August, 1977. Basin Electric Power Cooperative, along with other entities, intervened as defendants in November, 1977. The City of Lincoln also intervened as a defendant in December, 1977. In a related action filed on April 13, 1978, the State of Nebraska, the National Audubon Society, and the Nebraska Wildlife Federation filed suit against Colonel Ray, District Engineer of the United States Army Corps of Engineers, in his official capacity. On April 24, 1978, the Basin Electric Power Cooperative was joined as a defendant.

The two suits were consolidated, with the plaintiffs seeking to enjoin the construction of Grayrocks Dam and Reservoir under various statutory claims, including claims under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1989), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1989). The consolidated cases were decided at the district court level on October 23, 1978. Judgment was entered in favor of Nebraska and the intervening parties plaintiff. *See Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (D. Neb. 1978).

By an Agreement of Settlement and Compromise dated December 4, 1978, the action was settled and dismissed on appeal. *Nebraska v. Rural Electrification Administration*, 594 F.2d 870 (8th Cir. 1979). As part of the Agreement of Settlement and Compromise, Basin Electric guaranteed certain non-irrigation season, minimum instream flow releases

on the Laramie River down to its confluence with the North Platte River for downstream wildlife protection.

Although encouraged to participate, the State of Wyoming did not become a party to the litigation or to the Agreement of Settlement and Compromise of December 4, 1978, and has repeatedly asserted that it is not bound by either. To the contrary, Wyoming maintains that it has the right to dry up the Laramie River at its mouth, not only between May 1 and September 30 of each year, but also between October 1 and April 30 of each year. Wyoming's claim includes the right to totally diminish the guaranteed minimum releases required by the Agreement of Settlement and Compromise, which Wyoming acknowledges are not protectable under Wyoming law. The State of Wyoming's refusal to be bound by the Grayrocks Agreement has precluded certainty in the use of the non-irrigation season flows of the North Platte River.

Another pending issue which affects the non-irrigation season flows is the proposed Corn Creek Project, planned for construction in the Laramie River Basin. The Corn Creek Irrigation District is situated in Goshen County, Wyoming, and extends south of the confluence of the Laramie and North Platte rivers. On July 24, 1974, the District's predecessor contracted with the Basin Electric Power Cooperative on behalf of the Missouri Basin Power Project for the future delivery of 22,500 acre feet annually from Grayrocks Reservoir. Additional water supplies would come from new depletions of the Laramie and North Platte rivers. The most recent information of which Nebraska is aware indicates that the proposed project consists of a surface water diversion system, a 75 c.f.s. pump station at the confluence of the Laramie and North Platte rivers, a storage reservoir, and a pipeline distribution system. As is recognized in ¶ 5 of the Agreement of Settlement and Compromise, the proposed diversion of Laramie River water to the Corn Creek Irrigation District would undermine the tributary inflow to the North Platte between

Whalen and the state line which has historically entered Nebraska during the non-irrigation season.

Generally, in relation to the pending litigation, Wyoming has claimed the right to 100% of the flows of the Laramie River throughout the year. Wyoming's allegation obviously implicates more than just the irrigation season apportionment made pursuant to the Decree; it also implicates unapportioned, non-irrigation season water, a matter not yet addressed by the Court. Resolution of the pending Laramie River issues will necessarily determine non-irrigation season entitlements between the two states. The Court should recognize the relation between the pending issues and the unapportioned flows and deal with the two related problems at the same time rather than implicitly deciding the apportionment question without expressly addressing it.

b. The proposed Deer Creek Project will deplete non-irrigation season flows which are currently relied upon in Nebraska and to which Nebraska is entitled.

Nebraska alleges in its original petition that Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. Wyoming has proposed to construct the Deer Creek Dam and Reservoir on Deer Creek, a tributary of the North Platte River located between Pathfinder Dam and Guernsey Dam. Pursuant to ¶ XIII(c) of the Decree, the impact of any construction of additional storage capacity in this reach of the river is subject to analysis before construction commences. While the pending action has focused on depletions that the Deer Creek Project would cause during the irrigation season above Tri-State Dam, there would also be depletions during the non-irrigation season below Tri-State Dam. In

order to fully resolve the Deer Creek issue, there should be an apportionment of non-irrigation season flows.

Two methods of operating Deer Creek have been modelled. Each operating scenario shows that Deer Creek will cause significant depletions. However, depending on which model is used, the effects are manifest in different geographical areas. The North Platte River Simulation Model ("NPRSM") was a computer model created by Wyoming for one purpose — to obtain a § 404 permit for the proposed Deer Creek Project. The model was designed to portray the impacts of Deer Creek on the North Platte River under certain pre-determined conditions. It did not attempt to simulate the real-world hydrology of the North Platte River in order to predict the effects of the operation of Deer Creek. Instead, the NPRSM used what normally would be simulated output, *i.e.*, flows passing Tri-State Dam, as a fundamental input parameter. Apparently, Wyoming's objective was to portray minimal depletions on flows below the Tri-State Dam for a specific reason, *viz.*, to obtain a favorable Biological Opinion from the United States Fish and Wildlife Service ("FWS").

Pursuant to the federal permitting process, the FWS was required to conduct an analysis and write a Biological Opinion evaluating the impacts of Deer Creek on endangered and threatened species before a § 404 permit could be issued. Because there are several endangered or threatened species below Tri-State Dam, depletions to flows below that point are critical. If the adverse impacts on endangered or threatened species below Tri-State Dam reached a threshold level, the FWS would issue a "jeopardy opinion," and the related federal permit could not be issued. However, if the depletions were minimal, the FWS would issue a "non-jeopardy opinion," and Wyoming could obtain the § 404 permit.

Realizing the need to show a minimal amount of depletions in flows past Tri-State Dam, Wyoming backed into its computer model by using output as a fundamental input

parameter. Wyoming thereby held the reduction in flows past Tri-State Dam to 1050 to 1300 acre feet per year. However, in reducing depletions below Tri-State Dam to avoid a jeopardy opinion, Wyoming translated the significant depletions of Deer Creek upstream to the federal storage reservoirs. Under the NPRSM, the end-of-year carryover storage for both the Pathfinder and Kendrick ownerships is reduced respectively by as much as 9,400 acre feet and 77,000 acre feet.

In short, the NPRSM reduced depletions below Tri-State Dam at the expense of significant depletions on upstream federal storage reservoirs. Neither the Corps of Engineers nor the FWS was concerned with Deer Creek's affect on the federal storage reservoirs. Therefore, the large depletions in upstream reservoir storage were of no significance to Wyoming in obtaining its § 404 Permit. In the administrative forum, Wyoming deliberately diminished the impacts at Tri-State Dam, while ignoring depletions on upstream federal storage reservoirs.

The Deer Creek issue is now in this judicial forum in which the Court must assess how Deer Creek affects the interests of Nebraska and the United States. In conjunction with the present litigation — and quite aside from the contrived results of the NPRSM — a computer model has been developed by Nebraska which simulates the *actual* operation and administration of the North Platte River and the associated facilities. The Deer Creek Project was evaluated by simulating the operation of Deer Creek within the system with a junior priority. Under this operating scenario, the depletions on the upstream federal storage reservoirs are much less, while there are much greater impacts on flows below Tri-State Dam.

Wyoming's tactic has been to play both ends against the middle. While Wyoming argues on one hand that it must operate the Deer Creek Project pursuant to the NPRSM according to its state and federal permits, it argues on the other hand that according to Nebraska's model, Deer

Creek's primary impacts are below Tri-State Dam, an area in which Wyoming believes it can freely deplete the river without violating the Decree, while there would be comparatively little impact on upstream federal storage reservoirs. Wyoming can either transfer the impacts of Deer Creek to the flows below Tri-State Dam in an attempt to avoid violating the Decree or it can transfer the impacts to the federal reservoirs in an attempt to avoid jeopardizing the critical habitat of endangered and threatened species. It cannot do both.

The method of operation is vital to assessing the effects of Deer Creek. The Project must be considered in relation to its effect on the non-irrigation season flows in order to fully resolve the Deer Creek matter. The apportionment of non-irrigation season flows is directly relevant to the feasibility of Deer Creek. Significant effects of the proposed Project occur during the non-irrigation season. Under some operational scenarios, the effects are much greater than in others. Depending on how the equities are balanced in order to arrive at an equitable apportionment, Wyoming may or may not be entitled to deplete the non-irrigation season flows past Tri-State Dam. Determining the non-irrigation season equitable apportionment should be a prerequisite to a complete evaluation of the feasibility of Deer Creek.

c. Wyoming's attempt to curtail storage of non-irrigation season flows to the Inland Lakes affects and depletes Nebraska's non-irrigation season water supply.

In its original petition, Nebraska alleges that Wyoming is presently violating and threatens to violate Nebraska's equitable apportionment established in the Decree by actions of Wyoming state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska. The State of Wyoming's action in

this regard also threatens non-irrigation season flows of the North Platte River to which Nebraska is equitably entitled. Since the entry of the Decree, the State of Nebraska has relied on the apportioned, non-irrigation season flows for the Inland Lakes for irrigation, recreation, and for waterfowl, fish, and game habitat at Lake Minitare, Lake Alice, Little Lake Alice, and Winters Creek Lake.

d. The resolution of the pending counterclaim will affect non-irrigation season flows in Nebraska.

Wyoming's counterclaim directly implicates and threatens further depletions of the non-irrigation season flows of the North Platte River to which Nebraska is equitably entitled. In its counterclaim, Wyoming alleges that Nebraska has circumvented the Decree and continues to do so by demanding natural flow for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of those canals. Wyoming wrongly equates beneficial use with certain irrigation "requirements" which Special Master Doherty utilized in determining the proper proportion split for the apportionment in the Whalen Dam to Tri-State Dam reach. In essence, Wyoming is seeking to restrict Nebraska to arbitrary limitations on the application of North Platte water to beneficial use on lands in Nebraska served by canals diverting at or above Tri-State Dam.

As previously explained, the direct irrigation season diversions which enter canals at or above Tri-State Dam are the primary source of water below Tri-State Dam. *See supra* p. 9-11. When water is utilized for irrigation of crops by upstream canals, only a portion of the water is consumed. A significant amount of the water re-enters the river system in the form of return flows. If the diversions to the upstream canals are arbitrarily limited, there will be a resulting decrease in the return flows below Tri-State Dam. Because of the direct relationship between direct irrigation season diversions and non-irrigation season return flows, it is essential to examine both together. It is necessary to apportion

the non-irrigation season flows in order for any certainty to exist for downstream use.

POINT II

EQUITABLE APPORTIONMENT PRESENTS A JUSTICIABLE CONTROVERSY

In assessing this motion for leave to file, the standards for the exercise of original jurisdiction and the standards for relief on the merits must be kept distinct. The two are not the same and have been sharply distinguished by the Court in determining whether to accept an equitable apportionment case.

In *Ohio v. Kentucky*, 410 U.S. 641 (1973), the Court defined the purpose of a motion for leave to file: "Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Id.* at 644. This procedure tests the legal sufficiency of a petition by disposing of threshold legal issues.

By contrast, the traditional standard for relief on the merits in an original equitable apportionment action is that there must be clear and convincing evidence that the actions of a state are of a serious magnitude and fully and clearly proven before the Court will intervene and enjoin the actions of another state. *See generally Colorado v. New Mexico*, 459 U.S. 176, 187-88 n. 13 (1982); *Colorado v. Kansas*, 320 U.S. 383, 393-94 (1943). *Accord Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906). This determination is made by the Court, however, after it has granted the motion for leave to file and after the evidence has been heard.

The Court has rejected the concept that factual issues must be fully developed in the preliminary stages of an original action. The weighing of untested evidence to determine success on the merits is not a factor in determining whether to grant a motion for leave to file. The Court does "not pause to consider the scope of the relief which it might be possible to accord on such a bill." *Kansas v. Colorado*, 185 U.S. 125, 145 (1902). As indicated in Point I, a well pleaded action for equitable apportionment meets the Court's test for justiciability because it necessarily includes the concepts of an "imminent threat" of "serious injury."[14] *See supra* p. 11-16. The Court has repeatedly held that a fully appropriated river in which downstream equities are threatened by actual or proposed upstream development necessarily invokes sovereign rights and creates the "clash of interests . . . which makes the controversy a justiciable one under [the Court's] original jurisdiction." *Nebraska v. Wyoming*, 325 U.S. at 610. *See also Colorado v. New Mexico*, 459 U.S. 176 (1982); *Washington v. Oregon*, 297 U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907). Further, as the Court said in *Kansas v. Colorado*: "The disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court." *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907).

---

[14] There is no additional requirement that the state seeking equitable apportionment must demonstrate that the threatened injury is "imminent" or attempt a factual showing of "necessity." Language to that effect in *Alabama v. Arizona*, 291 U.S. 286 (1934), arose from a completely different and considerably more abstract context. In that case, Alabama sought to enjoin five other states from enforcing their statutes against the sale of products made from prison labor as a deprivation of its interstate market in prison manufactured products. The Court properly found that the factual allegations of injury to be highly speculative and insufficiently pled. *Id.* at 291. The ruling has no precedential effect on the clearly discernable impacts arising from the competition for interstate water.

POINT III

THE SOLE FORUM TO RESOLVE EQUITABLE APPORTIONMENT ISSUES IS THE SUPREME COURT

The Court has traditionally declined to exercise its original jurisdiction where an "appropriate" alternative forum exists. *See Arizona v. New Mexico*, 425 U.S. 794 (1976); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). In previous pleadings, Wyoming and Basin Electric have suggested that alternative forums are available for the resolution of discrete issues. However, the sole appropriate forum in which to allocate interstate waters is the Supreme Court of the United States. There is no alternative forum aside from a legislative apportionment. The Court has expressly reserved issues of equitable apportionment for its original jurisdiction.

In *Hinderlider v. La Plata & Cherry Creek Irr. Co.*, 304 U.S. 92 (1938), the Court confirmed that equitable apportionment forms an element of "federal common law:"

> For whether the water of an interstate stream must be apportioned between the two States is a question of "federal common law" upon which neither the statutes nor the decisions of either State can be conclusive. *Kansas v. Colorado*, 206 U.S. 46, 95, 97-98; *Connecticut v. Massachusetts*, 282 U.S. 660, 669-71; *New Jersey v. New York*, 283 U.S. 336, 342-43; *Washington v. Oregon*, 297 U.S. 517, 528. Jurisdiction over controversies concerning rights in interstate streams is not different from those concerning boundaries. These have been recognized as presenting federal questions.

Hinderlinder, 304 U.S. at 110. *See also Kansas v. Colorado*, 206 U.S. at 46, 98 (1907). The federal common law of equitable apportionment presents an overriding federal interest calling for the application of a uniform rule of decision. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964); *see also Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). *See generally D'Oench, Duhme &*

Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942). Maintaining a uniform rule of decision is not possible in a variety of alternative forums. The original jurisdiction of the Supreme Court is required.

Moreover, the alternative forum exception to accepting jurisdiction is subject to an important qualification. In *Kansas v. Colorado*, 185 U.S. 125 (1902), the Court emphasized that it had exclusive jurisdiction over matters properly within its jurisdiction: "The original jurisdiction of this court over 'controversies between two or more States' was declared by the judiciary act of 1789 to be exclusive, as in its nature it necessarily must be." *Kansas v. Colorado*, 185 U.S. at 139; *see* 28 U.S.C. § 1251(a) (1988). An equitable apportionment can only be accomplished by the Court; piecemeal proceedings in scattered forums will not suffice.

There are several state and federal actions or proceedings currently in progress that potentially affect the downstream regimen of the river.[15] At the state level, the Central Platte Natural Resources District has applied for an instream flow permit from the State of Nebraska for certain reaches of the Platte River.[16] Hearings have just concluded to determine if an instream flow permit is required, and if so, what quantity of water is appropriate. If an instream flow is

---

[15] These proceedings do not present alternatives forums for the resolution of issues of equitable apportionment.

[16] A Natural Resources District is a political subdivision of the State of Nebraska responsible for planning and executing programs and facilities relating to: 1) Erosion prevention and control; 2) prevention of damages from floodwater and sediment; 3) flood prevention and control; 4) soil conservation; 5) water supply for any beneficial uses; 6) development, management, utilization, and conservation of ground and surface water; 7) pollution control; 8) solid waste disposal and sanitary drainage; 9) drainage improvement and channel rectification; 10) development and management of fish and wildlife habitat; 11) development and management of recreational and park facilities; and 12) forestry and range management.

granted, the right receives a present-day and therefore a relatively junior priority. The permit has been applied for pursuant to Nebraska state law and is being adjudged by its standards. *See* NEB. REV. STAT. §§ 46-2, 107 to 2, 119 (Reissue 1988).

In an unrelated matter, Central Nebraska Public Power and Irrigation District has applied to the State of Nebraska to amend its state water right permits to allow it to store and release water from Lake McConaughy for recreational, and fish and wildlife purposes. Presently, its state permits encompass only agricultural and hydropower production purposes. While the district's proposed amendments to its state water rights permits were occasioned by pending Federal Energy Regulatory Commission ("FERC") proceedings, discussed *infra*, they will be evaluated and ruled on as a matter of Nebraska state law. NEB. REV. STAT. § 46-233, *et seq.* (Reissue 1988).

On a federal level, the FERC relicensing of Kingsley Dam has taken the spotlight. *See supra* p. 15. The operators of Lake McConaughy began the procedures to relicense their hydropower project in 1984. Environmental interests intervened, seeking to secure the release of certain minimum instream flows from Lake McConaughy for fish and wildlife, including federally endangered and threatened species. Several federal laws are implicated by this proceeding, including the Federal Power Act of 1920 (originally the Federal Water Power Act), 16 U.S.C. § 792-828c (1988 & Supp. 1989), the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1989), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1989). Based upon the claims asserted to date before FERC, it appears that there is not enough water in Lake McConaughy on an average annual basis to satisfy the needs of both irrigation interests and environmental interests. Either one interest or the other — most likely both — will end up with insufficient water supplies. This dispute implicates only the demand for water that finds its

way into Lake McConaughy. No resolution of the FERC proceeding can affect the available upstream water supply.

Also on the federal level, the United States Bureau of Reclamation has recently begun an evaluation of its facilities and their operations on the North Platte, South Platte, and Platte rivers in Nebraska, Wyoming, and Colorado, in consultation with the United States Fish and Wildlife Service. The § 7 consultation is mandated by the Endangered Species Act and is designed to assess the impacts of the federal projects on endangered and threatened species' habitat. The final results of the studies associated with this consultation are not expected to be completed for several years. It is unclear how the results of these studies could affect the management of federal facilities or the regimen of the river.

All of the described proceedings or actions are operating independently of one another and on different timetables. At least three out of four of these actions are solely intrastate in nature and will serve to divide a limited water supply among competing interests within the State of Nebraska. None of these forums performs the function of the Court in the case of two states competing over a limited water supply, *viz.*, an equitable apportionment of the unapportioned, non-irrigation season flows of the North Platte River between Nebraska and Wyoming.

Nebraska does not seek to have the Court enter into "intramural disputes" within the State of Nebraska over the allocation of its water resources, nor does it believe that doing so would be prudent. *See, e.g., New Jersey v. New York*, 345 U.S. 369, 373 (1953). Nebraska only seeks to have the Court balance the equities between the states and determine each state's equitable share of the unapportioned flows. Only then can each state manage its internal affairs with certainty.

POINT IV

THIS MOTION IS DISTINCT FROM NEBRASKA'S FIRST MOTION TO AMEND PETITION

Nebraska filed a motion for leave to file an amended petition for an order enforcing the Decree and for injunctive relief on January 11, 1988. The amended petition recited the Decree, the equitable apportionment, and the Court's retention of jurisdiction in ¶ XIII(f) of the Decree in regard to any change in conditions warranting modification or further relief. Based on the assertion that the apportionment for irrigation water diverted at or above Tri-State Dam in the Decree implicitly established a regimen of stream flow for uses below Tri-State, the amended petition asked the Court to "construe the Decree," albeit that it apportioned irrigation water, as apportioning the same water for the maintenance of critical wildlife habitat and as placing restrictions on Colorado's and Wyoming's authority to approve new appropriations. In effect, the Court was asked to construe an apportionment for irrigation as an apportionment for environmental interests. The relief requested in the amended petition was also limited to the decreed apportionment, *i.e.*, the irrigation season flows.

In the alternative, Nebraska asked the Court to modify the Decree "to recognize and provide for changes in the conditions of the North Platte River . . . that would result" from new, upstream appropriations. The actual changes were not articulated. The Court was also requested to modify the Decree to recognize the need for the protection of critical wildlife habitat as a result of post-Decree, federal and state legislation. The amended petition did not set out the facts upon which the "need" for protection allegedly arose.

The brief in support of the motion was more explicit, stating that equity requires that the apportionment recognize that the responsibility of protecting wildlife habitat should not be left to just one of the states. Nebraska argued

that equity requires the Court to take cognizance of post-Decree laws designed to further environmental interests and "to spread the burden of protecting critical wildlife habitat throughout the North Platte River Basin."

This amended petition is quite different from the one filed in 1988. The 1988 amended petition sought relief for fish and wildlife interests during the irrigation season. It asked the Court to construe or modify the Decree to consider post-Decree developments. By contrast, the present motion presents a classic equitable apportionment of the previously unapportioned, non-irrigation season flows. All equities in Nebraska and Wyoming will be considered and equitably balanced in relation to one another. The Court only partially apportioned non-irrigation season flows in the original litigation. Nebraska is seeking to complete the apportionment of the North Platte River which was partially accomplished in the original proceedings in order to provide certainty in the ongoing, intrastate proceedings in both state and federal forums in Nebraska.

POINT V

THE STATE OF WYOMING AND THE UNITED STATES ARE VIOLATING THE DECREE BY DEPLETING THE STORAGE WATER AND NATURAL FLOWS OF THE NORTH PLATTE RIVER

Counts II and III of the amended petition allege further violations of the Decree by Wyoming, and for the first time, violations of the Decree by the United States. These counts seek to further construe and enforce the apportionment made to the State of Nebraska pursuant to *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), and to enjoin the State of Wyoming's and the United States' continued and threatened violations of the Decree.

Under FED. R. CIV. P. 15(a), leave to amend pleadings is intended to be freely given. *See Foman v. Davis*, 371 U.S.

178 (1962); *see also Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061 (7th Cir. 1979); *Longbottom v. Swaby*, 397 F.2d 45 (5th Cir. 1968). Insofar as amendments to the complaint are concerned, the objective is to give the plaintiff "a chance to test his claim on the merits." *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F.2d 380, 384 (2d Cir. 1968). Accordingly, where the amended complaint states a valid cause of action its filing should normally be granted. *See Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973). This policy extends to the introduction of an entirely new cause of action. *See Jenn-Air Products Co. v. Penn Ventilator, Inc.*, 283 F. Supp. 591 (E.D. Pa. 1968); *Sperberg v. Firestone Tire & Rubber Co.*, 61 F.R.D. 78 (N.D. Ohio 1973); see 3 J.W. Moore, R.D. Freer, MOORE'S FEDERAL PRACTICE ¶ 15.08 [2] (2d ed. 1991).

The impediment is prejudice or unfair surprise. *See Toth v. USX Corp.*, 883 F.2d 1297 (7th Cir. 1989). As shown in Point VI, no prejudice will result to the defendants because they will not be prevented from presenting a responsive case. *See infra* p. 39-42. Under this circumstance, the majority rule is that amendments to the complaint prior to trial should be allowed. *See Granus v. North American Philips Lighting Corp.*, 821 F.2d 1253 (6th Cir. 1987); *R.E.B., Inc. v. Ralson Purina Co.*, 525 F.2d 749 (10th Cir. 1975); *P.S.G. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 417 F.2d 659 (9th Cir. 1969).

As previously discussed, the Decree apportions the waters of the North Platte River among the states of Nebraska, Wyoming, and Colorado. The State of Wyoming is violating and threatens to violate the Decree by depleting the flows of the North Platte River by irrigating acres in excess of the amount authorized, storing water in excess of the amount authorized, inaccurate reporting of irrigated acres and water stored, excessive diversions, including diversions in excess of beneficial use, unauthorized use of storage water, and modifying the legal and physical conditions upon which the Decree was based. The United States is violating and

threatens to violate the Decree by depleting the flows of the North Platte River by unauthorized use of storage water and unauthorized allocations of natural flow. These violations of the Decree disrupt the equitable balance of the river and deprive the State of Nebraska of its lawfully established entitlement under the Decree.

The State of Wyoming's and the United States' unlawful actions will cause the State of Nebraska to suffer substantial economic, ecological, and environmental injuries. Initial analyses of the economic impact of the present and imminent depletion of the flows of the North Platte River apportioned to the State of Nebraska show substantial annual losses in the form of increased power costs, lost farm income, decreased value of agricultural production, and decreased statewide economic output. These adverse economic impacts are in addition to, and do not include, the economic impacts set forth in Nebraska's original petition.

POINT VI

EXERCISE OF THE COURT'S ORIGINAL JURISDICTION IS NECESSARY TO PREVENT SEVERE PREJUDICE TO THE CITIZENS OF NEBRASKA AND WYOMING

In original actions there is a compelling policy in favor of full development of the facts. *See United States v. Texas*, 339 U.S. 707, 715 (1950). *See also Oklahoma v. Texas*, 253 U.S. 465, 471 (1920); *Kansas v. Colorado*, 185 U.S. 125, 144-45, 147 (1902); *United States v. Texas*, 162 U.S. 1 (1896). The exercise of original jurisdiction should therefore be regarded as comprehensive, embracing all issues in a cause of action.

The Court has been forced to revisit several controversies, including three equitable apportionments, to settle unresolved issues. *See, e.g., Oklahoma v. Texas*, 253 U.S. 465 (1920) and *United States v. Texas*, 339 U.S. 707 (1950); *Kansas v. Colorado*, 206 U.S. 46 (1907), *Colorado v. Kansas*,

320 U.S. 383 (1943), and *Kansas v. Colorado*, No. 105, Original; *Wyoming v. Colorado*, 259 U.S. 419 (1922), *Wyoming v. Colorado*, 286 U.S. 494 (1932), *Wyoming v. Colorado*, 298 U.S. 573 (1936), and *Wyoming v. Colorado*, 309 U.S. 572 (1940); and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Nebraska v. Wyoming*, 345 U.S. 981 (1953), and the present case, No. 108, Original. In this instance, there is no reasonable basis upon which to accept only certain issues in an original action while neglecting to address related issues. Such a circumstance would result in severe prejudice to the party states and their citizens and to the *amici*. Further, it would effectively defeat the policy of resolving original actions with judicial economy. As stated in Point III, the Court is the appropriate forum to determine equitable apportionment issues. *See supra* p. 32-35.

Supreme Court Rule 17.2 states that the Federal Rules of Civil Procedure "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." Federal Rule of Civil Procedure 15(a) provides that amendments to pleadings "be freely given when justice so requires." Amendments should be granted in the absence of bad faith or a dilatory motive. *See Leased Optical Departments-Montgomery Ward, Inc. v. Opti-Center, Inc.*, 120 F.R.D. 476 (D.N.J. 1988). There must be a specific showing of substantial prejudice to deny an amended pleading. *See Procter & Gamble Co. v. Nabisco Brand, Inc.*, 125 F.R.D. 405 (D. Del. 1987); *Ozark Air Lines, Inc. v. Delta Air Lines, Inc.*, 63 F.R.D. 69 (N.D. Ill. 1974). Delay by itself does not constitute prejudice. *See, e.g., Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594 (5th Cir. 1981); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir. 1980); *Cornell & Co., Inc. v. Occupation Safety and Health Review Comm'n*, 573 F.2d 820 (3d Cir. 1978).

"Prejudice" has a precise meaning under FED. R. CIV. P. 15(a). It affects a party's ability to present its case. As the court stated in *Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802 (D. Del. 1986):

> Prejudice does not mean inconvenience to a party. Moreover, it is obvious that an amendment, designed to strengthen the movant's legal position, will in some way harm the opponent. In the context of a 15(a) amendment, prejudice means that the nonmoving party "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the ... amendments been timely." *Heyl & Patterson Intern.*, 663 F.2d at 426.

Cuffy v. Getty Refining and Marketing Co., 648 F. Supp. at 806.

Prejudice has been construed to include unfair surprise. *See Pilotti v. Mobil Oil Corp.*, 565 A.2d 1227 (Pa. Super. 1989). It may include the extra costs of repeated delays which impair a party's ability to proceed. *See Andrews v. Government of Virgin Islands*, 132 F.R.D. 405, 412 (D. Virgin Islands 1990). It has included the introduction of a new set of operative facts or an effort to amend the pleadings after discovery has closed. *See Diduck v. Kaszycki & Sons Contractors, Inc.*, 737 F. Supp. 792 (S.D.N.Y. 1990). Whatever the particular circumstance, the unifying factor is "whether the opposing party was denied a fair opportunity to defend and to offer additional evidence on that different theory. [citing] *Universe Tankships, Inc. v. U.S.A.*, 528 F.2d 73, 76 (3d Cir. 1975) ...." *Evans Products Co. v. West American Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984).

No prejudice would result from accepting Nebraska's amended petition. Although the case was originally filed in October of 1986, what will have occurred with the Special Master's report and recommendations on the pending cross-motions for summary judgment will be the separation of triable issues of fact from the matters conducive to summary judgment. *See supra* p. 3-5. Neither the plaintiff, the defendants, nor the *amici* have spent substantial resources in developing the factual sides of their defenses. Trial segments have not been scheduled, and they will not be set until the cross-motions for summary judgment are resolved by the Court sometime next year. Because of the necessary

schedule on the pending legal issues, all parties and *amici* will have more than a sufficient opportunity to investigate the factual claims and to gather evidence in support of or in defense of the allegations. The introduction of additional allegations of violations of the Decree by Wyoming and the United States at this stage of the proceedings will not deny any party or *amici* a fair opportunity to defend against the allegations in the amended petition. Nor will the apportionment of unapportioned, non-irrigation season flows. To the contrary, resolving the entitlements of the states to the non-irrigation season flows will facilitate the resolution of all of the pending issues.

In this case, justice and equity require that the amended petition be allowed. Nebraska has not demonstrated bad faith or a dilatory motive. Neither Wyoming nor the United States will be unfairly disadvantaged and neither will be deprived of an opportunity to present facts or evidence which it would have offered had the proposed amendments come sooner. The amended petition would not unduly complicate this litigation, but rather would clarify the parties' rights and responsibilities, and it would eliminate the present uncertainty related to the entitlements of the states to the North Platte River.

CONCLUSION

There is no question whether the Court has jurisdiction over the amended petition. The question is whether the Court should exercise its jurisdiction to allow the parties to address the matters raised in the amended petition.

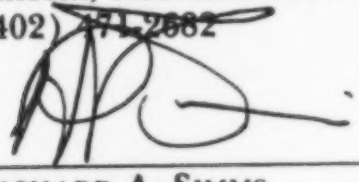
Similar amendments were recently allowed in two other original actions, *viz. Kansas v. Colorado,* Original No. 105, and *Oklahoma and Texas v. New Mexico,* Original No. 109. In the former, the complaint was amended twice over a four year period to allow the assertion of additional compact violations and to add a prayer for damages after the Court's decision in *Texas v. New Mexico,* 482 U.S. 124 (1987). In

Oklahoma and Texas v. New Mexico, the complaint was amended to facilitate an allegation that arose out of an initial adverse decision by the Special Master.

In 1945, the Court left some of the flows of the North Platte River unapportioned. With respect to those flows, there was no justiciable controversy at the time — only the recognition in the Court's retention of jurisdiction that conditions would likely change. Conditions have changed, and the Court should exercise its jurisdiction over the amended petition in order to resolve the present-day, remainder of the case.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

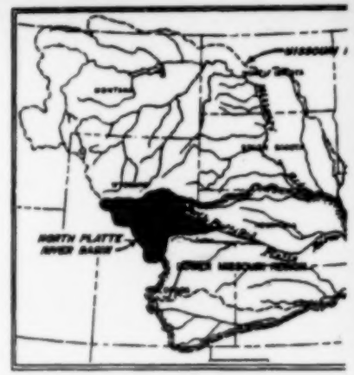


RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

APPENDIX 1



LOCATION MAP

HENDRICK PROJECT

GREY REEF RES.

ALCOVE RES.

PATHFINDER RESERVOIR

SEMINOE RESERVOIR

GLENDO RESERVOIR

GUERNSEY RESERVOIR

NORTH PLATTE PROJECT

WYOMING NEBRASKA

WYOMING COLORADO

Cheyenne

EXPLANATION

EXISTING TRANSMOUNTAIN DIVERSIONS

A City of Cheyenne Water Supply System
B Wilson Supply Ditch
C Columbine Ditch
D Bah Creek Ditch
E Laramie - Poudre Tunnel
F Skyline Ditch
G Colorado Park Ditch
H Michigan Ditch

Reservoir
Diversion Dam
Canal
Powerplant
Irrigated Land

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON MOTION FOR LEAVE TO FILE AMENDED PETITION

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

BARRY H. HARTMAN
Acting Assistant Attorney General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF CONTENTS

	Page
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 460 U.S. 605 (1983)	5
Nebraska v. *Wyoming*, 325 U.S. 589 (1945)	1, 4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON MOTION FOR LEAVE TO FILE AMENDED PETITION

BRIEF FOR THE UNITED STATES IN OPPOSITION

STATEMENT

On October 7, 1986, the State of Nebraska sought leave from this Court to file a petition for an order enforcing the Court's decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), which established an interstate apportionment of the flow of the North Platte River. The United States (which is a party to the decree) responded that Nebraska appeared to identify a substantial interstate dispute and suggested that the Court grant the petition and appoint a Special Master to examine Nebraska's claims. No. 6, Orig. U.S. Mem. 3-4 (filed Dec. 19, 1986). On January 20, 1987, this Court granted Nebraska leave to file the petition and instructed the parties to file answers. 479 U.S. 1051. On June 22, 1987, the Court referred the case to a Special Master, before whom the case is pending. 483 U.S. 1002.

On January 11, 1988, Nebraska sought leave of this Court to amend its petition to seek a modification of the underlying decree. Nebraska wished to include, as a part of the decree, a new requirement that Nebraska, Wyoming, and Colorado share the burden of maintaining stream flows necessary for critical wildlife habitat along the Platte River. The United States observed that Nebraska's 1986 petition "purported to seek enforcement of an existing decree" and that Nebraska's motion to amend its petition, if granted, "would greatly expand the scope, character, and complexity of the present suit." U.S. Mem. 3 (filed Feb. 12, 1988). The Court denied Nebraska's motion. 485 U.S. 931 (1988).

On June 14, 1989, the Special Master filed his First Interim Report with the Court. In that Report, he denied the motions of certain groups to intervene, subject to reconsideration at a later date. First Interim Report 6-14. He also denied Wyoming's comprehensive motion for summary disposition of the case. *Id.* at 14-37. The Special Master indicated that he would allow factual development on each of Nebraska's claims, but left open the possibility of summary resolution following a period of discovery. *Id.* at 17-18.

In March, 1991, after extensive discovery, Nebraska, Wyoming, and the United States each filed motions for summary judgment on one or more claims. The United States moved for summary judgment on the so-called "Inland Lakes" issues, while Wyoming moved for summary judgment on the so-called "Deer Creek" and "Laramie River" issues and on part of its counterclaim. Nebraska moved for partial summary judgment seeking an interpretation of the decree. The Special Master is currently preparing his report as to those matters.

Nebraska now seeks, once again, to amend its petition to raise new matters. The proposed amended petition would present three claims:

(a) Count I seeks to amend the 1945 decree "to apportion the unapportioned, non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows." Para. 20. Count I does not specifically identify any additional proposed upstream development in Wyoming beyond that already identified in the 1986 petition, and it gives no indication of the significance or magnitude of any injury Nebraska will allegedly incur as a result of that development.

(b) Count II of the amended petition alleges that, "[s]ince the entry of the decree in 1945, the State of Wyoming has initiated and allowed changes in the legal and physical environment" to "adversely affect the equitable apportionment made to Nebraska." Para. 1. Count II appears to enlarge the claim for relief set forth in the 1986 petition. Compare 1986 Petition, at 3-4, with proposed 1991 Amended Petition, at 13. It charges that Wyoming has violated the existing decree through excessive use of natural flow and ground water for irrigation; depletion of storage water; depletion of return flows reaching the North Platte River; and excessive consumption of water on tributaries entering the North Platte River below Alcova Reservoir. Para. 2.

(c) Count III of the amended petition alleges that the United States is violating the decree by "contracting for the use of Glendo Reservoir water for other than authorized purposes" and "[a]llocating natural flows among its contractors

in designated water-short years," in violation of paragraphs V, VI, and XII of the existing decree. Para. 2. Like Count I, Count III is entirely new. It raises, for the first time, a request by Nebraska for relief against the United States under the decree.

Nebraska has left unclear its intentions as to the future course of the claims, based on the 1986 petition, that are currently pending before the Special Master.

ARGUMENT

The United States opposes Nebraska's motion for leave to file an amended petition. Nebraska's revised petition would transform the current proceeding from an action "to enforce the Decree and restrain further violations," 1986 Petition, para. 7, into an action to formulate an amended decree. That course would greatly expand the technical complexity of this suit and would derail the efforts made during the past four years to narrow the issues in the case and prepare for trial. Moreover, it is not clear that there is any need to amend the existing decree. Nebraska's proposals to modify the decree should await completion of proceedings on Nebraska's 1986 petition to enforce the decree, which may clarify or eliminate the need for modifications.

This Court's decision in *Nebraska* v. *Wyoming*, *supra*, resulted in the formulation of a decree apportioning the waters of the North Platte River among the States of Nebraska, Wyoming, and Colorado for irrigation. See 325 U.S. at 610. Nebraska's 1986 petition contended that Wyoming was "violating and threatening to violate the State of Nebraska's equitable apportionment established by the Decree." 1986

Petition, para. 3. Nebraska's proposed amended petition, however, presents three new claims that go well beyond its original aim of enforcing the existing decree. The petition would require an apportionment of non-irrigation season flows and regulation of stored water—matters that, as Nebraska admits, the existing decree leaves largely unaffected. See Decree paras. V and VI, 325 U.S. at 667-669.

The Court should exercise great caution in reopening existing decrees. There is a compelling need for certainty and stability in the administration of water rights. Cf. *Arizona* v. *California*, 460 U.S. 605, 615-628 (1983). Those concerns are directly relevant here. As an initial matter, Nebraska's motion to amend its petition, if granted, would greatly complicate and enlarge proceedings that have already proven to be far more complex than was originally envisioned. The current proceedings have been pending before the Special Master for more than four years, during which time the parties have devoted considerable effort and incurred substantial expense in identifying, clarifying, and narrowing the issues for trial. The Special Master is currently preparing his decision on the fully briefed and argued motions of Nebraska, Wyoming, and the United States seeking summary resolution of some of the claims raised by the 1986 petition. Any amendment of the pleadings at this time would disrupt the orderly resolution of those claims.

Furthermore, the claims presented in the proposed amended petition have the potential to be far more complicated to resolve than the claims presented in the 1986 petition. The 1986 petition alleged four discrete violations of the existing decree. 1986 Peti-

tion, para. 3.* The proposed amended petition seeks an entirely new apportionment based not on the interstate demand for irrigation water—which formed the basis for the 1945 decree, see 325 U.S. at 591-592—but on a far broader demand for water for a myriad of municipal, industrial, recreational, and other uses in Nebraska. Those demands will not be easy to quantify.

In the earlier litigation, which spanned 11 years, Special Master Doherty relied heavily on data derived from detailed irrigation records to determine the relative equities among the States. See, *e.g.*, 325 U.S. at 640-654. It will prove far more difficult and time-consuming to obtain comparable information in support of the other water uses Nebraska seeks to protect. Moreover, it is far from clear that any further apportionment is necessary. Resolution of the claims that Nebraska presented in its 1986 petition may adequately satisfy Nebraska's concerns.

Finally, Nebraska's amended petition does not specifically identify any activity of Wyoming, beyond the activity identified in the pending proceedings, that poses a concrete threat to Nebraska's interests. Furthermore, Nebraska's brief in support of its proposed amended petition indicates that there are a

---

* Nebraska specifically alleged that Wyoming was unlawfully restricting the flow of the North Platte River by its operation of the Grayrocks Reservoir on the Laramie River; by its proposed construction of additional pumping, diversion and storage facilities at the confluence of the Laramie and North Platte Rivers; by its proposed construction of storage capacity on certain tributaries entering the North Platte River; and by its attempts to "prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska." 1986 Petition, para. 3.

number of proceedings in progress in Nebraska to determine competing demands for water from North Platte storage facilities. Neb. Br. 35. Any determination of additional entitlement to water in proceedings in this case should await the determinations in those proceedings. There is no justification for further complicating and delaying the resolution of the claims currently pending before the Special Master. Should the proceedings before the Special Master demonstrate a compelling need to enlarge the issues in this case, Nebraska can renew its request at a later time.

CONCLUSION

The motion for leave to file an amended petition should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY H. HARTMAN
Acting Assistant Attorney General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

NOVEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 48155

(13)

No. 108, Original

NOV 12 1991

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION OF THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A RESPONSE *AMICUS CURIAE* IN SUPPORT OF THE MOTION OF THE STATE OF NEBRASKA FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS AND MEMORANDUM IN SUPPORT THEREOF

AND

RESPONSE *AMICUS CURIAE* IN SUPPORT OF THE MOTION OF THE STATE OF NEBRASKA FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

Gary D. Bachman
Counsel of Record
D. Eric Hultman
Van Ness, Feldman & Curtis
A Professional Corporation
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
202/298-1800

Michael C. Klein
Anderson, Klein, Peterson & Swan
P.O. Box 133
Holdrege, NE 68949
308/995-4458

November 12, 1991

BEST AVAILABLE COPY

No. 108, Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION OF THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT FOR LEAVE TO FILE A RESPONSE *AMICUS CURIAE* IN SUPPORT OF THE MOTION OF THE STATE OF NEBRASKA FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

The Central Nebraska Public Power and Irrigation District moves the Court for leave to file as *amicus curiae* in response to and in support of the motion of the State of Nebraska for leave to file an amended petition for an apportionment of non-irrigation season flows and for the assertion of new claims. The reasons for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

Gary D. Bachman
Counsel of Record
D. Eric Hultman
Van Ness, Feldman & Curtis
A Professional Corporation
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007

Michael C. Klein
Anderson, Klein, Peterson & Swan
P.O. Box 133
Holdrege, NE 68949

November 12, 1991

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A RESPONSE *AMICUS CURIAE* 1

INTRODUCTION AND STATEMENT OF THE CASE 1

ARGUMENT 3

CONCLUSION 7

RESPONSE OF THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT IN SUPPORT OF THE MOTION OF THE STATE OF NEBRASKA FOR LEAVE TO FILE AN AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS 9

STATEMENT 10

ARGUMENT 10

I. Resolution of this Case Requires the Granting of Nebraska's Motion and Consideration of its Amended Petition . . 10

II. Applicable Case Law And The Federal Rules of Civil Procedure Permit Nebraska to Amend Its Petition 12

CONCLUSION 13

CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Cases

Foman v. Davis,
371 U.S. 178 (1962) 12

Kansas v. Colorado,
185 U.S. 125 (1902) 12

Nebraska v. Wyoming,
325 U.S. 589 (1945), *modified*,
345 U.S. 981 (1953) 1

Nebraska v. Wyoming,
485 U.S. 931 (1988) 3

Oklahoma v. Texas,
253 U.S. 465 (1920) 12

United States v. Texas,
339 U.S. 707 (1950) 12

Statutes and Court Rules

FED. R. CIV. P. 15(a) 12

Neb. Rev. Stat. Section 70-601
et seq. (Reissue 1990) 5

SUP. CT. R. 17.2 12

Miscellaneous

3 J.W. Moore, R.D. Freer,
MOORE'S FEDERAL PRACTICE ¶ 15.08
(2d ed. 1991) 13

Report of Owen Olpin,
Special Master, First Interim
Report (June 14, 1989) . . . 2

No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

**MEMORANDUM IN SUPPORT
OF MOTION FOR LEAVE
TO FILE A RESPONSE *AMICUS CURIAE***

INTRODUCTION AND STATEMENT OF THE CASE

This is an original jurisdiction proceeding brought by the State of Nebraska to enforce provisions of the Court's 1945 Decree, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) (the "Decree") apportioning

the flow of the North Platte River among Nebraska, Wyoming and Colorado. Nebraska petitioned the Court in 1986 to enforce the Decree as to irrigation season flows (May 1 to September 30) and to provide injunctive relief against Wyoming. The Court referred the case to the Special Master by its order of June 22, 1987. The Special Master granted The Central Nebraska Public Power and Irrigation District ("Central"), and other movants for intervention, the right to participate in the proceedings as *amici curiae*,[1/] and

---

[1/] "I envisioned the *amici* participating both to preserve their interests and as traditional friends of the court to aid in full exposition of the issues." Special Master First Interim Report (June 14, 1989) at 6. Nebraska, for instance, expects that *amici* will be entitled to participate in the proceedings involving the amended petition. "[A]ll parties and *amici* will have more than a sufficient opportunity to investigate the factual claims and to gather evidence. . . ." Nebraska's Brief in Support of Motion for Leave to File Amended Petition for an Apportionment of Non-irrigation Season Flows and for the Assertion of New Claims (October 9, 1991) ("Nebraska's Brief") at 42.

At oral argument in Salt Lake City on June 8, 1991, the Special Master indicated that present *amici* could again seek intervention. Central subsequently filed a motion to intervene which is pending before the Special Master. Nebraska has not objected to Central's motion to intervene. Nebraska's Response

(continued...)

Central has been participating in the proceedings in that capacity.

On October 9, 1991, Nebraska moved the Court for leave to file an amended petition for an equitable apportionment of non-irrigation season flows (October 1 to April 30) and for the assertion of new claims. On October 15, 1991, the Court directed that all responses be filed by November 12, 1991, in order to provide the Court with the benefit of the views of all the parties. Central seeks leave of the Court to respond to Nebraska's motion as *amicus curiae*.[2/]

ARGUMENT

Nebraska's motion seeks, *inter alia*, leave to file an amended petition for an equitable apportionment of the unapportioned, non-irrigation season flows of the North Platte. The unapportioned, non-irrigation season flows, as well as the undiverted irrigation season flows of the North Platte River are collected and stored in Lake McConaughy, above the confluence of the North and South Platte

---

1/ (...continued)
to Central Nebraska Public Power and Irrigation District's, National Audubon Society's, and the Platte River Trust's Motions to Intervene (August 21, 1991) ("Nebraska's Response to Intervention Motions") at 1.

2/ *Cf. Nebraska v. Wyoming*, 485 U.S. 931 (1988) (granting motion of Basin Electric for leave to file response).

rivers.[3/] Such flows are subsequently used for irrigation, generation of hydroelectric power, municipal use, maintenance of recreation uses (fishing, hunting and boating), and for waterfowl, fish and other wildlife habitat. Nebraska's Amended Petition at 5. Nebraska's amended petition further asserts that equitable interests in the State have historically relied upon these flows as part of the "regimen of the river." *Id.* at 6.

As Nebraska notes, "[t]hese uses are made possible principally through the operation of Lake McConaughy and other associated projects. . ." *Id.* at 5. Downstream equities are adversely affected "[w]hen Lake McConaughy does not have a sufficient water supply."[4/] Parties and *amici* in this proceeding are litigating in various State and federal forums the appropriate downstream "regimen of the river," which is dependent, in large measure, upon the historic upstream "regimen of the river" and inflow into Lake McConaughy. Nebraska's Brief at 33-35. The location and operation of Lake McConaughy, therefore, becomes the critical fulcrum between the issues presented by Nebraska's amended petition and the "intramural disputes" in the other forums. *Id.* at 35.

[3/] Nebraska's Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (October 9, 1991) ("Nebraska's Amended Petition") at 4.

[4/] Nebraska's Brief at 10.

Thus, any foray into equitable interests dependent upon the "regimen of the river" necessarily affects Lake McConaughy and Central, the entity entrusted with its operation and management.[5/] Central owns and operates Nebraska' largest irrigation district, and it constructed Lake McConaughy as a storage reservoir to serve irrigation needs in arid central Nebraska. Central, which operates as a not for profit entity, provides irrigation water directly or indirectly to over 500,000 acres of land. It is a public corporation and political subdivision of the State of Nebraska, created pursuant to Nebraska law. Neb. Rev. Stat. Section 70-601 *et seq.* (Reissue 1990). Central is governed by an elected board of twelve directors, three of whom must reside in each of four counties in south central Nebraska. Central has no taxing power and relies on the sale of services, including hydroelectric generation and delivery of irrigation water, for revenue from which to support district operations. Central may issue bonds for financing capital improvements and for related activities.

Pursuant to Nebraska law, Central acquires no ownership interest in the waters stored in Lake McConaughy, but only holds the storage water in trust for the purposes specified in the water rights

---

[5/] Indeed, in those other proceedings involving Central, the maintenance of the downstream "regimen of the river" is premised on Central's management of Lake McConaughy. Any diminution of flows into Lake McConaughy will clearly affect Central's interests.

issued to it by the Nebraska Department of Water Resources pursuant to Nebraska law, and for the benefit of the irrigators who rely upon storage water.

Central is arguably the most interested of all the *amici*. The operation of Central's system is built around the existing "regimen of the river." Nebraska's motion to file an amended petition is premised upon the need to protect the "regimen of the river" for the traditional equitable interests dependent upon this regimen. Any and all changes in the regimen will have an impact on how Central may or may not be able to operate its reservoir.

Moreover, should the Court grant Nebraska's motion, parties and *amici* in the proceeding will doubtless focus on the equitable interests dependent upon storage water in Lake McConaughy. As the operator of Lake McConaughy and various hydroelectric projects, as well as the entity managing the reservoir for equitable interests under Nebraska law, parties and other *amici* will invariably have to look to Central for information concerning the historic reliance by equitable interests, including Central, on the "regimen of the river."

Furthermore, because there is considerable disagreement among the "equitable interests" dependent upon the "regimen of the river," Central is likely to have different interests from Nebraska. Nebraska is placed in the untenable position of having to represent inherently conflicting interests in the same controversy. The State of Nebraska, as *parens patriae*, cannot adequately represent the interests of Central in this case.[6/] Nebraska, therefore, has not challenged Central's participation in this proceeding.[7/] Indeed, Nebraska fully expects Central to play a significant role in this proceeding. *See supra* note 1.

Consequently, in the interests of fairness and in order to afford the Court full illumination of the concerns of those dependent on the "regimen of the river," Central seeks leave of the Court to respond to Nebraska's motion.

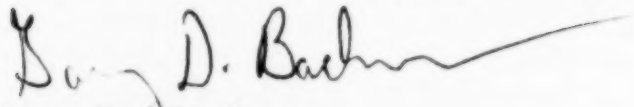
CONCLUSION

For the foregoing reasons, Central should be granted leave to respond as *amicus curiae*.

6/ *See, e.g.*, Brief in Support of the Joint Motion of Nebraska Public Power District and The Central Nebraska Public Power and Irrigation District to File a Joint Complaint in Intervention and for Leave to Intervene as Plaintiffs (April 15, 1987) at 5-19.

7/ Nebraska's Response to Intervention Motions at 1.

Respectfully submitted,



Gary D. Bachman
Counsel of Record
D. Eric Hultman
Van Ness, Feldman & Curtis
A Professional Corporation
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800

Michael C. Klein
Anderson, Klein,
Peterson & Swan
P.O. Box 133
Holdrege, NE 68949
(308) 995-4458

Attorneys for The Central Nebraska Public Power & Irrigation District

November 12, 1991

No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

RESPONSE OF THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT IN SUPPORT OF THE MOTION OF THE STATE OF NEBRASKA FOR LEAVE TO FILE AN AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

Gary D. Bachman
Counsel of Record
Van Ness, Feldman Curtis
A Professional Corporation
1050 Thomas Jefferson St. N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800

Michael C. Klein
Anderson, Klein,
Peterson & Swan
P.O. Box 133
Holdrege, NE 68949
(308) 995-4458

November 12, 1991

STATEMENT

On October 9, 1991, Nebraska moved the Court for leave to file an amended petition for an equitable apportionment of non-irrigation season flows (October 1 to April 30) and for the assertion of new claims. Central has sought leave of the Court to respond to Nebraska's motion as an *amicus curiae*. For the following reasons, this Court should grant Nebraska's motion.

ARGUMENT

I. Resolution of this Case Requires the Granting of Nebraska's Motion and Consideration of its Amended Petition.

During the course of this proceeding, the need for and appropriateness of Nebraska's motion to amend its petition has become abundantly apparent. For quite some time, the parties and *amici* have been arguing about equitable interests below the Tri-State Dam and the scope of the 1945 Decree. It has been Central's position that the 1945 Decree, as modified, incorporates the present "regimen of the river," free from currently planned and future upstream diversions in the State of Wyoming that

would reduce the non-irrigation season flows into Nebraska, and particularly into Lake McConaughy. As the operator of Lake McConaughy, Central has in the past, and thought it could in the future, rely upon the "regimen of the river" in managing the river for the equitable interests discussed in Nebraska's motion.

It would now appear that the uncertainty surrounding upstream development and its ultimate impact on water supply below the Tri-state Dam necessitates this Court's consideration and resolution of Nebraska's amended petition. Nebraska asserts that equitable interests in the State have historically relied on the over-appropriated and unapportioned flows of the North Platte River. Non-irrigation season flows are inextricably linked to the flows relied on by equitable interests during irrigation season; together, the two seasonal flows form part of "an integral hydrologic continu[um]." Nebraska's Brief at 21. To the extent that the "regimen of the river" and this hydrologic continuity is not already encompassed by the Decree, Nebraska's petition presents a much needed avenue for clarification.

II. Applicable Case Law And The Federal Rules of Civil Procedure Permit Nebraska to Amend Its Petition.

Central supports Nebraska's motion to amend its petition. The Court "has always been liberal in allowing full development of the facts" in original actions between sovereigns involving matters of high public importance. *United States v. Texas*, 339 U.S. 707, 715 (1950); *see also Oklahoma v. Texas*, 253 U.S. 465, 471 (1920); *Kansas v. Colorado*, 185 U.S. 125, 144-45 (1902). This case is no different: it involves the interstate allocation of water--a matter of high public importance to the respective sovereigns and their citizenry.

Under Supreme Court Rule 17.2, the Federal Rules of Civil Procedure "may be taken as a guide to procedure in an original action in this Court" when appropriate. In *Foman v. Davis*, 371 U.S. 178, 182 (1962), the Court held that FED. R. CIV. P. 15(a)'s mandate that leave to amend pleadings "shall be freely given when justice so desires" "is to be heeded." None of the impediments to leave "freely given" set out in *Foman* such as "undue delay, bad faith or dilatory motive . . . undue prejudice to the opposing

party . . . futility of the amendment . . ."[8] are present here. As the entity charged with the management and operation of Lake McConaughy, and to which parties may turn for information on downstream equitable interests dependent on the "regimen of the river," Central will not be prejudiced by Nebraska's amended petition, nor does it appear to Central that any other participant will be so prejudiced. On the contrary, Central is of the opinion that the amendment is important to the full development and resolution of the case.

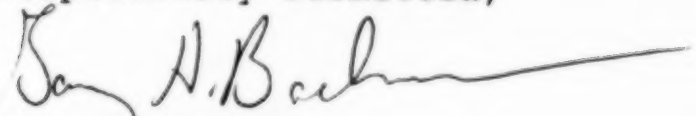
CONCLUSION

For the reasons stated above, Central requests that the Court grant Nebraska's Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims.

---

[8] *Id. See also* 3 J.W. Moore, R.D. Freer, MOORE'S FEDERAL PRACTICE ¶ 15.08 (2d ed. 1991).

Respectfully submitted,



Gary D. Bachman
Counsel of Record
D. Eric Hultman
Van Ness, Feldman & Curtis
A Professional Corporation
1050 Thomas Jefferson Street, N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800

Michael C. Klein
Anderson, Klein,
Peterson & Swan
P.O. Box 133
Holdrege, NE 68949
(308) 995-4458

Attorneys for The Central
Nebraska Public Power &
Irrigation District

November 12, 1991

CERTIFICATE OF SERVICE

This is to certify that the foregoing documents have been filed and served, by depositing true and correct copies thereof into the United States mail, first class, postage fully prepaid, on this 12th day of November, 1991, to each of the following:

The Honorable Owen Olpin
Special Master
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071-2899
(FEDERAL EXPRESS)

Soane B. Crocker, Esq.
Beveridge & Diamond, P.C.
1350 I Street, Suite 700
Washington, D.C. 20005
(MESSENGER)

Nancy E. McFadden, Esq.
O'Melveny & Myers
Suite 500 West
555 - 13th Street, N.W.
Washington, D.C. 20004-1109
(MESSENGER)

The Honorable Don Stenberg
Attorney General of Nebraska
Ms. Laura Essay, Esq.
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920

The Honorable Gale Norton
Attorney General of Colorado
Wendy C. Weiss, Esq.
First Assistant Attorney General
110 Sixteenth Street, 10th Floor
Denver, Colorado 80202

Peter A. A. Berle, President
National Audubon Society
950 Third Avenue
New York, New York 10022

Edward Weinberg, Esq.
Frederick L. Miller, Jr., Esq.
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W., Suite 800
Washington, D.C. 20036

Andrew F. Walch, Esq.
U.S. Department of Justice
Environment and Natural
Resources Division
999 - 18th Street, Suite 945
Denver, Colorado 80202

Michael J. Hinman, Esq.
Claire Olson, Esq.
Basin Electric Power Cooperative
1717 East Interstate Avenue
Bismarck, North Dakota 58501

Abbe David Lowell, Esq.
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

William E. Holland, Esq.
Chadbourne & Burke
30 Rockefeller Plaza
New York, New York 10112

Dennis C. Cook, Esq.
Senior Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002

Raphael J. Moses
Charles N. Woodruff
James R. Montgomery
Special Assistant Attorneys General
State of Wyoming
P.O. Box 1440
1002 Walnut Street
Boulder, Colorado 80306-1440

Richard A. Simms
Special Assistant Attorney general
Simms & Stein, P.A.
P.O. Box 280
121 Sandoval Street
First Northern Plaza
Santa Fe, New Mexico 87501

William Madden, Esquire
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20017

The Honorable Michael J. Sullivan
Governor of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Roy Roemer
Governor of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Kenneth Starr
United States Solicitor General
Jeffery P. Minear, Esq.
Office of Solicitor General
Constitution Ave. & 10th St., N.W.
Washington, D.C. 20530

The Honorable E. Benjamin Nelson
Governor of Nebraska
c/o J. Michael Jess, Director
Department of Water Resources
Post Office Box 94676
301 Centennial Mall South
Lincoln, Nebraska 68509

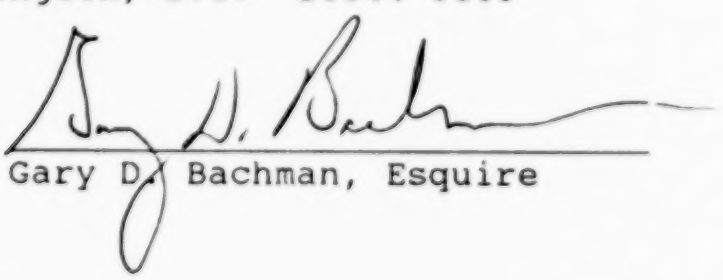
Michael C. Klein, Esq.
Anderson, Klein, Peterson & Swan
P.O. Box 133
Holdrege, Nebraska 68949

Frank J. Dragoun
Central Nebraska Power
& Irrigation District
415 Lincoln Street
P.O. Box 740
Holdrege, Nebraska 68949-0740

Melinda E. Taylor
Henry, Kelley & Lowerre
2103 Rio Grande
Austin, Texas 78705

Peter A.A. Berle
John Echeverria
National Audubon Society
666 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

Patricia L. Weiss, Esq.
U.S. Department of Justice
Environment & Natural
Resources Division
P.O. Box 663
Washington, D.C. 20044-0663



Gary D. Bachman, Esquire

Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

(14)

No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1986

Before the Honorable Owen Olpin
Special Master

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF OF AMICUS CURIAE PLATTE RIVER TRUST IN SUPPORT OF NEBRASKA'S AMENDED PETITION FOR APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

*ABBE DAVID LOWELL
MAX HATHAWAY
SUE ELLEN RUSSELL
* *Counsel of Record*

Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:

EUGENE GRESSMAN
Seton Hall University School of Law

TABLE OF CONTENTS

STATEMENT OF THE CASE ..... (1)

ARGUMENT 8

A. The Decree and The Doctrine of Equitable Apportionment Allow This Court To Invoke Its Original Jurisdiction Over The State Of Nebraska's Amended Petition 9

B. The Close Relationship Between Irrigation And Non-Irrigation Season Flows Requires That This Court Exercise Its Original Jurisdiction And Accept Nebraska's Amended Petition 14

C. To Avoid Irreversible Injury To The Wildlife Habitat The Court Must Exercise Its Original Jurisdiction and Accept Nebraska's Petition 17

CONCLUSION 18

TABLE OF AUTHORITIES

CASES: **Page**

Colorado v. New Mexico,
459 U.S. 176 (1982) 12, 13

Connecticut v. Massachusetts,
282 U.S. 660 (1931) 12, 13

Idaho ex rel. Evans v. Oregon and Washington,
462 U.S. 1017 (1983) 12, 13

Kansas v. Colorado,
206 U.S. 46 (1907) 11

Maryland v. Louisiana,
451 U.S. 725 (1981) 11

Massachusetts v. Missouri,
308 U.S. 1 (1939) 11

Nebraska v. Wyoming,
325 U.S. 589 (1945) 2, 9, 11, 12

Nebraska v. Wyoming,
325 U.S. 665 (1945) 2

Nebraska v. Wyoming,
345 U.S. 981 (1953) 2

New Jersey v. New York,
283 U.S. 336 (1931) 13

CASES (continued): **Page**

Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109 (D.C. Cir. 1989) 3, 7

Texas v. New Mexico, 462 U.S. 554 (1983) 11

STATUTES AND REGULATIONS: **Page**

Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, (1989):
16 U.S.C. § 1532(5)(A)(i) 4
16 U.S.C. § 1532(20) 3
16 U.S.C. § 1532(6) 3

MISCELLANEOUS: **Page**

43 Fed.Reg. 20,938 (1978) 4

50 FERC ¶ 61,180 (1990) 3, 7

Currier, P.J., G. Lingle & J. VanDerwalker, *Migratory Bird Habitat On The Platte and North Platte Rivers in Nebraska (1985)* .. 3

Platte River Trust Unpublished Data 4

Safina C., L. Rosenbluth, C. Pustweller, K. Strom, R. Klatakse, M.Lee, and J. Beyea, *Threats to Wildlife and the Platte River* (1989) 4, 5

MISCELLANEOUS (continued): **Page**

The Platte River Ecology Study, Spec. Rept. Northern Prairie Wildlife Research Center (1981) 6

United States Constitution Art. III, § 2 10

IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BRIEF OF AMICUS CURIAE PLATTE RIVER TRUST IN SUPPORT OF NEBRASKA'S AMENDED PETITION FOR APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

STATEMENT OF THE CASE

This proceeding involves a dispute between Wyoming, Nebraska, and Colorado over water rights in the North Platte River and its tributaries. In 1945, the United States Supreme Court apportioned the irrigation-season natural flows of this river system and restricted their

future use.[1] *Nebraska v. Wyoming*, 325 U.S. 589 (1945). The Court retained jurisdiction to modify the Decree as warranted by changed circumstances or for "further relief." *Id.* at 655.

On October 6, 1986, the State of Nebraska petitioned the Court to enjoin certain upstream projects proposed by the State of Wyoming. The Court appointed a Special Master and on September 11, 1987, Wyoming filed a motion for summary judgment. The Platte River Whooping Crane Critical Habitat Maintenance Trust ("the Platte River Trust") was granted amicus curiae status on April 1, 1988 and on March 2, 1989 the Special Master denied Wyoming's motion for summary judgment. Thereafter, Wyoming and Nebraska filed cross-motions for summary judgment. Those motions, as well as the Trust's motion for a more active litigation role or reconsideration of the issue of its intervention are currently pending before the Special Master. On March 13, 1991, the State of Nebraska requested that the Special Master recommend an apportionment of the *non-irrigation* season natural flows of the North Platte River. The Trust supported Nebraska's motion. The Special Master denied Nebraska's motion, and suggested that the request for a recommendation should instead be submitted to the Supreme Court as an amended petition.

On October 9, 1991 Nebraska filed her motion with this Court for leave to file an amended petition for an appropriation of non-irrigation season flows, which included a request for the assertion of new claims, as well as a brief in support ("Nebraska Amended Petition"

---

[1] The Court's decree imposing the water-use restrictions is reported at *Nebraska v. Wyoming*, 325 U.S. 665 (1945). The Court modified the decree in 1953 upon joint stipulation of the parties. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

and "Nebraska Brief"). The Trust respectfully submits the following memorandum in support of that motion.

The non-irrigation season flows are closely connected to the irrigation season flows. Realistically, the distinction between the two flows is now obsolete. Equities in Nebraska such as recreation, irrigation, hydropower, and the survival of fish and wildlife -- including federally protected endangered species -- rely to a substantial extent upon non-irrigation season flows for their continued viability. Without an apportionment of non-irrigation season flows, Wyoming's proposed projects will threaten the existence of these equities.

Paramount among those equities is the federally-protected "critical habitat" and other wildlife habitat areas in central Nebraska. In particular, "[t]he banks of the Platte River * * * are home to a number of endangered species of wildlife, including the whooping crane."[2] *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 110 (D.C. Cir. 1989). In addition, the Platte River provides essential roosting or nesting habitat for hundreds of other avian species (resident and migratory), including the endangered Bald Eagle, Least Tern, Peregrine Falcon, Eskimo Curlew, and the threatened Piping Plover.[3] *P. Currier, G. Lingle & J. VanDerwalker, Migratory Bird Habitat On The Platte and North Platte Rivers in Nebraska ("Migratory Bird Habitat")*, 1985 at 4; *see also* 50

---

[2] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." *Endangered Species Act, 16 U.S.C. § 1532(6) (1989).*

[3] A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *16 U.S.C. § 1532(20).*

FERC ¶ 61,180 at 61,525 (1990).[4] In fact, at least 300 species of birds migrate annually through the Platte and North Platte River Valleys. *Platte River Trust Unpublished Data.* "[H]undreds of thousands of Sandhill Cranes and millions of ducks and geese of many species, funnelling from vast areas, converge on this unique river and its environs during their long northward migration in spring." C. Safina, et al., *Threats to Wildlife and the Platte River ("Threats to Wildlife")*, 1989 at 1.

In an attempt to protect the habitat of these birds and to promote their survival, the federal government has designated certain protected areas. For example, the Department of the Interior has designated the 53-mile-long Big Bend reach of the Platte River (from Lexington to Kearney in central Nebraska) a "critical habitat" for the whooping crane.[5] 43 Fed.Reg. 20,938-42 (1978). The Department has also designated two areas of the Platte River as "Resource Category 1" habitat for Sandhill Cranes and Greater White-fronted Geese, acknowledging that habitat to be "unique and irreplaceable."

The wildlife habitat along the Platte River in central Nebraska is generally recognized as a unique and invaluable natural resource of international importance. The rapid loss of habitat throughout the range of many

---

[4] The endangered Prairie White-Fringed Orchid also occurs on the riparian meadows that are sub-irrigated by the Platte River.

[5] Critical habitats are defined as "the specific areas within the geographical area occupied by the species * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection."
16 U.S.C. § 1532(5)(A)(i).

of the migratory avian species that use the Platte River amplifies its importance. *Threats to Wildlife* at 10. The Platte River is a particularly suitable habitat for many species because of its channel morphology, that is, its physical characteristics, as well as its instream flow regime.[6] In its pre-development state, the Platte River exhibited a relatively steep riverbed slope, periodic movement of large quantities of sediment, a dramatic seasonal variance in the volume of instream flows, unstable banks, and constantly migrating sandbars. The interplay of these characteristics created a wide "braided" river, laced with unvegetated sandbars -- the essential components of roosting habitat for whooping cranes. In addition, the river afforded cranes wide expanses of sub-irrigated marshes, sloughs, and wetland sedge meadows adjacent to the river channel for feeding habitat. Least terns and piping plovers once nested on large, barren sandbars exposed by the low flows characteristic of the summer season. Terns fed on fish from nearby channels, while Plovers fed on invertebrates from sandbars and mudflats. Over-wintering eagles fed on fish from the river. *See Threats to Wildlife, supra*, at 10-26.

Only a few reaches of the Platte River currently retain these habitat characteristics. Upstream consumptive use of the natural flow of the North Platte system -- in both the irrigation and non-irrigation season -- has significantly altered the character of the Platte River and the habitat it can offer wildlife. The Platte River channel has lost many of its natural contours as inflows have decreased and the natural (seasonal) variance in flow levels has been disrupted. In some reaches, the

---

[6] The National Audubon Society discusses the habitat features of the Platte River in detail in its brief on the pending cross-motions for summary judgment. *Audubon Brief* at 8-16; *see also Threats to Wildlife, supra*, at 10-26, 39-62.

Platte River channel has become narrow and deep with large trees growing on former sandbars and along its banks.[7] Some reaches of the Platte River have suffered a total loss of roosting habitat, causing cranes and other species to abandon entire portions of the river. Overall, the Platte River Trust estimates that at least 80 percent of the historic roosting habitat in central Nebraska has been lost. In the "best" reaches less than 50 percent of the original roosting habitat remains. Accordingly, any further reduction in flows by Wyoming will exacerbate those losses and seriously jeopardize the continued existence of the endangered and threatened species dependent upon the Platte River habitat.

Proceedings before the Federal Energy Regulatory Commission ("the Commission") to re-license the Kingsley/Keystone power projects in Nebraska (upstream of the Critical Habitat and other habitat areas) confirm the adverse effect of reduced flows. Following several months of proceedings and voluminous record submissions, the Commission concluded that critical aspects of the Platte River habitat system are degrading, seriously impeding the recovery of federally-

---

[7] In 1981, the U.S. Fish and Wildlife Service observed that: "[w]ith approximately 70 percent of the Platte's annual flows diverted for various consumptive uses upstream in Colorado, Wyoming, and western Nebraska, channel width in many areas has been reduced to 10-20 percent of former size. Habitat conditions within the existing channel have also changed as a result of reduced scouring of sandbars and shifting of alluvial sediments. A broad band of mature deciduous woodland now occupies tens of thousands of acres that formerly were part of the river and numerous islands overgrown with woody vegetation exist within the channel." *The Platte River Ecology Study, Spec. Rept. Northern Prairie Wildlife Research Center*, 1981 at i.

protected species and jeopardizing the river's viability as a wildlife habitat.[8] 50 FERC ¶ 61,180 at 61,532 (1990).

The Commission held that in light of the immediate threat to the habitat, "the facts of this case warrant the extraordinary remedy of amending the annual licenses to include interim [instream flow] measures to protect the Platte River habitat" from "potential irreversible environmental damage pending re-licensing." *Id.* at 61,524. However, despite its holding, the Commission was persuaded that the annual license amendment jeopardized irrigation needs, and subsequently stayed enforcement of the emergency instream flow measures. All parties continue to strenuously disagree about the best ways to balance the needs of competing uses with the available water supply.

Unfortunately, the Commission's fears of irreversible harm may well have been realized. In the past 14 months, 19 endangered whooping cranes have perished. The whooping crane population numbered only 135 at the onset of this past spring's migration; having decreased from 142 birds in the spring of 1990. The loss of such proportions, to the only naturally-breeding flock of whooping cranes remaining in the world, is staggering. It is the greatest single loss of whooping cranes in the five decades of record.

---

[8] The Commission held those proceedings on remand from an order of the U.S. Court of Appeals for the District of Columbia finding the Commission "irresponsible" for having "ignore[d] * * * expert opinion and refus[ing] even to conduct a preliminary investigation into this [habitat] threat and the availability of interim measures to combat it." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 117 (D.C. Cir. 1989).

ARGUMENT

The Platte River Trust supports Nebraska's motion for leave to file an amended petition for an apportionment of non-irrigation season flows and for the assertion of new claims. In comparison to those irrigation season flows that are contested by Wyoming, non-irrigation season flows constitute a larger component of the water issue. Resolving the entire apportionment dispute will necessarily require apportioning non-irrigation season flows. For example, the needs of the habitat are annual rather than seasonal, depending in significant part on non-irrigation season flows. Enforcing the Decree as to irrigation season flows alone will not prevent irreversible injury to the habitat. Indeed, several endangered or threatened species (and hundreds of resident and migratory avian species) depend heavily upon non-irrigation season flows to preserve the vestiges of Platte River habitat in central Nebraska.

The Platte River habitat constitutes an important environmental "equity" within the scope of the equitable apportionment doctrine. Wyoming's proposed projects and the United States' recent actions, will cause further upstream depletions and threaten serious injury to the habitat, invoking the Court's jurisdiction under the 1945 Decree and its original jurisdiction to resolve interstate disputes over water allocation. The Court must, therefore, fashion an apportionment of non-irrigation season flows in order to ensure compliance with the 1945 Decree and protection to the equities in Nebraska.

A. The Decree and The Doctrine of Equitable Apportionment Allow This Court To Invoke Its Original Jurisdiction Over The State Of Nebraska's Amended Petition

In 1945, when the Supreme Court issued its Decree equitably apportioning the waters of the North Platte River among Colorado, Wyoming and Nebraska, it recognized the need for flexible administration and enforcement of the provisions of its Decree. *Nebraska v. Wyoming*, 325 U.S. 589, 616-617 (1945). Anticipating a possible charge in factual circumstances, the Supreme Court retained jurisdiction over the matter, 325 U.S. at 655, finding that "[t]he Decree will not necessarily be for all time. Provision will be made for its adjustment to meet substantially changed conditions." 325 U.S. at 623. In fact, Article XIII of the Decree expressly provides:

> Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary Decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> (f) Any change in conditions making modification of the Decree or the granting of further relief necessary or appropriate.

In accordance with Article XIII, Nebraska's petition is clearly related to the "subject matter in controversy", namely, the equitable apportionment of the waters of the North Platte River among Colorado, Wyoming and Nebraska. As we will demonstrate below, the Court cannot reach a comprehensive solution to the appropriation dispute without addressing the apportionment of non-irrigation season flows. Moreover, in the absence of an equitable apportionment of non-irrigation season flows, the established equitable uses of irrigation, hydropower, recreation, fish and wildlife will be jeopardized. In 1936 and 1945 the parties were unaware of the needs of the downstream equities, particularly those of recreation and wildlife. The newly recognized jeopardy to these uses -- particularly to the endangered species that rely upon the critical habitat -- constitutes a "change in conditions" that makes the modification of the Decree or the granting of further relief necessary and appropriate. Accordingly, this Court must invoke Article XIII to modify and supplement the Decree to include an apportionment of non-irrigation season flows and to permit Nebraska's additional claims.

Furthermore, there is no question that Nebraska's amended petition presents a justiciable "case or controversy" regarding equitable apportionment of non-irrigation season flows invoking this Court's original jurisdiction. U.S. Const. Art. III, § 2.[9] *See Nebraska Brief* at 12-13. This Court considers a dispute a "controversy" for purposes of its original jurisdiction where the complaining state "is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the

---

[9] The Trust also agrees with Nebraska's assertion that she is not a "nominal party", representing only private interests. *See Nebraska Brief* at 12.

common law or equity systems of jurisprudence." *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981)(quoting *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939)). Moreover, it is well established that:

> whenever * * * the action of one State reaches, through the agency of natural laws, into the territory of another State, the question of the extent and the limitations of the rights of the two states become a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Kansas v. Colorado, 206 U.S. 46, 97-98 (1907). Accordingly, "[t]here is no doubt that this Court's jurisdiction to resolve controversies between two States * * * extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows" *Texas v. New Mexico*, 462 U.S. 554, 567 (1983).

This is particularly true, where, as here, the controversy concerns a fully appropriated river. *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945). Here, Nebraska -- which shares the North Platte River with two other States -- seeks an equitable apportionment of non-irrigation season flows in order to protect the established equities within its borders whose continued survival depends upon those flows. Nebraska's request for an equitable apportionment, therefore, invokes this Court's jurisdiction under both the 1945 Decree and the U.S. Constitution.

Nebraska's Amended Petition requests an equitable apportionment of non-irrigation season flows. An equitable apportionment of non-irrigation season flows is needed to protect established Nebraska uses, including the Platte River habitat. "Equitable apportionment is the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982); *see also Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931). "At the root of the doctrine is the * * * principle that * * * a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon and Washington*, 462 U.S. 1017, 1025 (1983). That doctrine "clearly extends" to a case -- such as this -- in which an upstream state proposes "to divert water for future uses." *Colorado v. New Mexico*, 459 U.S. at 190.

The touchstone of equitable apportionment in such cases is the protection of existing equities. *Nebraska v. Wyoming*, 325 U.S. at 618 (aim is always to secure a "just and equitable" apportionment). Under the doctrine, the Court will relax state priority rules to protect *existing* equities based upon junior uses. *See, e.g., Nebraska v. Wyoming*, 325 U.S. at 618 ("[E]stablished uses should be protected though strict application of the priority rule might jeopardize them."); *Colorado v. New Mexico*, 459 U.S. at 186 (senior appropriations must sometimes "yield to the 'countervailing equities' * * * even though * * * based on junior appropriations"). When balancing the benefits of future use against the harms to existing uses, the Court has also

> recognize[d] that the equities supporting the protection of existing economies *will usually be compelling.*

> The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote.

Colorado v. New Mexico, 459 U.S. at 187 (emphasis added).

Consistent with this principle, the Court has protected wildlife equities which depend upon the existing regimen of an interstate stream. For example, in *New Jersey v. New York*, 283 U.S. 336, 343-45 (1931), the Court considered the effect of diversions in New York on the shad fisheries, oyster industry, and recreational value of the Delaware River and some its tributaries. Finding the effect upon recreation and "the oyster fisheries * * * *to be greater than New Jersey ought to bear*," the Court substantially reduced the diversion permitted by the special master and required New York to "construct[] an efficient plant for the treatment of sewage entering the [river]." *Id.* at 345 (emphasis added); *see also Idaho v. Oregon*, 462 U.S. at 1024 (equitable apportionment doctrine applied to a dispute over anadromous fish); *Connecticut v. Massachusetts*, 282 U.S. 660, 667 (1931) (impact of a proposed diversion on downstream "shad run" considered but no proof of injury found).

Accordingly, the equitable apportionment doctrine requires that this court accept Nebraska's Amended Petition in order to protect Nebraska's endangered wildlife from the proposed Wyoming diversions.

B. The Close Relationship Between Irrigation And Non-Irrigation Season Flows Requires That This Court Exercise Its Original Jurisdiction And Accept Nebraska's Amended Petition

The majority of Nebraska's unprotected equities are located below Kingsley Dam and are met by flows released from McConaughy Reservoir. Approximately 20% of the water supply flowing into McConaughy Reservoir are non-irrigation season flows entering Nebraska from Wyoming. Approximately 40% of the water supply is comprised of return flows, precipitation and tributary flows arising in Nebraska during the non-irrigation season. Only 40% of the annual supply enters the reservoir during the irrigation season. Thus, if the Court addresses only the apportionment of irrigation season flows, without at the same time determining the apportionment of non-irrigation season flows, it leaves unresolved the largest component of the apportionment dispute. To avoid wasting judicial resources on litigation which focuses only on part of the controversy, this Court should allow Nebraska to amend its complaint to consider the apportionment of non-irrigation season flows.

Since the construction of the McConaughy Reservoir, designating portions of the river flow according to the time of year, i.e., "irrigation season flows" versus "non-irrigation season flows," is no longer a meaningful division for apportionment purposes. At the time that Nebraska filed its original petition for an apportionment of irrigation season flows, the McConaughy reservoir had not yet been constructed. When the Court formulated its original decree, the McConaughy Reservoir was just beginning operation. Before the construction of the McConaughy Reservoir, Nebraska had to rely on the natural flow of the river at particular times of the year

to meet the needs of the equities located below Llewellen. For example, during irrigation season, Nebraska would have to rely on irrigation season flows -- that is, the natural flow of water during the season -- for its irrigation needs.

When the States approached the Supreme Court to apportion the river flow, they were primarily concerned with obtaining sufficient water during irrigation season, and less concerned with the apportionment of non-irrigation season flows. In addition, neither the Special Master, Nebraska nor the United States anticipated any threatened diversion of the non-irrigation season flows. Certainly, the states did not consider the non-irrigation uses, such as wildlife, to be unimportant. However, for purposes of simplifying the issues, and because the states were concerned predominately with the irrigation season problem, they did not petition the Court to apportion non-irrigation season flows. Recognizing that factual circumstances with respect to water flow change over time, Special Master Dougherty had the foresight to include a reopener clause in the Decree to allow additional action by the Court should the need arise.

In 1941, Nebraska completed construction of the McConaughy Reservoir, which has a storage capacity of nearly 2 million acre feet of water. Nebraska was now able to store non-irrigation season flows in large quantities for use during the irrigation season, and conversely could also store non-irrigation season flows during irrigation season. With its newfound storage capacity, Nebraska was no longer wholly dependent on the natural flow of the river to meet its seasonal needs downstream of Llewellen, and at this point in the river, the distinction between irrigation season flows and non-irrigation season flows became irrelevant. Thus, after the construction of the reservoir, Nebraska became less concerned with the seasonal flow of the river, and more

concerned with the overall annual flow of water into the State.

Non-irrigation season flows constitute the largest component of the average annual flow into the McConaughy Reservoir. In fact, non-irrigation season flows make up 60% of the total flow into the Reservoir. A significant portion of that non-irrigation season flow (37%) enters by way of the North Platte River from Wyoming to Nebraska and into the Reservoir.

These figures demonstrate the potential harm to Nebraska if Wyoming is left to divert the currently unregulated non-irrigation season flows. If the Court were to decide the apportionment of irrigation season flows alone, the Court would be addressing only part of the problem, leaving the other portion of the problem to be resolved in separate litigation. Requiring Nebraska to litigate this issue separately, and retaining the now obsolete categories of irrigation season flows and non-irrigation season flows is illogical, ignores the true nature of this problem, and would unnecessarily waste judicial resources. It would be far more sensible for this Court to address the true nature of this dispute -- the apportionment of the *annual* water flow from the North Platte River -- than for the Court to continue to recognize artificial seasonal distinctions which are of no practical relevance. Thus, this Court should allow Nebraska to amend its complaint to include the non-irrigation season flows, the portion of annual flow that under the Court's 1945 Decree remains unregulated.

C. To Avoid Irreversible Injury To The Wildlife Habitat The Court Must Exercise Its Original Jurisdiction and Accept Nebraska's Petition

A final Decree that does not include an apportionment for non-irrigation season flows will have a serious adverse effect upon the critical habitat. Important and long-standing uses in Nebraska have come to rely upon non-irrigation season flows. For example, the return of North Platte Project irrigation flows (protected by the Decree) continues well into the non-irrigation season. In fact, such return flows may be released into the river at a steady rate throughout the entire year.

As explained above, one of the world's most important avian habitats depends upon non-irrigation season natural flows. Similarly, agriculture and hydropower production also rely on those flows. These uses in turn support long-established and substantial economies of vital importance to Nebraska. In short, a thriving economy has arisen around the natural resource values of the Central Platte and the lower reaches of the North Platte. These critical equities are to a considerable extent interrelated, and protection of flows required for one will often inure to the benefit of another.

The proposed upstream projects in Wyoming will substantially reduce the natural flow reaching Nebraska during the irrigation and non-irrigation seasons. That depletion of the available sources for instream flows will seriously threaten the Platte River habitat.

Nebraska has identified, through discovery, at least eighteen proposed Wyoming water development projects or actions. *See Nebraska Brief* at 20. Each of these proposed projects would deplete the quantity of non-irrigation season flows reaching Nebraska. Accordingly, in order to develop a comprehensive solution to a comprehensive problem, this Court must exercise its

discretion and accept for filing Nebraska's amended petition.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant Nebraska's motion to amend its petition for an equitable apportionment of non-irrigation season flows of the North Platte River and for the assertion of new claims.

Respectfully submitted,

Abbe David Lowell (SEE)

*ABBE DAVID LOWELL
MAX HATHAWAY
SUE ELLEN RUSSELL
* *Counsel of Record*

Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:

EUGENE GRESSMAN
Seton Hall University School of Law

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

(12)

No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF NEBRASKA,
Plaintiff,
vs.

STATE OF WYOMING,
Defendant.

COLORADO'S BRIEF IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

GALE A. NORTON
Attorney General
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
WENDY C. WEISS*
First Assistant Attorney General
Natural Resources Section
Attorneys for Defendant
State of Colorado
110 Sixteenth St., 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4730
***Counsel of Record**

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE 3

ARGUMENT 6

I. NEBRASKA HAS FAILED TO SATISFY THE STANDARDS FOR REOPENING AN EQUITABLE APPORTIONMENT DECREE. 6

A. *Arizona v. California* articulates the standards for upsetting settled expectations by relitigating an equitable apportionment decree. 6

B. Nebraska does not allege changed circumstances that would justify reopening the Decree. 8

II. NEBRASKA'S AMENDED PETITION PRESENTS THE VERY SAME PROBLEMS AS THE PETITION REJECTED BY THE COURT IN 1988. 12

III. THE COURT SHOULD NOT DELAY RESOLUTION OF THE MERITS AND INCREASE LITIGATION EXPENSES BY DEFERRING DISPOSITION OF NEBRASKA'S REQUEST TO MODIFY THE DECREE. 15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Page
Arizona v. California, 376 U.S. 340 (1964)	7
Arizona v. California, 460 U.S. 605 (1983)	7, 8, 12, 16
Catherland Reclamation Dist. v. Lower Platte North Natural Resources Dist., 230 Neb. 580, 433 N.W.2d 161 (1988)	11
Nebraska v. Rural Electrification Admin., 12 Env't Rep.Cas. (BNA) 1156 (D.Neb. Oct. 2, 1978), *dismissed and vacated upon stipulation*, 594 F.2d 870 (8th Cir. 1979)	14
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953)	1, 4, 5, 9
Nebraska v. Wyoming, 485 U.S. 931 (1988)	2
Ohio v. Kentucky, 410 U.S. 641 (1973)	15, 16
Riverside Irrigation Dist. v. Andrews, 758 F.2d 508 (10th Cir. 1985)	14
United States v. New Mexico, 438 U.S. 696 (1978)	10

Statutes **Page**

16 U.S.C. §§ 661-667 (1988) 14

16 U.S.C. §§ 1531-1544 (1988 & Supp. I 1989) 14

16 U.S.C. §§ 2901-2911 (1988) 14

33 U.S.C. § 1344 (1988) 14

42 U.S.C. §§ 4321-4370b, (1988 & Supp. I 1989) 14

Electric Consumers Protection Act of 1986, Pub. L. No. 99-495, 100 Stat. 1243 (1986) 14

Rules **Page**

Fed. R. Civ. P. 15(a) 15

Other Authorities **Page**

D. Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1, 20 (1985) 11

No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF NEBRASKA,
Plaintiff,
vs.

STATE OF WYOMING,
Defendant.

COLORADO'S BRIEF IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

INTRODUCTION

On October 9, 1991, the State of Nebraska filed a Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Motion to File Amended Petition), an Amended Petition for an Apportionment of Non-Irrigation Season Flows (Amended Petition), and a Brief in Support of Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Supporting Brief). The Motion to File Amended Petition, Amended Petition, and Supporting Brief were filed almost exactly five years after this case was commenced as an action to enforce the decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) (the Decree), and more than three years after this

Court summarily denied Nebraska's first motion to amend its petition to add a claim to modify the Decree. *Nebraska v. Wyoming*, 485 U.S. 931 (1988)

Nebraska represents that "[t]his motion to amend bears no relation to the motion of January 11, 1988." Supporting Brief at 5, 36-37. While Nebraska's new motion and petition are framed differently, the similarity of result sought by the two amended petitions shows that Nebraska subscribes to the adage that there is more than one way to skin a cat. This is simply the latest round in the continuing efforts of Nebraska and several amici curiae to reopen the Decree and expand the scope of what began as a straightforward enforcement action against Wyoming into a full-blown equitable apportionment proceeding to increase Nebraska's water supply from the North Platte River.

Thus, the issue before the Court is whether to allow Nebraska to reopen the 46-year old Decree and transform this enforcement action against Wyoming, the merits of which have yet to be decided, into a new and completely different case -- one to reapportion the flows of the North Platte River.[1]

Nebraska would have the Court believe that this new case would be solely between Nebraska and Wyoming and would not affect Colorado, alleging: "The Decree specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season." Amended Petition at 2; *see also* Supporting Brief at 6. Despite this matter-of-fact statement

---

[1]This brief is directed only to Nebraska's request for an apportionment of non-irrigation season flows, and does not address Nebraska's request to assert new claims against Wyoming and the United States.

that the Decree specifies Colorado's entire apportionment, Nebraska never actually says what that apportionment is. However, it appears that Nebraska is, in fact, asking the Court to apportion "unapportioned flows" that have already been apportioned to Colorado. Colorado therefore has an important stake in Nebraska's attempt to reopen and modify the Decree and urges the Court to reject Nebraska's Motion.

STATEMENT OF THE CASE

In its brief in opposition to Nebraska's previous motion to amend its petition, Colorado summarized the scope of the North Platte Decree and the history of this case from its filing in 1986 to Nebraska's 1988 motion to amend, noting that Nebraska had dramatically changed its position. Nebraska ostensibly brought this case solely to enforce the existing Decree against Wyoming. By 1988, however, when Nebraska moved to amend its petition, it wanted much more: it wanted to modify the Decree to include an entirely new apportionment for uses other than irrigation, to expand the geographic scope of the Decree, and to further restrict Colorado's uses under the Decree. At that time, Colorado observed that "the inescapable conclusion is that Nebraska desires to reopen the Decree to increase her apportionment at Colorado's expense." Colorado's Brief in Opposition to Motion to Amend Petition at 5 n.2 (February 12, 1988).

Today, more than three years after this Court denied Nebraska's motion, the inescapable conclusion is that nothing has changed. Nebraska is still seeking to reopen the Decree to increase its apportionment, apparently still at Colorado's expense. Now, however, instead of asking for a new apportionment to serve non-irrigation uses in a different geographic area, it has changed its terminology to ask for an

apportionment of non-irrigation season flows. From a practical standpoint, there is little difference as far as Colorado is concerned.

In support of its assertion that the Decree specifies Colorado's equitable apportionment in its entirety during the non-irrigation season, Nebraska relies on two provisions that impose certain numeric limitations on Colorado's use of the North Platte River and its tributaries [2]: paragraph I(b), which enjoins Colorado from storing more than a total amount of 17,000 acre feet of water for irrigation purposes in Jackson County, Colorado, between October 1 of any year and September 30 of the following year (325 U.S. at 665); and paragraph I(c), which enjoins Colorado from exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, more than 60,000 acre feet of water in any period of 10 consecutive years reckoned in continuous progressive series beginning with October 1, 1945 (325 U.S. at 665). Amended Petition at 2-3; Supporting Brief at 6. According to Nebraska, these are the only provisions in the Decree that equitably apportion the non-irrigation season flows of the North Platte River to Colorado. Amended Petition at 3.

Nebraska ignores an additional paragraph of the Decree which expressly provides:

> This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic,

---

[2]The Decree does not affect this Court's previous apportionment between Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River. Decree, para. XII(d), 325 U.S. at 671.

municipal and stock watering purposes and consumption.

Decree, para. X., 325 U.S. at 670. Moreover, the Decree is silent concerning the diversion or storage of water for all other (*e.g.*, industrial, fish and wildlife, or recreational) in-basin uses.

Thus, Nebraska fails to address Colorado's right during the non-irrigation season (or the irrigation season) to make in-basin use of the waters of the North Platte River for ordinary and usual domestic, municipal, and stock watering purposes and for any other beneficial purposes besides irrigation. If, by saying that the Decree specifies Colorado's equitable apportionment in its entirety, Nebraska recognizes that all uses by Colorado that are not expressly enjoined are permitted without restriction, Colorado and Nebraska are in agreement. If, on the other hand, Nebraska reads the Decree to in any respect limit Colorado's in-basin non-irrigation uses, such an "interpretation" would prohibit uses not now enjoined by the Decree, some of which are expressly permitted. This would be a modification of the Decree, which Colorado would strenuously oppose. In light of Nebraska's previous attempt to amend its petition, in which it sought to enjoin all new development by Colorado (Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree at 6 (January 11, 1988)), Colorado assumes that Nebraska's interpretation of Colorado's non-irrigation season apportionment is restrictive, rather than permissive.[3]

---

[3]Another possible interpretation of the Decree is that it does not specify Colorado's equitable apportionment in its entirety. However, that interpretation is directly contrary to Nebraska's asserted position.

Given the ambiguity of Nebraska's representations concerning Colorado's non-irrigation season apportionment, and absent assurances from the other parties that they interpret the Decree to impose no restrictions on Colorado's in-basin non-irrigation uses of the North Platte River, Colorado has an important interest in assuring that Nebraska's claim for an apportionment of non-irrigation season flows does not result in modification of the Decree to impose additional constraints on Colorado uses.

ARGUMENT

I. NEBRASKA HAS FAILED TO SATISFY THE STANDARDS FOR REOPENING AN EQUITABLE APPORTIONMENT DECREE.

A. *Arizona v. California* articulates the standards for upsetting settled expectations by relitigating an equitable apportionment decree.

Nebraska argues at length, and with many citations of supporting authority, that "the apportionment of non-irrigation season flows is an appropriate action in the Court's original jurisdiction" and that "equitable apportionment presents a justiciable controversy." Supporting Brief at 11-31. However, Nebraska's arguments misrepresent the nature of the relief sought, and the authority cited is therefore inapposite. Try as it may, Nebraska cannot turn its Amended Petition into a request for a new equitable apportionment, when it is really a request to reopen and modify a decree that has been in place since 1945 (as modified by stipulation of the parties in

1953). Nebraska's Motion to File Amended Petition must be judged by the standards for reopening a long-standing decree and upsetting an apportionment that is "an historic fact." Nebraska's Memorandum in Opposition to the Motion of the National Audubon Society for Leave to Intervene or to Participate as Litigating Amicus Curiae at 2 (April 3, 1987).

In *Arizona v. California*, 460 U.S. 605 (1983), this Court articulated the standard for deciding whether to entertain a motion to modify an existing equitable apportionment decree. The question there was whether to reopen the determination of practicably irrigable acreage within reservation boundaries to consider claims for "omitted" lands for which water rights could have been sought in the litigation preceding the 1964 decree. The Court held that, despite a reserved jurisdiction paragraph in the decree very similar to the one in this case, the prior determination of Indian water rights in the 1964 decree precluded relitigation of the irrigable acreage issue.

Article IX of the 1964 decree in *Arizona v. California*, 376 U.S. 340, 353 (1964) states:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Despite the broad language of Article IX, the Court held that it should be read narrowly "and should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously

litigated." 460 U.S. at 619. The Court observed that while the technical rules of preclusion were not strictly applicable, the principles underlying the rules should inform the Court's decision, particularly with respect to water rights in the arid western states:

> Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country.... The doctrine of prior appropriation, the prevailing law in the Western States, is itself largely a product of the compelling need for certainty in the holding and use of water rights.

Id. at 620 (citation and footnote omitted).

The Court also feared that "the urge to relitigate, once loosed, will not be easily cabined," recognizing that it would be hard to draw a defensible line separating issues that could and could not be relitigated and that "[i]t would be counter to the interests of all parties to this case to open what may be a Pandora's Box, upsetting the certainty of all aspects of the decree." *Id.* at 625.

B. Nebraska does not allege changed circumstances that would justify reopening the Decree.

Nebraska's motion does not raise the type of changed circumstances alluded to in *Arizona v. California* and

contemplated by paragraph XIII of the Decree in this case. 325 U.S. at 671-672. Nebraska's request to reopen the Decree is premised on alleged threats by Wyoming to "downstream equities" in Nebraska. No threat of upstream development in Colorado is alleged. The alleged threats by Wyoming fall into two categories: (1) potential water development projects and legal positions taken by Wyoming that are already the subject of the pending action to enforce the Decree and for injunctive relief; and (2) additional potential projects that "are being watched closely by Nebraska" (Supporting Brief at 20), but which are apparently too speculative and remote to be included in the enforcement action.

The first category of threat is, of course, already included in this action (indeed, numerous motions for summary judgment covering all these projects and issues are now before the Special Master awaiting decision) and Colorado believes it is not disputed that if any actions by Wyoming are found to have violated the Decree, the measure of damages would include consequential injuries to interests not directly protected by the Decree. In light of this, the first category of alleged threats hardly justifies throwing open the Decree. Wyoming is addressing the second category of alleged threats in its response to Nebraska's motion. Colorado expects Wyoming to demonstrate that the projects listed by Nebraska do not constitute a significant threat of new depletions to the North Platte River.

As far as downstream equities are concerned, Nebraska's position is equally tenuous, since Nebraska's problems are largely of its own making. Nebraska states, "Downstream equities in Nebraska have not had an adequate water supply for some time, and competition is intense for the limited supply that is available." Supporting Brief at 15.

Nebraska goes on to describe that "intense" and expensive competition, largely between agricultural and environmental interests. *Id.* at 15, 34-35. It is hardly surprising that, in the arid West, the competition -- intrastate as well as interstate -- for water from over-appropriated streams is often intense. The Court has recognized this competition in the context of federal reserved water rights. *See, e.g., United States v. New Mexico*, 438 U.S. 696, 699 (1978) ("In the arid parts of the West, however, claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.").

Two downstream equities relied on by Nebraska are recreational uses and fish and wildlife uses, including endangered species habitat. Supporting Brief at 18-19. These equities are threatened by **other Nebraska water users**, since Nebraska has yet to grant any instream flow water rights to protect habitat flows on either the North Platte or Platte River. Deposition of J. Michael Jess, Vol.I at 142-143 (Nov. 28, 1989). Only now is Nebraska finally even **considering** granting an instream flow permit for certain reaches of the Platte River. Supporting Brief at 33-34. Moreover, Nebraska does not regulate groundwater pumping that depletes the North Platte and Platte Rivers. Jess Deposition, Vol. I at 29-30, 57-58; *see also* Vol. IV at 78-79 (Feb. 2, 1990). Additionally, in 1986, Mr. Jess, Director of the Nebraska Department of Water Resources, issued a permit for the Catherland Reclamation Project to divert and transport out of the basin about 125,000 acre-feet of water per year just upstream of the Big Bend reach of the Platte River. *Id.* Vol. IV at 153-154. Mr. Jess issued the permit despite "a substantial volume of testimony, exhibits and evidence in general offered on the impacts the Catherland project would have on wildlife in the Platte Valley as well as wildlife habitat impacts in the area where the water would

have been taken." *Id.* at 154.[4] Mr. Jess also stated that it is doubtful that Nebraska would forego all further water development projects on the North and South Platte Rivers to protect the endangered species on the Platte River. *Id.* at 175.

Given Nebraska's unwillingness to itself protect what it claims are important equities, it is difficult to envision how this Court could do so in this proceeding. And, indeed, Nebraska frankly states that it "does not seek to have the Court enter into 'intramural disputes' within the State of Nebraska over the allocation of its water resources, nor does it believe that doing so would be prudent." Supporting Brief at 35.[5] Having failed to make hard decisions about water allocation, and finding itself in a position where federal agencies may be making some of those decisions for it (*id.* at 34-35), Nebraska now seeks to resolve its internal conflicts by appealing to this Court for more water from its neighboring states, and asking the Court to trust it to distribute that water equitably among competing water users within the state. Considering Nebraska's record of disregarding fish and

---

[4]The Nebraska Supreme Court set aside the permit on the ground that assignment of the application was void. *Catherland Reclamation Dist. v. Lower Platte North Natural Resources Dist.*, 230 Neb. 580, 433 N.W.2d 161 (1988).

[5]Nebraska previously opposed intervention by the Platte River Trust because Nebraska feared the Trust would expand the scope of the case to seek "intrastate relief in the form of minimum instream flows in Nebraska." Nebraska's Memorandum in Opposition to the Motion of Platte River Trust for Leave to Intervene at 3 (April 3, 1987). While not wanting instream flows in Nebraska to be established in this case, Nebraska seems to have reverted to its Grayrocks Reservoir strategy of protecting Nebraska agricultural uses "under the wing of the endangered whooping crane." Tarlock, *The Endangered Species Act and Western Water Rights*, 20 Land & Water L. Rev. 1, 20 (1985).

wildlife habitat and its past failure to resolve its internal water allocation conflicts, Nebraska has not met the strict test of *Arizona v. California* for relitigating an equitable apportionment decree.

II. NEBRASKA'S AMENDED PETITION PRESENTS THE VERY SAME PROBLEMS AS THE PETITION REJECTED BY THE COURT IN 1988.

Nebraska assures the Court that "[t]his amended petition is quite different from the one filed in 1988." Supporting Brief at 37. The alleged difference is that the 1988 petition asked the Court to modify the Decree to apportion water to protect fish and wildlife interests during the irrigation season while "the present motion presents a classic equitable apportionment of the previously unapportioned, non-irrigation season flows." *Id.*

In its 1988 petition, Nebraska requested the Court, *inter alia*, to:

> (3) Explicitly recognize the apportionment of North Platte River waters to the State of Colorado, the State of Wyoming, and to the State of Nebraska for maintenance of critical wildlife habitat;
>
> (4) Enjoin the State of Colorado and the State of Wyoming and their agencies from approving new appropriations of the waters of the North Platte River and its tributaries, and to enjoin the State of Colorado, the State of Wyoming, and the United States and their

> agencies from authorizing or sanctioning construction of new storage projects on the North Platte River and its tributaries which would reduce the flows of the river into Nebraska and would thereby reduce the amount of water historically used in Nebraska to maintain and preserve critical wildlife habitat;...

Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree at 6 (January 11, 1988).

Contrary to Nebraska's representation that "[t]he 1988 amended petition sought relief for fish and wildlife interests **during the irrigation season**," (Supporting Brief at 37 (emphasis added)) the 1988 amended petition included no seasonal limitation; it sought a year-round apportionment for downstream fish and wildlife interests. Nebraska's new Amended Petition is broader than its 1988 petition insofar as it requests an apportionment for other downstream uses as well as **the same fish and wildlife interests asserted in 1988**. The new petition is in another respect narrower in that, unlike the 1988 petition, it is limited to the non-irrigation season; however, when combined with Nebraska's expansive reading of the Decree to apportion to it the "regimen of the river" during the irrigation season (*see, e.g.,* Supporting Brief at 11; Nebraska's Motion for Partial Summary Judgment at 7-8 (March 1, 1991); Nebraska's Brief in Support of Motion for Partial Summary Judgment at 127 n.62 (March 1, 1991)), the practical effect is virtually identical. Just as the 1988 and 1991 petitions seek the same result, they suffer from the same defects.

Colorado responded at length to Nebraska's 1988 motion, pointing out that the amended petition would

embroil the Court in a trial of exceedingly complex water resource planning and policy issues in a hypothetical context, which might never present a justiciable controversy. *See* Colorado's Brief in Opposition to Motion to Amend Petition (February 12, 1988). This is so because application of the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & Supp. I 1989), and § 404 of the Clean Water Act, 33 U.S.C. § 1344 (1988), just two of a host of federal laws that affect water development in all the states,[6] may well resolve Nebraska's wildlife habitat concerns in other forums. *See, e.g., Riverside Irrigation Dist. v. Andrews*, 758 F.2d 508 (10th Cir. 1985); *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep.Cas. (BNA) 1156 (D.Neb. Oct. 2, 1978), *dismissed and vacated upon stipulation*, 594 F.2d 870 (8th Cir. 1979). While Nebraska would have the Court believe that it deserves special relief from the burdens of compliance with federal environmental legislation, as *Riverside* and *Nebraska v. Rural Electrification Administration* show, these burdens fall equally on all three states.

Not only would hearing Nebraska's fish and wildlife habitat claim involve this Court in a quagmire of technical issues best resolved in other forums, it could actually preempt the determination of those issues by the administrative and judicial tribunals that are responsible under federal statutes for making them. For example, if this Court undertakes to determine the habitat requirements of the whooping crane, least tern, and piping plover below Lake McConaughy, how will that affect the Federal Energy Regulatory Commission relicensing proceedings for Kingsley

---

[6]*See also, e.g.*, the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370b, (1988 & Supp. I 1989); the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667 (1988); the Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901-2911 (1988); and the *Electric Consumers Protection Act of 1986*, Pub. L. No. 99-495, 100 Stat. 1243 (1986).

Dam that have been underway since 1984? Supporting Brief at 34-35. Scientific investigations and decisions in both ongoing and future federal statutory proceedings involving the North Platte, South Platte, and Platte River basins are likely to be constrained by any findings of technical facts made in this case.

III. THE COURT SHOULD NOT DELAY RESOLUTION OF THE MERITS AND INCREASE LITIGATION EXPENSES BY DEFERRING DISPOSITION OF NEBRASKA'S REQUEST TO MODIFY THE DECREE.

Nebraska's arguments to the contrary notwithstanding, the Court is not bound to grant any well pled motion to amend simply because it is phrased in terms of an equitable apportionment. The liberal amendment policies of Rule 15(a) of the Federal Rules of Civil Procedure do not apply to actions within the original and exclusive jurisdiction of the Supreme Court. *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). In that case, this Court applied the same standard to the motion to amend that it applies to a motion for leave to file a complaint, noting that the requirements of a motion for leave to file and a brief in opposition permit and enable the Court to dispose of matters at a preliminary stage. The Court explained:

> Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay

> adjudication on the merits and needlessly add to the expense that the litigants must bear.

Id. at 644. Applying that standard, the Court denied Ohio's motion to amend.

The reasons for denying the motion to amend are equally compelling here. As in *Ohio v. Kentucky*, the motion to amend was filed five years after the case was commenced. Pending motions for summary judgment may dispose of all or many of the outstanding issues. It would be unfair to the other parties to delay resolution of the merits as the case now stands and to needlessly add to the expense that they must bear based on a motion to amend that, as demonstrated above, manifestly fails to satisfy the criteria enunciated in *Arizona v. California*, 460 U.S. 605 (1983), for reopening an equitable apportionment decree.

CONCLUSION

Colorado respectfully requests that the Court deny Nebraska's Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows.

Respectfully submitted,

GALE A. NORTON
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

WENDY C. WEISS*
First Assistant Attorney General
Natural Resources Section
Attorneys for Defendant
State of Colorado

110 Sixteenth Street, 10th Floor
Denver, Colorado 80202
Telephone: (303)620-4730
*Counsel of Record

MOTION FILED
NOV 12 1991

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION AND PROPOSED MEMORANDUM

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

November 12, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION

Basin Electric Power Cooperative (Basin) moves for leave to file the accompanying Memorandum in Opposition to Nebraska's Motion for Leave to File Amended Petition. In support of its motion Basin states:

1. Basin is the operator and, with five other consumer owned electric utilities, the owner of the Missouri Basin Power Project (MBPP), the facilities of which include the Grayrocks Dam and Reservoir located on the Laramie River in Wyoming about 10

miles above its confluence with the North Platte River.[1]

2. Two of the four violations alleged by Nebraska in the petition that the Court granted her leave to file on January 20, 1987, are that Wyoming is:

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River.
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers.

Each of those allegations directly involves Basin because Basin is an owner and the operator of Grayrocks Dam and Reservoir and because the proposed development referred to in paragraph b is the Corn Creek irrigation project, the Laramie River water

---

[1] The other participants in the MBPP are Tri-State Generation and Transmission Cooperative; the Lincoln Electric System, operated by the City of Lincoln, Nebraska; the Western Minnesota Municipal Power Agency; Heartland Consumer Power District; and the Wyoming Municipal Power Agency. The MBPP participants and their member distribution systems serve more than 1,200,000 people in Colorado, Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wyoming. Grayrocks Dam and Reservoir provide cooling water for MBPP's Laramie River Station, a 1500 megawatt thermal electric generating plant. The MBPP is one of the major power suppliers in the region of the northern and central great plains and its transmission system is interconnected with all the major utility systems, public and private, that serve or connect in the eight state area served by MBPP's member systems.

supply for which will be stored in and released from Grayrocks Reservoir, if the project is ever built.

3. Basin Electric is an *amicus curiae* in the proceedings before Special Master Olpin, to whom the Court referred Nebraska's petition and five then pending petitions to intervene, including that of Basin. In granting Basin the right to participate as an *amicus*, Special Master Olpin observed that "Basin Electric's participation here as an *amicus* will serve both to ensure that Wyoming adequately protects Basin Electric's substantial interests, and to fully flesh out the necessary data for the Court." Seventh Memorandum of Special Master, 11 (April 1, 1988). Basin has since participated fully in the proceedings before the special master, including the briefing and argument of the motions for summary judgment now awaiting his action.

4. Basin was granted leave by the Court to file a response in opposition to Nebraska's first motion to amend her petition. Order of March 7, 1988, 485 U.S. 931.

Respectfully submitted,

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

November 12, 1991

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

November 12, 1991

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	
1. There Is No Unapportioned Natural Flow Water Above Tri-State	6
2. Nebraska Has Shown No Such Injury or Damage As Would Warrant the Court To Alter the Existing Apportionment	7
3. The Issues Posed by the Case As It Is Must Be Resolved Before Consideration Is Given To Allowing the Litigation of Others	17
CONCLUSION	20

TABLE OF AUTHORITIES

CASES:	Page
Alabama v. Arizona, 291 U.S. 286 (1934)	5
Colorado v. Kansas, 320 U.S. 383 (1943)	5
Colorado v. New Mexico, 459 U.S. 176 (1982)	5
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	5
Dooley v. Penland, 300 S.W. 9 (Tenn. 1927)	13
Idaho v. Oregon, 462 U.S. 1017 (1983)	5
Jess v. West, Civ. No. 88-L-308 (D. Neb.)	10
Missouri v. Illinois, 200 U.S. 496 (1906)	5
Nebraska v. REA, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *judgment vacated and appeal dismissed*, 594 F.2d 870 (8th Cir. 1979)	14
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified and supplemented*, 345 U.S. 981 (1953)	*passim*
Orders:	
Jan. 20, 1987, 479 U.S. 1071	3
Mar. 7, 1988, 485 U.S. 931	3
New York v. New Jersey, 256 U.S. 296 (1921)	5
North Dakota v. Minnesota, 263 U.S. 365 (1923)	5
Ohio v. Kentucky, 410 U.S. 641 (1973)	19
Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC, 876 F.2d 109 (D.C. Cir. 1989)	8
Washington v. Oregon, 297 U.S. 517 (1936)	5
Wyoming v. Colorado, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957)	11,12

Table of Authorities Continued

Page

STATUTES:

Endangered Species Act, 16 U.S.C. § 1536(e)-(p) ... 15

MISCELLANEOUS:

A. D. Tarlock, *Law of Water Rights and Resources* (Clark Boardman Co. 1990) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION

Statement

Nebraska sought leave in 1986 to file this action to enforce the decree entered herein in 1945, as modified and supplemented in 1953. *Nebraska v. Wyoming*, 325 U.S. 589, 665; 345 U.S. 981. In the petition she then proposed for filing Nebraska alleged that Wyoming was violating the decree by:

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage

> facilities at the confluence of the Laramie and the North Platte rivers;
>
> c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and
>
> d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.[1]

Wyoming opposed the filing on the ground, among other, that Nebraska had made no such showing of injury as is required to invoke the original jurisdiction of the Court in an action between states.

Replying to Wyoming's opposition, Nebraska assured the Court that she sought only to enforce the decree as it stands and not to modify it in any way. She said:

> Each of Nebraska's allegations involves present or threatened interference with its apportionment established by the Court in this case. Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so. We do not propose to litigate anything new, but simply to protect what the Court has already de-

[1] Neb's Petition for Order Enforcing Decree, 2 (Oct. 6, 1986).

> cided. In short, we are asking the Court to protect the integrity of its Decree pursuant to its express and specific retention of jurisdiction.[2]

The Court then granted Nebraska leave to file her petition to enforce the decree by order of January 20, 1987. 479 U.S. 1071.

Notwithstanding her representation to the Court, made to avoid Wyoming's contention that she had made no such showing of injury as would move the Court to consider modifying the decree, Nebraska subsequently sought leave to amend her petition to seek such modification to augment her apportionment. The Court denied this motion by order of March 7, 1988. 485 U.S. 931.

Nebraska asserts that her previous motion to amend bears no relation to her instant motion to do so. Neb's Brief, 5 (Oct. 9, 1991). She says:

> This amended petition is quite different from the one filed in 1988. The 1988 amended petition sought relief for fish and wildlife interests during the irrigation season. It asked the Court to construe or modify the Decree to consider post-Decree developments. By contrast, the present motion presents a classic equitable apportionment of the previously unapportioned, non-irrigation season flows. All equities in Nebraska and Wyoming will be considered and equitably balanced in relation to one another. The Court only partially apportioned non-irrigation season flows in the original litigation.

---

[2] Neb's Reply to Wyo's Brief in Opposition, 2 (Jan. 14, 1987).

Id. at 37.

But however cast, it is clear that Nebraska is seeking by her instant motion to obtain exactly the same thing as she sought by her earlier motion, *i.e.*, to increase her apportionment of the natural flow of the North Platte originating above Tri-State Dam for use below.[3] Basin submits that Nebraska's instant motion should be denied as was her earlier one. She has made no showing of such real and substantial injury as is required to plead a case for an apportionment or modification of an existing apportionment of an interstate stream.[4]

---

[3] Tri-State Dam is the division point employed in the decree. It is located in Nebraska approximately one mile east and downstream of the Wyoming-Nebraska line. The decree apportions the natural flow in the segment of the river between Guernsey (or Whelan) and Tri-State between Wyoming and Nebraska. Decree ¶ V, 325 U.S. at 667-68.

The decree apportions no water to Nebraska for diversion below Tri-State Dam. Yet, except in relation to her claim involving the Inland Lakes, Nebraska does not contend that Wyoming has interfered in any way with the diversions Nebraska is entitled to make into the canals headed at or above Tri-State or with her use of the natural flow so diverted. Rather, she contends that she has developed "equities" below Tri-State since 1945 that entitle her, under the decree as it stands, to receive, below Tri-State during the irrigation season, natural flow water originating above Tri-State for in-stream use, including storage in Lake McConaughy, and for downstream diversion for irrigation and other purposes. These claims are among those now pending for determination by the special master on motions for summary judgment.

[4] The burden on a state that seeks to invoke the Court's original or retained jurisdiction to obtain an apportionment or to alter an existing apportionment is different in kind and substantially greater, both as a matter of pleading and proof, than

In the original proceedings in this case, Nebraska initially contended that her apportionment should provide for uses of water in Nebraska down to Grand Island, 325 U.S. at 607, about 300 miles east of Tri-State Dam and the Wyoming-Nebraska line. She abandoned this claim before the decree was entered but continued to assert that her apportionment should provide for uses of water in Nebraska down to Bridgeport, located about 60 miles downstream from Tri-State and the state line. *Id.*

Master Doherty concluded that Nebraska had no equities to warrant her being apportioned any part

---

the burden on a state that seeks only to enforce an existing decree. The Court has said that a state seeking to sue another "must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor," *Alabama v. Arizona*, 291 U.S. 286, 291-92 (1934), and that "[a] state seeking equitable apportionment must prove by clear and convincing evidence some real and substantial injury or damage." *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983).

> Not every matter which would warrant resort to equity by one citizen against another [warrants the Court's] interference with the action of a state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and clearly proved.

Colorado v. Kansas, 320 U.S. 383, 393 (1943). *See also Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982); *Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660, 669, 672 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 520 (1906).

of the natural flow of the river originating above Tri-State Dam for use below that point, except such as she should be entitled to divert into specified canals headed at or above Tri-State (in the stretch of the river from Guernsey [or Whelan] to Tri-State) for the irrigation of specified quantities of land under the canals in Nebraska. The Court, over Nebraska's exceptions, confirmed the master's conclusion, saying:

> We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whelan for use below Tri-State.

325 U.S. at 628.

Argument

1. There Is No Unapportioned Natural Flow Water Above Tri-State

The major premise of Nebraska's instant motion for leave to amend her petition, that the existing decree does not apportion all of the natural flow of the river originating above Tri-State, is patently fallacious. The decree expressly apportions all of the natural flow of the river originating above Tri-State among Colorado, Wyoming, and Nebraska. It leaves none of the natural flow unapportioned during either the irrigation or non-irrigation season.

Nebraska acknowledges that the decree deals with non-irrigation season (October 1 through April 30, inclusive) flow in a number of respects, including making provision for her to store 46,000 acre feet of such flow in her Inland Lakes during the months of October, November and April. Neb's proposed amended

petition, 2-3 (Oct. 9, 1991). Nevertheless, she would have it that the decree effects less than a total apportionment of such flow because her apportionment of the natural flow originating above Tri-State is, except as noted above, restricted to the irrigation season (May 1 through September 30, inclusive). This is a *non sequitur* of generous proportions. In plain terms the decree apportions all of the natural flow ("all water in the stream except storage water," 325 U.S. at 670) originating above Tri-State among Colorado, Wyoming and Nebraska. An imperative of the very structure of the decree is that all natural flow water originating above Tri-State that is apportioned neither to Colorado nor to Nebraska is apportioned to Wyoming.

What Nebraska seeks by her proposed amended petition is not unapportioned water but water within Wyoming' apportionment under the existing decree. No one questions the power of the Court, where it believes the exercise of such power appropriate, to alter an apportionment previously made to accommodate changed conditions. What Basin finds objectionable about Nebraska's new motion for leave to amend her petition is its disingenuousness; its undertaking to mask the fact that she is seeking a reapportionment behind a phantasm of the existence of "unapportioned" water.

2. Nebraska Has Shown No Such Injury or Damage As Would Warrant the Court To Alter the Existing Apportionment

Stripped of the robes of obfuscation in which she dresses it, Nebraska's proposition is that the apportionment of the natural flow originating above Tri-State effected by the decree should be revised to

increase her allocation and reduce Wyoming's. She contends that, since the entry of the decree, she has actually received more water than is apportioned to her; that she has found uses for such water from which "equities" have sprung up; and that these equities should now be accommodated by altering the current apportionment. These contentions are precisely the same as those on which she predicates her claim in this case as it stands that the existing decree apportions her water, including Laramie water, for diversion and use below Tri-State during the irrigation season.

What is driving Nebraska's present efforts to wrest water from Wyoming are proceedings before the Federal Energy Regulatory Commission involving the relicensing of power and irrigation in projects in Nebraska located about 200 miles downstream from Wyoming and Tri-State. Neb's Brief, 34-35 (Oct. 9, 1991). Nebraska anticipates that, as a condition of relicensing, these projects are going to be required to make more water available for the protection of wildlife, particularly for the protection of habitat in the Big Bend area of the Platte River located below its confluence with the North Platte. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989). She fears that the modes of operation that will be prescribed for these projects will diminish their value for power and irrigation, Neb's Brief, 34-35 (Oct. 9, 1991), and seeks to compel Wyoming to make up the anticipated deficit from the share of the natural flow of the North Platte now apportioned to Wyoming. As Nebraska says, the purpose of her previous motion for leave to amend her petition, which the Court denied, was "to

spread the burden of protecting critical wildlife habitat throughout the North Platte Basin." Neb's Brief, 37 (Oct. 9, 1991).[5]

This is still her purpose. She aims to shift the anticipated burden, on irrigation and power generation in central Nebraska, of enhancing the protection of wildlife on the Platte River by securing a reduction of Wyoming's apportionment of the natural flow of the North Platte originating above Tri-State Dam. She asks the Court to reapportion to her substantially all of the water within Wyoming's existing apportionment that Wyoming has not consumed and that she has received as a windfall since the decree was entered. She variously contends that this windfall constitutes a "regimen of the river," or a "predicate of the decree," that is, in the case of irrigation season flows, comprehended within her existing apportionment and that should, in the case of non-irrigation season flows, now be settled on her by reapportionment.

With the exception of the Missouri Basin Power Project (Grayrocks) operated by Basin on the Laramie River, she does not contend that Wyoming has actually done anything that has interfered with the passage to her of natural flow water within Wyoming's apportionment. She says that "[t]hrough formal discovery [she] has become aware of numerous water development projects in Wyoming" that threaten her "downstream equities." Neb's Brief, 20-21.[6] As Wy-

---

[5] Even this is disingenuous, since the habitat principally involved is located in the Platte River Basin about 300 miles east of Tri-State, rather than in the North Platte River Basin.

[6] Among the projects she represents she became aware of

oming has demonstrated by uncontroverted evidence, *see* n.14 *infra*, none of these projects has resulted or threatens to result in any significant change in, to borrow the shibboleth so favored by Nebraska, "the regimen of the river."

What extensive discovery, briefing and argument has revealed is that there is only one project currently under active development in Wyoming that arguably might diminish the quantity of natural flow water passing into Nebraska and constitute a violation of Nebraska's rights under the decree. This is the Deer Creek project under development on a tributary entering the North Platte below Pathfinder Dam to supply municipal water to Casper, Wyoming. The issues relating to this project will be resolved in this case as presently structured, *i.e.*, as an action to enforce the decree. It will be determined in this case as it is whether the construction and operation of the Deer Creek project would violate any rights of Nebraska under the existing decree. That is, whether it would reduce the natural flow of the North Platte in the Guernsey to Tri-State section below the amounts specified and limited in paragraph IV of the decree, which Nebraska is entitled to divert into the five specified canals for the benefit of the lands served by them in Nebraska.

If it is finally determined that the operation of the project would result in an invasion of Nebraska's

---

"through formal discovery" are the Deer Creek Project, which she has been monitoring and hectoring for many years and which she is challenging in separate litigation (*Jess v. West*, Civ. No. 88-L-308 [D. Neb.]), and the Corn Creek Project, which is a subject of the settlement agreement she entered into with Basin and others relative to the Missouri Basin Power Project (Grayrocks) in 1978.

rights under the decree, its construction will be enjoined or Wyoming will be required to compensate for its consumptive use of water in some other way. If, on the other hand, it is finally determined that the operation of the project would result in no violation of Nebraska's rights (*e.g.*, because the project is determined to be for domestic or municipal purposes within the exemption provided by paragraph X of the decree or because it will not diminish natural flow in the Guernsey to Tri-State section of the river below the amount necessary to satisfy the entitlement of the Nebraska lands specified in paragraph IV of the decree), Nebraska will have no cause for complaint.

Other threats to maintenance of the "regimen of the river" perceived by Nebraska are: 1) Wyoming's adherence to the position that the water of the Laramie River is completely apportioned between Colorado and her by the decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957), that this is confirmed by the decree in this case, and that Nebraska is not entitled to any Laramie water, except such as actually reaches the North Platte and thereby becomes subject to apportionment in accordance with ¶ V of the decree herein;[7] 2) the proposed Corn Creek Project on the Laramie near its mouth;[8] 3) the refurbishment of Tri-State Dam resulting in the stop-

---

[7] Neb's proposed amended petition, 8 ¶ 27; Neb's Brief, 24-25 (Oct. 9, 1991).

[8] Neb's proposed amended petition, 9 ¶ 28; Neb's Brief, 24 (Oct. 9, 1991).

page of leakage through it of some 81,700 acre feet of water annually.[9]

Basin submits that Wyoming must be excused for holding fast to the position that the Laramie is completely apportioned between Colorado and her and that this is recognized and confirmed by the decree in this case.[10] Nevertheless, Wyoming is not "threat-

---

[9] Neb's proposed amended petition, 10 ¶¶ 34-36; Neb's Brief, 11 (Oct. 9, 1991).

[10] A great deal of plain language in both this case and *Wyoming v. Colorado* would have to be turned upside-down to conclude that Nebraska has any entitlement to water in the Laramie that does not actually reach the North Platte.

The current and only operative decree in *Wyoming v. Colorado*, 353 U.S. 953 (1957), provides:

> The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie river and its tributaries after such diversion and use [as the decree provides for] in Colorado.

The Court practically began its opinion in *Nebraska v. Wyoming* by observing that Colorado "prayed for an equitable apportionment [of the waters of the North Platte] between the three states, *excluding only the tributary waters of the South Platte and Laramie rivers.*" 325 U.S. at 592 (emphasis supplied). The Court then stated:

> The waters of the South Platte and the Laramie were previously apportioned—the former between Colorado and Nebraska by compact . . ., the latter between Colorado and Wyoming by decree. *Wyoming v. Colorado*, 259 U.S. 496. Those apportionments are in no way affected by

ening to dry up the Laramie at its mouth," Neb's Brief, 24 (Oct. 9, 1991), and has done nothing to

---

the decree in this case.

Id. n.1.

Both the context and the use of the definite article "the" before "waters" make clear that the Court meant "all of the waters" of the South Platte and the Laramie rivers. Respecting the construction of the definite article in such a context, *see, e.g., Dooley v. Penland*, 300 S.W. 9, 11 (Tenn. 1927). Moreover, the Court's treatment in tandem of the effects of the decree in *Wyoming v. Colorado* and of the compact between Colorado and Nebraska, demonstrates that the Court regarded the former as having apportioned the waters of the Laramie between Colorado and Wyoming just as completely as the latter apportioned the waters of the South Platte between Colorado and Nebraska. This is confirmed by paragraph XII of the decree which provides:

> This decree shall not affect:
>
> * * *
>
> (d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte;
>
> (e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

325 U.S. at 671.

After concluding that "the water of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, . . . and that the South Platte River was equitably distributed by compact between Nebraska ratified by the Congress in 1926," Special Master Doherty stated: "This conclusion takes into account the interests of all parties and no redistribution of the waters of those rivers should be undertaken in this suit." Report of Special Master Doherty, 8. He began his recommendations for the decree by stating that they em-

impede the releases which Basin is obligated to make from the Missouri Basin Power Project (Grayrocks) under its agreement with Nebraska, *et al.*, from reaching the North Platte. Nebraska makes no allegation to the contrary.

After the Missouri Basin Power Project was proposed, Nebraska brought suit in the United States District Court for the District of Nebraska against the Rural Electrification Administration (REA) and joined in a suit brought by others against the Corps of Engineers challenging, on environmental grounds, the issuance by the Corps of a 404 permit for the project and the undertaking of the REA to assist with the financing.[11] *Nebraska v. REA*, 12 Env't Rep. Cas.

---

braced the "water of the North Platte River and its tributaries, *except the Laramie River.*" *Id.* at 177 (emphasis supplied).

[11] Professor Tarlock has observed:

> The first major clash between the Endangered Species Act and water allocation arose when Nebraska discovered that downstream irrigators on the Platte River could be better protected under the wing of the endangered whooping crane than by litigating the allocation of the river under interstate compacts and the doctrine of equitable apportionment. Nebraska brought a 'defensive' suit to prevent utility companies from building the Grayrocks Dam on the North Platte River [sic]. By seeking to enjoin the construction of the dam under the Endangered Species Act in order to protect the endangered whooping crane, Nebraska used federal regulatory rights to achieve its principal purpose; protection of the interests of downstream Nebraska agricultural diversions. It proved easier to get water for this purpose than to reopen a 1945 equitable apportionment,

(BNA) 1156 (D. Neb. 1978), *judgment vacated and appeal dismissed*, 594 F.2d 870 (8th Cir. 1979). After protracted negotiations, Nebraska, Basin, and the other parties[12] entered into the settlement agreement of December 4, 1978, which prescribes conditions for water storage and releases in relation to the operation not only of the Missouri Basin Power Project, but of the Corn Creek project as well, should the latter ever be developed. The agreement was submitted to and approved by the United States Court of Appeals for the Tenth Circuit and the obligations it places on Basin were incorporated in a waiver for the project granted by the Endangered Species Committee (popularly referred to as the "God Group") established under the Endangered Species Act. *See* 16 U.S.C. § 1536(e)-(p).

The settlement agreement spells out not only the releases Basin must make from the Missouri Basin Power Project for the benefit of Nebraska, including releases during the non-irrigation season, but also the

---

although Nebraska was able to do this in 1987.

A. D. Tarlock, *Law of Water Rights and Resources* § 9.06[4][c] at p. 9-36 (Clark Boardman Co. 1990).

[12] The other parties to the settlement agreement are: the United States Department of Justice; the Corps of Engineers; the Rural Electrification Administration; the National Wildlife Federation; the Nebraska Wildlife Federation; the National Audubon Society; the Powder River Basin Resource Council; the Laramie River Conservation Council; the City of Lincoln, Nebraska; the Tri-State Generation and Transmission Association; and the Wyoming Municipal Power Agency. The agreement is reprinted in Wyo's Opposition to Neb's Motion for Leave To File Petition, A-24 through A-32 (Dec. 17, 1986).

obligations of Basin in the event the Corn Creek project is developed.[13]

Nebraska has conceded before the special master that the Missouri Basin Power Project has been operated in compliance with the settlement agreement. Neb's Brief in Support of Motion for Partial Summary Judgment, 112 (March 1, 1991). She has absolved the project of any violation of her alleged rights to Laramie water. She says: "It is not the Grayrocks Project itself that Nebraska complains of but rather Wyoming's present and threatened depletions of the minimum releases called for in the Settlement Agreement." *Id.* Apart from Wyoming's holding to her legal position that no water in the Laramie is apportioned to Nebraska by the decree in this case, Nebraska does not now contend, and certainly has made no showing (despite her reference to "present" depletions in the statement quoted immediately above), that Wyoming has done or is threatening to do anything that has resulted or might result in the reduction of the amount of Laramie water reaching the North Platte.[14]

---

[13] The settlement agreement makes provision for the operation of the Corn Creek project, should it ever be built, just as it does for the Missouri Basin Power Project. Moreover, the development of Corn Creek is problematical and the prospect of its ever being built is highly speculative and conjectural. In any event, by no stretch of language can its advent be termed "imminent" or even probable. Corn Creek has no Wyoming water rights, no contract with the Bureau of Reclamation for Glendo water (which would be essential), no 404 permit nor any other required federal permit, and no financing.

[14] Wyoming has shown by uncontroverted evidence that all of the other "projects" mentioned from time to time by Nebraska

Nebraska's proposition that the "regimen of the river," and her supposed downstream equities, are threatened by the refurbishment of Tri-State Dam is most curious. She does not allege that the 81,700 acre feet of water, whose passage through Tri-State she says was "a predicate of the Decree," Neb's proposed amended petition, 10 ¶ 35 (Oct. 9, 1991), no longer reaches Tri-State (much less that Wyoming has done anything to interfere with its doing so), but only that, since refurbishment of the dam, this water no longer leaks through it. But the dam is located in Nebraska, is operated by a citizen of Nebraska, and is subject to the control of Nebraska. Manifestly, water reaching Tri-State has to go somewhere in Nebraska. It cannot flow uphill back into Wyoming. Nebraska cannot hold Wyoming responsible for the actions of Nebraska's citizens for whom she here stands in *parens patriae*.

3. The Issues Posed by the Case As It Is Must Be Resolved Before Consideration Is Given To Allowing the Litigation of Others

The Court granted leave to Nebraska to commence this proceeding on the strength of her assurance that

---

as potential "threats" to her alleged rights have long since been abandoned or would not deplete North Platte flows. *See* third affidavit of Gordon W. Fassett, Wyoming's brief in opposition to Nebraska's motion to recommend, 23-29 (April 5, 1991). Nebraska has admitted that nothing that has been done in Wyoming since the decree was entered in 1945 has interfered with Laramie flows into the North Platte, except the construction of the Missouri Basin Power Project and the proposal of the Corn Creek project. But with respect to these projects she entered into the settlement agreement providing for the construction and operation of Grayrocks (which she admits has been adhered to) and of Corn Creek, should it ever get beyond the drawing board. Neb's Brief in Support of Motion for Partial Summary Judgment, 109-110 (March 1, 1991).

she sought only to enforce the decree as it stands and not to modify it in any way. The Court turned back a previous attempt by Nebraska to renege on this assurance.

The case based on the petition the Court granted Nebraska leave to file has been in litigation now for almost five years. Extensive discovery has been conducted, a massive documentary record has been compiled, the record of the earlier proceedings herein, as well as of those in *Wyoming v. Colorado*, has been exhaustively reviewed, and the issues framed by the petition have been addressed in many rounds of briefing and argument to the special master.

The special master is now preparing a report and recommended decision on a second round of motions for summary judgment, which he will soon file with the Court and which he has indicated will be subject to exceptions and briefing thereon by the parties and *amici*.[15]

---

[15] Denying Ohio's motion for leave to file an amended complaint in a case in a procedural posture analogous to the instant, the Court said:

> Accepted procedures for an ordinary case in this posture would probably lead us to conclude that the motion for leave to file should be granted, and the case would then proceed to trial or judgment on the pleadings. This, however, is not an ordinary case. It is one within the original and exclusive jurisdiction of the Court. Procedures governing the exercise of our original jurisdiction are not invariably governed by common-law precedent or by current rules of civil procedure. Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of

The issues that have been presented to the special master by the motions for summary judgment fall generally into four groups, tracking the allegations of Nebraska's petition, which are styled: 1) Laramie issues; 2) East-of-Tri-State issues; 3) Deer Creek issues; and 4) Inland Lakes issues.

Most, if not all, of these issues are now ripe for disposition and should be finally determinable by the Court upon review of the special master's report and recommendations and exceptions thereto. Although Basin submits that Nebraska's instant motion for leave to file an amended petition should be denied on the basis of her failure to make such a showing of injury or damage as the Court requires to permit one state to sue another for an apportionment of an interstate stream or to alter an apportionment previously made, any other action on Nebraska's motion, including its referral to the special master should the Court be disposed to do so, ought to be stayed pending disposition of the motions for summary judgment.

Basin submits that the issues posed by the case as it now stands should be resolved before considering the need for, or appropriateness of, permitting others to be litigated. The respective rights of the parties

---

> a brief in opposition, permit and enable us to dispose of matters at a preliminary stage. Our object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented. To this end, where feasible, we dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear.

Ohio v. Kentucky, 410 U.S. 641, 644 (1973) (citations omitted).

under the decree as it stands are issues in hot dispute, whose resolution, Nebraska acknowledges, "will have a significant affect on the non-irrigation season flows." Neb's Brief, 21 (Oct. 9, 1991). These issues are on the threshold of authoritative resolution in this case as now structured. Until the present rights of the parties are authoritatively determined, it would make little sense to commission a proceeding to consider their alteration.

Conclusion

For the foregoing reasons, Basin submits that Nebraska's motion for leave to file an amended petition must be denied.

Respectfully submitted,
EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
BASIN ELECTRIC POWER COOPERATIVE
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

November 12, 1991



(10)

No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

JOSEPH B. MEYER
Attorney General of Wyoming

DENNIS C. COOK
Senior Assistant Attorney General

Counsel of Record
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

November 12, 1991

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. QUESTIONS PRESENTED 1

II. STATEMENT OF THE CASE 2

III. STATEMENT OF FACTS 4

IV. SUMMARY OF ARGUMENT 12

V. ARGUMENT 14

A. The Supreme Court Exercises Its Original Jurisdiction With Extreme Caution and Only Where Absolutely Necessary 14

B. Nebraska Has Not Alleged Any Present Injury From Wyoming Actions That Would Warrant Reopening the Existing Apportionment 16

C. Nebraska's Tendered Claim for an Apportionment of Non-Irrigation Season Flows is Too Vague and Indefinite to Admit of Adjudication in the Original Jurisdiction 19

1. The Wyoming actions alleged in Nebraska's Amended Petition either are already being litigated before the Special Master or are too speculative and remote to warrant exercise of the Court's original jurisdiction 19

2. The injury alleged by Nebraska is dependent on the outcome of disputes pending in other intrastate and federal forums 24

D. The Relief Nebraska Now Seeks Against Wyoming is Identical to the Relief Sought in Nebraska's First Attempt to Amend Her Petition and Should Be Denied for the Same Reasons the First Amendment Was Denied 27

E. The New Allegations of Decree Violations in Count II of Nebraska's Amended Petition are Both Groundless and Untimely 28

F. Accepting the Amended Petition Would Cause Undue Prejudice to Wyoming, Colorado and the Other Litigants 31

VI. CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Arizona,
291 U.S. 286 (1934) 14, 15, 26

Arizona v. California,
283 U.S. 423 (1931) 16, 23, 26

Arizona v. California,
460 U.S. 605 (1983) 18, 22

Arizona v. New Mexico,
425 U.S. 794 (1976) 15, 28

California v. Nevada,
447 U.S. 125 (1980) 26

Carey v. Beans,
500 F. Supp. 580 (E.D. Pa. 1980),
aff'd 659 F.2d 1065 (3rd Cir. 1981) 32

Colorado v. Kansas,
320 U.S. 383 (1943) 17

Connecticut v. Massachusetts,
282 U.S. 660 (1931) 14

Foman v. Davis,
371 U.S. 178 (1962) 32

Glesenkamp v. Nationwide Mut. Ins. Co.,
71 F.R.D. 1 (N.D. Cal. 1974),
aff'd 540 F.2d 458 (9th Cir. 1976) 32

Idaho v. Oregon,
462 U.S. 1017 (1983) 14

Massachusetts v. Missouri,
308 U.S. 1 (1939) 15

Missouri v. Illinois,
200 U.S. 496 (1906) 14

Nebraska v. Rural Elec. Admin.,
12 E.R.C. 1156 (D. Neb. 1978),
appeal dismissed upon stipulation,
594 F.2d 870 (8th Cir. 1979) 21

Nebraska v. Wyoming,
325 U.S. 589 (1945) ..... *Passim*

Nebraska v. Wyoming,
345 U.S. 981 (1953) 8

Nebraska v. Wyoming,
483 U.S. 1002 (1987) 2

Nebraska v. Wyoming,
485 U.S. 931 (1988) 2, 28

Nebraska v. Wyoming,
492 U.S. 903 (1989) 2

New York v. Illinois,
274 U.S. 488 (1927) 15, 25

New York v. New Jersey,
256 U.S. 296 (1921) 14

Ohio v. Kentucky,
410 U.S. 641 (1973) 31

Ohio v. Wyandotte Chemicals Corp.,
401 U.S. 493 (1971) 14, 28

Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC,
876 F.2d 109 (D.C. Cir. 1989) 11

Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC,
No. 90-1397, (D.C. Cir. filed Aug. 3, 1990) ... 11

Texas v. New Mexico,
462 U.S. 554 (1983) 14

United States v. Nevada,
412 U.S. 534 (1973) 26

United States v. West Virginia,
295 U.S. 463 (1935) 16, 22

Verhein v. South Bend Lathe, Inc.,
598 F.2d 1061 (7th Cir. 1979) 32

Wyoming v. Colorado,
259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *vacated and new decree issued*,
353 U.S. 953 (1957) 21

Wyoming v. Colorado,
286 U.S. 494 (1932) 22

Zenith Radio Corp. v. Hazeltine Research, Inc.,
401 U.S. 321 (1971) 32

STATUTES AND COURT RULES

Act of Feb. 19, 1935, ch. 105, 1935 Wyo. Sess. Laws 154 (amending Wyo. Rev. Stat. § 122-117 (1931) and now codified at Wyo. Stat. § 41-4-317 (1977)) 30

Act of Feb. 24, 1945, ch. 153, 1945 Wyo. Sess. Laws 189 (effective Feb. 24, 1945) (now codified at Wyo. Stat. §§ 41-4-317 to 41-4-324 (1977)) 30

Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & Supp. I 1989) 12, 21

FED.R.CIV.P. 15(a) 32

National Environmental Policy Act, 42 U.S.C. §§ 4321-4370b (1988 & Supp. I 1989) 21

Neb. Rev. Stat. §§ 46-2,107 to 46-2,119 (1988 Reissue) 10

16 U.S.C. § 808(a) (1988) 11

ADMINISTRATIVE RULES AND PROCEEDINGS

18 C.F.R. § 16.3(a) (1991) 11

In re Application Nos. A-17004 through A-17009 of the Central Platte Natural Resources District (Nebraska Department of Water Resources filed July 25, 1990) 10, 25

In re Application Nos. A-15145, A-15146, A-15147 and A-15148 Assigned to the Catherland Reclamation District (Nebraska Department of Water Resources July 29, 1986), *set aside on other grounds, Catherland Reclamation District v. Lower Platte North Natural Resources District,* 230 Neb. 580, 433 N.W.2d 161 (1988) 10

Central Nebraska Public Power and Irrigation District, 39 FERC ¶ 61,378 (1987) 11

Central Nebraska Public Power and Irrigation District, 43 FERC ¶ 61,225 (1988) 11

MISCELLANEOUS

J. David Aiken, *New Directions in Nebraska Water Policy,* 66 NEB. L. REV. 8 (1987) 10

A. Bleed, *et al.,* University of Nebraska Conservation and Survey Division, *Economic, Environmental and Financing Optimization Analysis of Platte River Development Alternatives* (1986) 9

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

WYOMING BRIEF IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

I. QUESTIONS PRESENTED.

A. Whether Nebraska's second motion to amend her petition presents a case or controversy that is appropriate for the Court's original jurisdiction; and

B. Whether amendment of Nebraska's petition to assert new claims is appropriate when pending cross-motions for summary judgment on the claims in the original petition may dispose of the claims in the amended petition.

II. STATEMENT OF THE CASE.

Nebraska's original petition to enforce her apportionment of the North Platte River under the existing Decree[1] was filed more than five years ago on October 6, 1986. The matter was referred to Special Master Owen Olpin on June 22, 1987. *Nebraska v. Wyoming,* 483 U.S. 1002 (1987). On September 11, 1987, Wyoming filed with the Special Master a motion for summary judgment addressing Nebraska's claims of Decree violation. While Wyoming's summary judgment motion was pending before the Special Master, Nebraska filed, and the Court denied, Nebraska's first motion to amend. *Nebraska v. Wyoming,* 485 U.S. 931 (1988). Nebraska's first amended petition would have sought modification of the Decree to provide a new apportionment for instream uses in Nebraska.

The Special Master later denied Wyoming's motion for summary judgment in order to allow for development of the facts. *See* First Interim Report of Special Master, accepted for filing by the Court June 26, 1989, 492 U.S. 903 (1989). Although Wyoming believes the Special Master erred in not recommending the granting of Wyoming's summary judgment motion, Wyoming did not seek leave to file exceptions to the First Interim Report because the Court had not invited such exceptions and because the Special Master had expressly left open the possibility of summary disposition of the pending claims following additional discovery and development of facts.

---

1. *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953). The earlier litigation in this case culminating in the 1945 opinion and decree at 325 U.S. 589 will sometimes be referred to in this brief as *"Nebraska v. Wyoming (I)."*

Following extensive discovery, the States of Wyoming, Colorado and Nebraska, as well as the United States, filed cross-motions for summary judgment which are now pending before the Special Master. Like Wyoming's first motion for summary judgment, the pending cross-motions seek interpretation of the existing Decree as a matter of law. Those cross-motions were argued before the Special Master in June, 1991. The parties are now awaiting a report and recommendation from the Special Master to the Court for disposition of those motions.

The issues of Decree interpretation raised by the pending summary judgment motions are:

(1) Whether the existing Decree limits Wyoming's use of the Laramie River;

(2) Whether Nebraska's apportionment under the Decree includes the right to curtail Wyoming uses in favor of Nebraska uses below Tri-State Dam;

(3) Whether municipal use of the proposed Deer Creek Reservoir is part of Wyoming's apportionment pursuant to Paragraph X of the Decree;

(4) Whether Nebraska has raised sufficient facts to meet her burden of proving that Deer Creek Reservoir would violate her apportionment under the Decree; and

(5) Whether the Decree apportioned to Nebraska a right to store natural flow in the Inland Lakes.

While responses to the summary judgment motions were being briefed before the Special Master, Nebraska filed a "Motion to Recommend an Apportionment of Non-

Irrigation Season Flows" with the Special Master. In that pleading, Nebraska requested "that the Special Master recommend to the Court, as part of his report and recommendations in regard to the pending cross-motions for summary judgment, that the unapportioned, non-irrigation season natural flows of the North Platte River be apportioned among the States of Nebraska, Wyoming, and Colorado." Nebraska's Motion to Recommend an Apportionment of Non-Irrigation Season Flows at 6 (March 13, 1991). Nebraska accompanied that motion with neither a motion to amend her petition nor a new petition praying for such an apportionment of non-irrigation season flows. After briefing by the parties and *amici,* the Special Master denied that motion. Order of Special Master Owen Olpin, June 17, 1991.

III. STATEMENT OF FACTS.

Following unsuccessful attempts in the 1920's and early 1930's by Wyoming, Nebraska and Colorado to negotiate a compact apportioning the North Platte River, Nebraska brought suit in the Supreme Court in 1934 praying that "this court find and determine the equitable share of the waters of the North Platte River to which this complainant is entitled." Nebraska Bill of Complaint at 32-33, Article Fifteenth (October 1, 1934), *Nebraska v. Wyoming,* 325 U.S. 589 (1945). After 11 years of litigation, the Court was divided over the question of whether Nebraska had made out a case entitling her to *any* apportionment, much less the complete apportionment prayed for in the bill of complaint. *Id.,* 325 U.S. at 657 (J. Roberts, dissenting). The five-justice majority of the Court accepted the recommendation of Special Master Michael J. Doherty for an apportionment by means of limited injunctions. Those injunctions were tailored

to resolve the conflict arising in times of shortage among the particular irrigation uses presented by the states "by means of the imposition of a minimum of restriction." Report of Michael J. Doherty, Special Master at 122, *id.* ("Doherty Report").

Recognizing that Nebraska had proved no threat of injury except in years of very short water supply, Special Master Doherty recommended, and the Court adopted in Paragraph XIII of the Decree, a provision for retained jurisdiction to modify the Decree in response to changed conditions. The changed condition particularly contemplated by both Doherty and the Court was the "possibility of the passing of the present drouth cycle . . . which might justify the release of some or all of the restrictions . . ." in the Decree. Doherty Report at 10-11. *See also Nebraska v. Wyoming,* 325 U.S. 589, 620 (1945).

After reviewing extensive and conflicting evidence in which Nebraska claimed injury to uses all the way downstream to Grand Island on the Platte River, Special Master Doherty wrote:

> The conclusion is that Nebraska's claim for equitable apportionment of water originating above the Wyoming state line is in all events limited to the North Platte Project and State Line Canals and the lands supplied by them.[2]

Doherty Report at 96. The Court agreed with the Special Master:

---

2. "State Line Canals" is used to refer to the Farmers (Tri-State), Ramshorn, Mitchell, Gering and French Canals, all diverting near the state line at or above Tri-State Dam, except the now inactive Ramshorn Canal which diverted just below Tri-State Dam.

> We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State.

Nebraska v. Wyoming, 325 U.S. 589, 628 (1945). *See also id.* at 654-55.

Based on extensive evidence, both Special Master Doherty and the Court made specific findings of the reasonable water requirements of those Nebraska uses diverting at and above Tri-State. Doherty Report at 53-87, 196-253; *Nebraska v. Wyoming*, 325 U.S. 589, 648-49 (1945). The injunctions recommended by Special Master Doherty and adopted by the Court in the Decree were intended to protect those specific uses.

Although the injunctions in the Decree that operate outside the irrigation season are not as extensive as those that operate during the irrigation season, river flows during the non-irrigation season are part of the apportionment under the existing Decree. The North Platte River non-irrigation season flows addressed in Nebraska's motion to amend consist of four components: (1) return flows below Tri-State Dam, (2) return flows and minor gains between Guernsey Dam and Tri-State Dam, (3) Laramie River contributions and (4) inflows from above Guernsey Dam. Each component either is already at issue in the present case or is not threatened even under the allegations in Nebraska's Amended Petition.

Return flows below Tri-State Dam are totally a function of Decree-apportioned diversions during the irrigation season. Therefore, resolution of the pending issues

of the extent of Nebraska's apportionment during the irrigation season will resolve any issue regarding return flows below Tri-State.[3] Return flows between Guernsey Dam and Tri-State Dam likewise are controlled by the irrigation season diversions. Moreover, any return flows accruing to the river in the non-irrigation season below Guernsey Dam will flow to Nebraska because Wyoming has neither the present ability nor any proposal to capture such flows for new uses. The Laramie River also flows into the North Platte River downstream of Guernsey Dam. As Wyoming explains *infra* at 20-23, the respective rights of the states to the Laramie River are presently at issue before the Special Master. The final component of winter flows — water from above Guernsey Dam — is expressly controlled by Paragraph III of the Decree which orders the priority of storage in the federal reservoirs on the North Platte.[4]

Development of the North Platte River in Wyoming has been limited since entry of the Decree. The only significant development of the North Platte River in Wyoming since entry of the Decree is already currently before the Court on Nebraska's pending petition challenging Grayrocks Reservoir and the proposed Deer Creek Reser-

3. The Director of the Nebraska Department of Water Resources admitted the self-evident proposition that protection of Nebraska's decreed apportionment for uses diverting at and above Tri-State Dam will automatically protect downstream uses of return flows from those Decree-apportioned uses. Deposition of J. Michael Jess, Vol. I at 109-10, 113-14 (November 28, 1989).

4. The only flows past Guernsey Dam that are not controlled by the existing Decree are the periodic surplus flows in excess of the water rights of the federal reservoirs. The right of proposed projects such as Deer Creek Reservoir to capture such surplus flows is presently at issue in the claims pending before the Special Master.

voir and Corn Creek Project.[5] Moreover, Wyoming has not yet used all the water apportioned to her under the Decree and the unused flows have reached Nebraska. In *Nebraska v. Wyoming (I),* it was determined that 60,000 acres would be irrigated under the Kendrick Project (Seminoe and Alcova Reservoirs), resulting in an irrigation season depletion (diversion minus returns) of 122,000 acre-feet and an annual depletion of 72,000 acre-feet. Doherty Report at 137-38; *Nebraska v. Wyoming,* 325 U.S. 589, 602 (1945). Wyoming has irrigated less than 24,250 acres under that project resulting in depletions of less than half of what was contemplated by the Court in 1945. In addition, Wyoming users have contracted for less than 5,000 acre-feet of the 15,000 acre-feet of Glendo Reservoir water apportioned to Wyoming under the 1953 stipulation for modification of the Decree. *Nebraska v. Wyoming,* 345 U.S. 981 (1953).

Since 1945, Nebraska's canals diverting in the Whalen to Tri-State Dam section of the river have diverted substantially in excess of the water requirements found by Special Master Doherty.[6] Nebraska's own records show that diversions in the Tri-State Dam to Bridgeport section of the river since 1945 also significantly exceeded the requirements found by Special Master Doherty for

5. Glendo Reservoir was built and has been operated pursuant to the 1953 stipulated amendment of the Decree, *Nebraska v. Wyoming,* 345 U.S. 981 (1953).

6. This fact is established without dispute in affidavits filed by both Nebraska and Wyoming with their motions for summary judgment. Affidavit of Bern S. Hinckley, Wyoming Second Motion for Summary Judgment (February 22, 1991); Affidavit of Ann S. Bleed, Nebraska Motion for Partial Summary Judgment (March 1, 1991).

those canals.[7] Furthermore, the water supply available for Lake McConaughy has exceeded the supply projected at the time of *Nebraska v. Wyoming (I)*. Special Master Doherty concluded that uses below Lake McConaughy (Kingsley Dam) had no "equitable claim upon water from the upper states." Doherty Report at 99. In reaching that conclusion, he cited and relied on U.S. Exhibit Nos. 186 to 191, including U.S. Exhibit No. 189, a graph depicting the average annual flow from 1930 to 1940 at Martin, two miles above Kingsley Dam, of 1,049,000 acre-feet. Doherty Report at 96-99. Nebraska admits that the flow of the North Platte River available at Kingsley Dam since 1946 has averaged 1,105,000 acre-feet per year, 5% more than Special Master Doherty had determined was sufficient to meet the uses east of Kingsley. Amended Petition at 5, para. 12.[8]

Despite Nebraska's statement that "all water which currently flows into Nebraska is important to support minimum stream flows for the Platte River" (Nebraska Brief at 19), Nebraska sees no need to limit future depletions to the North Platte or Platte Rivers in Nebraska in order to preserve such instream flows. One study for Nebraska concluded that an additional 400,000 acre-feet of water could be developed under proposed projects such as the Prairie Bend and Landmark Projects from the central Platte and above, even after providing some level of minimum instream flows for wildlife habitat. A. Bleed,

---

7. Second Affidavit of Bern S. Hinckley, Figure 1, Wyoming Brief [before Special Master Olpin] in Opposition to Nebraska's Motion to Recommend an Apportionment of Non-Irrigation Season Flows at 38 (April 5, 1991).

8. Nebraska's Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims and Nebraska's Brief in Support of that motion are cited herein as "Amended Petition" and "Nebraska Brief" respectively.

et al., University of Nebraska Conservation and Survey Division, *Economic, Environmental and Financing Optimization Analysis of Platte River Development Alternatives* (1986). Further, in 1986, the Nebraska Department of Water Resources issued a permit for diversion and transportation entirely out of the Platte River basin of about 125,000 acre-feet above the reach of the Platte River that Nebraska says is important to wildlife habitat. *See In re Application Nos. A-15145, A-15146, A-15147 and A-15148 Assigned to the Catherland Reclamation District* (Nebraska Department of Water Resources July 29, 1986), *set aside on other grounds, Catherland Reclamation District v. Lower Platte North Natural Resources District,* 230 Neb. 580, 433 N.W.2d 161 (1988).[9]

In 1984, Nebraska first enacted a statute providing for the appropriation of minimum instream flows in Nebraska for wildlife, environmental and recreational purposes. Neb. Rev. Stat. §§ 46-2,107 to 46-2,119 (1988 Reissue). However, it was not until 1990 that the State of Nebraska proceeded at the request of one of her political subdivisions to determine the need for an instream flow for the Platte River. That application is pending before the Nebraska Department of Water Resources. *In re Application Nos. A-17004 through A-17009 of the Central Platte Natural Resources District* (Nebraska Department of Water Resources filed July 25, 1990). *See* Nebraska Brief at 33-34.

---

9. Professor J. David Aiken of the University of Nebraska describes how serious depletion of groundwater from uncontrolled pumping for irrigation of 6.2 million acres in Nebraska has led to a number of proposals like Catherland to "rescue" irrigators from declining groundwater supplies. J. David Aiken, *New Directions in Nebraska Water Policy,* 66 NEB. L. REV. 8, 43-48 (1987).

At the same time, the Federal Energy Regulatory Commission ("FERC") is considering renewal of the hydroelectric licenses for Kingsley Dam and related power facilities.[10] The central issue in that proceeding is whether, and the extent to which, the renewed licenses ought to be conditioned on certain releases for the maintenance of instream flows for wildlife habitat. Of particular concern is whether certain minimum flows are required to avoid harming the designated critical habitat of the endangered whooping crane far downstream from Kingsley Dam on the Platte River. Various environmental groups have urged FERC to impose such conditions. The applicants for the renewed licenses, the Central Nebraska Public Power and Irrigation District ("CNPPID") and the Nebraska Public Power District ("NPPD") have challenged the biological necessity for such flows to maintain wildlife habitat. FERC is in the process of complet-

---

10. The Kingsley Dam relicensing process began in 1984 when the Central Nebraska Public Power and Irrigation District ("CNPPID") and the Nebraska Public Power District ("NPPD") filed relicensing applications pursuant to FERC regulations. *See* 18 C.F.R. § 16.3(a) (1991). FERC initially rejected the relicense applications for their failure to assess the impact of the projects on whooping crane habitat. *Central Nebraska Public Power and Irrigation District*, 39 FERC ¶ 61,378 at 62,222-23 and n.4 (1987). Since 1987, the projects have been operating under annual licenses pending the issuance of the permanent licenses. *See* 16 U.S.C. § 808(a) (1988). Studies are continuing concerning the need for wildlife protective conditions in the permanent licenses. *See, e.g., Central Nebraska Public Power and Irrigation District*, 43 FERC ¶ 61,225 at 61,580-81 (1988). The issue of the need for interim conditions in the annual licenses is presently on appeal for the second time before the D.C. Circuit Court of Appeals. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, No. 90-1397 (D.C. Cir. filed Aug. 3, 1990). *See also Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C. Cir. 1989) (cause remanded to FERC to determine whether substantial evidence existed to require interim conditions in annual licenses for maintenance of instream flows).

ing an environmental impact statement addressing the issue, among others, of whether conditions to maintain instream flows should be included in the permanent licenses of CNPPID and NPPD. FERC will not proceed with the license applications until the impact statement is completed.

Also on the federal level, the U.S. Bureau of Reclamation has begun consultation with the U.S. Fish and Wildlife Service under Section 7 of the Endangered Species Act to assess the impacts of the reclamation projects in Colorado, Wyoming and Nebraska on the North Platte and South Platte Rivers on endangered and threatened species habitat in the Platte River in central Nebraska. *See* Nebraska Brief at 35.

It is apparent throughout Nebraska's motion, amended petition and brief that the *possibility* that Lake McConaughy, the North Platte Project in Nebraska, or other proposed future projects in Nebraska might be required to maintain instream flows is the driving force behind Nebraska's present motion to amend, as it was behind the first such motion.

IV. SUMMARY OF ARGUMENT.

This is the second time that Nebraska has filed a motion to amend her petition while a summary judgment motion was pending. Nebraska's present motion is no more than an attempt to accomplish indirectly that which the Court denied her leave to do directly with the first motion to amend. Quite simply, Nebraska fears that in the future Kingsley Dam, the North Platte Project, or proposed Nebraska water projects on the Platte River will be required to maintain certain instream flows for

wildlife habitat in central Nebraska. In mere anticipation of such an outcome in pending federal and state administrative proceedings, Nebraska would ask the Court to reapportion the North Platte River by imposing new injunctions against present and future uses in Wyoming.

Principles of finality and certainty should compel the Court to deny Nebraska's attempt to upset the existing apportionment on the basis of the allegations in the Amended Petition. Furthermore, given the caution with which the Court exercises its original jurisdiction, the allegations in Nebraska's Amended Petition are too vague, indefinite and speculative to justify exercise of that jurisdiction.

To accept Nebraska's Amended Petition would be to engage the Court in factual litigation over the need for and quantification of instream flows for wildlife habitat in central Nebraska, the very issue the Court avoided in denying Nebraska's first motion to amend. The Court should not undertake such complex, factual litigation where, as here, the same issues are being addressed in other, more appropriate forums.

The states are in sharp disagreement over construction of the existing Decree and definition of the extent of Nebraska's apportionment under the Decree. The parties have spent considerable time and money preparing those Decree interpretation issues for resolution in the pending motions for summary judgment. Nebraska should not be permitted to avoid or postpone resolution of the pending issues by amending her petition. Those issues must be resolved before the Court considers entertaining any claim to modify, supplement or replace the apportionment under that Decree.

V. ARGUMENT.

A. The Supreme Court Exercises Its Original Jurisdiction With Extreme Caution and Only Where Absolutely Necessary.

This Court will not exercise the extraordinary power of its original jurisdiction to enjoin the activities of one sovereign state at the instance of another unless injury of a serious magnitude is shown by clear and convincing evidence. *Connecticut v. Massachusetts,* 282 U.S. 660 (1931); *Idaho v. Oregon,* 462 U.S. 1017 (1983); *New York v. New Jersey,* 256 U.S. 296, 309 (1921).

The caution with which the Court exercises its original jurisdiction serves two purposes. First is a recognition of the sovereign dignity of the states that come before it, particularly of the state that would be subject to the Court's injunction. *See Missouri v. Illinois,* 200 U.S. 496, 520-522 (1906); *New York v. New Jersey,* 256 U.S. 296 (1921). Second, and at least as important to the Court, is a recognition of the limits of this Court's docket and its reluctance to engage in complex and technical factual issues, particularly where those issues may be better resolved in another forum. *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). For both purposes, the Court has reserved "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Texas v. New Mexico,* 462 U.S. 554, 570 (1983).

As the Court said in *Alabama v. Arizona,* 291 U.S. 286, 291-292 (1934):

> [A] state asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this Court with the action of a state. *Missouri v. Illinois,* 200 U.S. 496; *New York v. New Jersey,* 256 U.S. 296; *North Dakota v. Minnesota,* 263 U.S. 365. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent.[11]

Nebraska suggests that a well-pleaded complaint in the ordinary sense under the Federal Rules of Civil Procedure should be accepted by the Court as a matter of course. However, the Court is not constrained to merely analyze the sufficiency of the pleading in the same manner as a lower federal court would under FED.R.CIV.P. 12. Rather, the Court has discretion to decline cases that, although "well-pleaded," are otherwise inappropriate for its original jurisdiction. *See Arizona v. New Mexico,* 425 U.S. 794 (1976); *Massachusetts v. Missouri,* 308 U.S. 1 (1939).

The Court will not exercise its original jurisdiction over claims that involve only a future and speculative threat of injury. *New York v. Illinois,* 274 U.S. 488, 489

---

11. Nebraska tries to distinguish *Alabama v. Arizona,* 291 U.S. 286 (1934), as having "no precedential effect on the clearly discernible impacts arising from the competition for interstate water." Nebraska Brief at 31, n.14. To the contrary, *Alabama v. Arizona* is on point precisely because Nebraska's Amended Petition identifies no clearly discernible impacts but only hypothetical and speculative allegations of injury that are not ripe for decision.

(1927) (dismissing a claim by New York for an injunction against the use of Great Lakes water that New York claimed would interfere with her use of the waters of the Niagara and St. Lawrence Rivers for power development, where the complaint did "not show that there is any present use of the waters for such purposes which is being or will be disturbed; nor that there is any definite project for so using them which is being or will be affected"). *See also Arizona v. California,* 283 U.S. 423, 462 (1931) (dismissing bill of complaint "because it is based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions"); *United States v. West Virginia,* 295 U.S. 463, 475 (1935) (mere assertion of a right to build a dam did not constitute an imminent threat to the government's control of navigation).

It is true that a controversy between states involving competing present or imminent uses of an overappropriated and water-short interstate stream is generally appropriate for the exercise of the Court's original jurisdiction. However, Nebraska fails to show that this is such a case. Rather, the Amended Petition alleges only potential conflicts that are not ripe for adjudication in the original jurisdiction.

B. Nebraska Has Not Alleged Any Present Injury From Wyoming Actions That Would Warrant Reopening the Existing Apportionment.

Nebraska's Amended Petition falls far short of alleging facts that, if proved, would establish any present injury to Nebraska's apportionment or other equitable interests. The Court wrote in 1945 that "equitable appor-

tionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming,* 325 U.S. 589, 628 (1945). Nebraska herself alleges that since 1946 she has received an abundant supply of such direct flow past Tri-State Dam, on the order of 150,000 acre-feet each irrigation season in excess of her entitlement under the existing apportionment. Nebraska Brief at 11.[12]

Although the Court made specific findings in 1945 concerning the reasonable water requirements of the Nebraska lands served by diversions between Whalen and Tri-State Dam, Nebraska does not dispute the fact that her canals have diverted far more than those requirements since 1945. Rather, she asserts now that she is entitled to the continued flow of such surpluses. Additionally, Nebraska's own allegations show that the supply available for Lake McConaughy has been substantially greater than the supply anticipated by Special Master Doherty. *See* Statement of Facts, *supra,* at 9.

In *Colorado v. Kansas,* 320 U.S. 383, 400 (1943), the second attempt by Kansas to convince the Court to limit Colorado's use of the Arkansas River was denied because

12. The "retrofit" of Tri-State Dam that Nebraska says threatens to cut off these flows was performed by one of Nebraska's own water users, the Farmers Irrigation District, in order to more efficiently use the supplies available at the dam. Nebraska's suggestion that the repair of Tri-State Dam will cut off the flows past Tri-State Dam is very misleading. The majority of such flows since 1946 occurred in the very wet years when large, uncontrollable surplus flows passed Tri-State Dam. In any event, in light of the Court's determination in 1945 that Nebraska was not entitled to *any* direct flow past Tri-State Dam, Nebraska has no ground to complain about improvements made for the sake of efficiency and better water management by one of her own water users.

Kansas failed to prove that Colorado had materially increased her depletions to the substantial injury of Kansas since the earlier litigation. Here, Nebraska, like Kansas, is back before the Court seeking new injunctions against the upstream state having once litigated the matter. However, in this case, the Court previously apportioned the river and Nebraska has not even *alleged* facts that would demonstrate increased depletions to the injury of Nebraska's equitable apportionment.

Nebraska characterizes Count I of the Amended Petition as a claim for apportionment of "previously unapportioned non-irrigation season flows" as if she were asking the Court to draw a new apportionment on a clean slate. But the slate is not clean. There is an existing Decree and an existing apportionment that was intended to describe all of Nebraska's rights to demand natural flow of the North Platte River from Wyoming. Nebraska now seeks to reapportion the North Platte by attempting to reopen that Decree to impose new injunctions on Wyoming which the Court previously found unnecessary. The importance of finality and certainty compels the Court to hold Nebraska to a high burden in seeking to reopen the Decree. *Arizona v. California*, 460 U.S. 605 (1983).

Nebraska urges the Court to exercise its retained jurisdiction under the Decree to consider "changed conditions" since entry of the Decree. However, she alleges neither changed conditions that threaten her apportionment under the existing Decree nor changed conditions that would justify a reapportionment to enlarge her share. The only changed condition is that Wyoming has not yet fully used her apportionment while Nebraska has received far more than her share of the river since 1945.

There is simply no reason for the Court to reopen the litigation to consider new and more limiting injunctions on Wyoming at this time. The Court should instead encourage expeditious resolution of the pending claims to enforce the existing apportionment.

C. Nebraska's Tendered Claim for an Apportionment of Non-Irrigation Season Flows is Too Vague and Indefinite to Admit of Adjudication in the Original Jurisdiction.

In Count I of the Amended Petition, Nebraska seeks a new or modified apportionment in effect to enjoin all new depletions in Wyoming during the non-irrigation season. However, neither the actions of Wyoming that Nebraska complains of nor the injury Nebraska fears are detailed sufficiently in the Amended Petition to meet the threshold showing of imminent and serious injury required to invoke this Court's original jurisdiction.

1. The Wyoming actions alleged in Nebraska's Amended Petition either are already being litigated before the Special Master or are too speculative and remote to warrant exercise of the Court's original jurisdiction.

Nebraska describes the Wyoming actions that she complains of in Count I of the Amended Petition as follows:

> The current and imminent actions of the State of Wyoming, including the *pending claims before the Court,* as well as Wyoming's *claimed but unspecified right to develop future uses,* infringe upon

> Nebraska's equitable share of the North Platte River during the non-irrigation season.

Amended Petition at 10, Count I, ¶ 37 (emphasis added).

"Pending claims before the Court" apparently is a reference to the pending summary judgment motions in which Wyoming argues that Nebraska's apportionment of water from Wyoming under the 1945 Decree was limited to the water found by the Court to be reasonably necessary for the uses supplied by diversions at and above Tri-State Dam.[13] Nebraska's Amended Petition alleges that the legal position advanced by Wyoming on that issue violates Nebraska's existing apportionment and threatens Nebraska's use of what she calls "unapportioned, non-irrigation season flows." Nebraska's apparent fear of an adverse ruling on the legal issues now pending before the Special Master is no ground for amending her petition at this time.

Likewise, Nebraska's complaint about "Wyoming's claimed but unspecified right to develop future uses" does not show an imminent threat that should move this Court to exercise its original jurisdiction. For example, with respect to the Laramie River, the only specific projects

---

13. Nebraska characterizes Wyoming's position as trying to limit Nebraska's diversions between Guernsey Dam and Tri-State Dam to "arbitrary" amounts. Amended Petition at 8, para. 24e. There is nothing arbitrary about Special Master Doherty's detailed findings of the water requirements that were made only after painstaking analysis of extensive evidence and were expressly approved by the Court. Doherty Report at 53-87, 196-253; *Nebraska v. Wyoming*, 325 U.S. 589, 648-49 (1945). Those very requirements that Nebraska characterizes as arbitrary were adopted in Paragraph IV of the Decree as fixed "diversion limitations in second feet and seasonal limitations in acre feet" for the Nebraska State Line Canals. *Id.*, 325 U.S. at 667.

that Nebraska identifies are Grayrocks Reservoir, which began operating in 1981, and the potential Corn Creek Project. Both projects are already at issue in the pending case. The pending summary judgment motions address the issue, among others, of whether, in the Grayrocks Settlement Agreement,[14] Nebraska gave up her right to argue that the use of Laramie River water by Grayrocks Reservoir or the Corn Creek Project violates her equitable apportionment. Again, allowing Nebraska's Amended Petition would only delay and prejudice resolution of those issues on the pending motions for summary judgment.

Beyond the allegations concerning Grayrocks Reservoir and the Corn Creek Project, Nebraska's only claim with respect to the Laramie River is that she is injured by Wyoming "claiming the right to dry up the Laramie River." Amended Petition at 7, para. 24b.[15] The pend-

---

14. The Grayrocks Settlement Agreement ended litigation in 1978 brought by Nebraska and several environmental groups to stop construction of Grayrocks Reservoir on the ground that the U.S. Army Corps of Engineers and the Rural Electrification Administration had violated the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370b (1988 & Supp. I 1989) (current version), and the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & Supp. I 1989) (current version), in granting approvals for the project. *Nebraska v. Rural Elec. Admin.*, 12 E.R.C. 1156 (D. Neb. 1978), *appeal dismissed upon stipulation*, 594 F.2d 870 (8th Cir. 1979). Under that agreement, the operator of the reservoir, Basin Electric Power Cooperative, is obligated to maintain certain year-round minimum flows at the mouth of the Laramie River. The settlement agreement is reproduced at Appendix A-24 to A-32 of Wyoming Brief in Opposition to Motion for Leave to File Petition, December 17, 1986.

15. Although there is no threat "to dry up the Laramie River," Wyoming does believe her right to use Laramie River water is unrestricted under the plain language of this Court's decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *vacated and new decree issued*, 353 U.S. 953 (1957) ("the State of Wyo-

ing summary judgment motions again address the issue of whether the decrees in *Wyoming v. Colorado* and *Nebraska v. Wyoming (I)* effectively apportioned all the Laramie River to Colorado and Wyoming. Resolution of that issue could completely dispose of Nebraska's claim to the Laramie River.

Even if the Laramie River had not been fully apportioned between Colorado and Wyoming, Wyoming's claim to the Laramie would not raise a present dispute for resolution in the original jurisdiction. In *U.S. v. West Virginia,* 295 U.S. 463 (1935), the United States filed a bill of complaint taking issue with West Virginia's claim that she had the right and the power to construct a dam across the Ohio River notwithstanding the federal government's power over navigable waters. In dismissing the United States' bill of complaint, the Court said:

> The sovereign rights of the United States to control navigation are not invaded or even threatened by mere assertions . . . . The control of navigation by the United States may be threatened by the imminent construction of the dam, but not by permission to construct it.

---

ming . . . shall have the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado"). Although Nebraska raised and litigated a claim for apportionment of the Laramie River in *Nebraska v. Wyoming (I),* the Court recognized that the Laramie River had been previously apportioned between Colorado and Wyoming and declined to apportion any of the Laramie River to Nebraska, either in or out of the irrigation season. *Nebraska v. Wyoming,* 325 U.S. 589, 592 n.1 (1945). As Wyoming argues in her pending summary judgment motion, the principle of finality underlying the doctrine of *res judicata* precludes relitigation of Nebraska's claim to an apportionment of the Laramie River. *See Arizona v. California,* 460 U.S. 605, 625-26 (1983); *Wyoming v. Colorado,* 286 U.S. 494, 507 (1932).

295 U.S. at 475. *See also Arizona v. California,* 283 U.S. 423, 462-463 (1931) (failure to allege "definite physical acts by which [the defendant] is interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions . . ." was cause for dismissal of Arizona's bill of complaint).

The other claims tendered by Nebraska in Count I of its Amended Petition likewise fall far short of raising issues that should move this Court to exercise its original jurisdiction. With respect to proposed construction on the tributaries between Pathfinder and Guernsey in Wyoming, it has been clearly shown that Deer Creek Reservoir is the only proposed project.[16] Again, the question of whether the construction and operation of Deer Creek Reservoir will violate the Decree or injure Nebraska's equitable apportionment under the Decree is before the Special Master on Wyoming's motion for summary judgment. Likewise, the question of whether Nebraska's decreed apportionment includes *any* right to store natu-

16. In the Nebraska Brief, but not in her Amended Petition, Nebraska lists the names of what she terms "numerous water development projects in Wyoming." Nebraska Brief at 20. Without including any specific allegation in the Amended Petition, Nebraska suggests that the listed items constitute a significant threat of new depletions to the North Platte River. The suggestion is misleading. Many of the listed items are studies aimed at improving the efficiency of water use, including the importation of new sources into the North Platte basin. Others are old studies of potential projects that have been given no serious consideration since the 1960's or 1970's. Still others are projects for the improvement of municipal water delivery systems that have already been completed. It has been necessary for Wyoming and its water users to commit substantial funding toward improving the efficiency of use of the North Platte partly because the injunctions in the Decree restrict that use. In contrast, Nebraska has enjoyed abundant supplies since entry of the Decree and has committed little toward more efficient use of her available resources.

ral flow in the Inland Lakes without a Wyoming permit is also pending before the Special Master on the summary judgment motions. In short, the Wyoming actions that Nebraska complains of in Count I of the Amended Petition all are presently at issue in the pending claims before the Special Master or are too speculative and indefinite to warrant exercise of this Court's original jurisdiction.

2. The injury alleged by Nebraska is dependent on the outcome of disputes pending in other intrastate and federal forums.

Boiled down, Nebraska's claim for a new apportionment seeks to enjoin new Wyoming water uses in the North Platte basin because Nebraska fears that all the water presently crossing the state line might be needed in the future to satisfy uses that are competing with each other in Nebraska. The conflict between instream uses for wildlife habitat in the central Platte and upstream consumptive uses for irrigation and electric power generation in Nebraska is at the heart of Nebraska's injury claims.[17]

Nebraska points out that Kingsley Dam, which forms Lake McConaughy, is the "structure through which all

17. In this regard, Nebraska's agenda is identical to that of the environmental groups that have sought intervention in this case. Neither Nebraska nor those environmental groups are content to allow the question of the need for flows or a quantification of flows for instream wildlife purposes to take place in an appropriate forum before seeking further injunctions against Wyoming. Counsel for the Audubon Society described the strategy as to "Let [the water] all get downstream to Nebraska and then we'll worry about the details." June 7, 1991, Hearing Before Special Master on Summary Judgment, Transcript at 177.

subsequent downstream flows are controlled." Nebraska Brief at 10. The Federal Energy Regulatory Commission ("FERC") is presently considering applications to relicense the hydropower facilities associated with Kingsley Dam. (*See* Statement of Facts, *supra,* at 11-12.) Nebraska fears that the new licenses will be conditioned on minimum releases for the maintenance of instream flows at downstream wildlife habitat with a resulting reduction in the amount of water stored in Lake McConaughy and available for irrigation and power generation at Kingsley Dam and below. In anticipation of such a result, the Amended Petition would pray the Court to limit future use upstream in Wyoming.

In a related proceeding, the Central Platte Natural Resources District, a political subdivision of the State of Nebraska, seeks an instream flow water right under Nebraska law for the central Platte in the minimum amount necessary to maintain certain environmental values, including wildlife habitat. *In re Application Nos. A-17004 through A-17009 of the Central Platte Natural Resources District* (Nebraska Department of Water Resources filed July 25, 1990). Although the standard by which that application will be judged is the Nebraska statute, the factual issue of the biological necessity of minimum instream flows for wildlife habitat is likewise being adjudicated there.

The mere possibility of an outcome in those pending proceedings adverse to the interests of Lake McConaughy and its users cannot be the ground for invoking the Court's original jurisdiction, particularly where the Wyoming actions complained of are so uncertain. In *New York v. Illinois,* 274 U.S. 488, 489-490 (1927), the Court would not hear New York's complaint of injury to the possible

future use of the St. Lawrence River for hydropower purposes where such future use was uncertain and speculative. Likewise, Nebraska's claim of injury in mere anticipation of a certain outcome in the pending FERC proceeding and state water right proceeding does not merit the exercise of this Court's original jurisdiction. *See also Arizona v. California,* 283 U.S. 423, 463-64 (1931).

Wyoming agrees with Nebraska that this Court alone has the power to adjust its earlier apportionment of the North Platte River. However, until the various federal and intrastate proceedings involving instream flows for wildlife habitat have run their course, it is premature to speculate whether Nebraska's apportionment under the existing Decree is sufficient to satisfy the competing uses in Nebraska, whether the existing apportionment is no longer equitable, or whether any future use in Wyoming might cause Nebraska substantial harm. For political reasons Nebraska may consider it more convenient for the Court to resolve the intrastate conflict between instream and consumptive uses here. However, the Court should not exercise its original jurisdiction for the mere convenience of a party. *See California v. Nevada,* 447 U.S. 125 (1980). Rather, original jurisdiction is necessarily reserved for addressing only those cases or controversies that meet the strict standards the Court has laid down. *Alabama v. Arizona,* 291 U.S. 286 (1934); *United States v. Nevada,* 412 U.S. 534 (1973).

D. The Relief Nebraska Now Seeks Against Wyoming is Identical to the Relief Sought in Nebraska's First Attempt to Amend Her Petition and Should Be Denied for the Same Reasons the First Amendment Was Denied.

Despite Nebraska's earnest assurance that her second motion to amend is not like her first, which the Court denied, the two bear only cosmetic differences. In her first amended petition, Nebraska requested *modification* or interpretation of the existing Decree to include protection of wildlife habitat as well as irrigation uses. Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree at 4-5, paras. 7, 8 (January 11, 1988). In the second Amended Petition, Nebraska requests an apportionment of non-irrigation season flows for the protection of those same uses. Although the language of the two amended petitions differs, the relief Nebraska would now seek against Wyoming is identical to the relief sought in her first amended petition — to freeze all use of the North Platte River in Wyoming. More importantly, the driving force behind both motions is the same assertion that "all water which currently flows into Nebraska is important to support minimum stream flows for the Platte River." Nebraska Brief at 19.

If the Court accepts Nebraska's Amended Petition, it will embark upon an extremely expensive and time-consuming trial of the factual question of whether, or the extent to which, instream flows in the central Platte River are essential to endangered species and other wildlife habitat at a time when both state and federal administrative proceedings are addressing that same question. To accept Nebraska's Amended Petition also would engage the Court in complex water planning and policy

issues that are better left to the states and the federal regulatory agencies in the first instance. Those are the very issues that this Court avoided by denying Nebraska's first motion for leave to amend. *Nebraska v. Wyoming,* 485 U.S. 931 (1988).

This Court is best suited to function in its role as the appellate court of last resort and not as a trial court for the purpose of trying such complex, technical issues. *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). The Court is also particularly reluctant to take on such factual issues where they may be resolved in other, more appropriate forums. *See Arizona v. New Mexico,* 425 U.S. 794 (1976). Because those issues are being addressed in the context of state and federal administrative proceedings created specifically to deal with them, the Court is justified in declining to take on such complex, factual litigation.

E. The New Allegations of Decree Violations in Count II of Nebraska's Amended Petition are Both Groundless and Untimely.

The relief Nebraska seeks in Count II of the Amended Petition is the same as she seeks in the pending claims — an injunction against potential Wyoming depletions of the river in violation of Nebraska's claimed apportionment under the Decree. Resolution of the pending summary judgment motions should dispose of some, if not all, of Nebraska's new allegations, because those motions address the controlling legal issue — the extent of Nebraska's apportionment under the existing Decree. After the present claims are resolved, any party would be free to seek leave to amend the pleadings or to bring new claims if such claims are properly supported. If that should

happen, the Court's decision interpreting the existing Decree would help focus the issues more sharply.

The claims in Count II of the Amended Petition appear calculated to delay and prejudice resolution of Nebraska's original petition. At the same time, they lack credibility and substance. Had Nebraska been concerned about the matters described in Count II, she would have raised them in her original petition or brought them to Wyoming's attention earlier. Nebraska's statement that she tried to resolve those matters with Wyoming before filing the Amended Petition is false. Nebraska never raised those issues with Wyoming,[18] although doing so might have provided an opportunity to resolve them and avoid needless litigation.

Nebraska seems to believe that the Court would apply a more relaxed standard in determining whether to accept a petition alleging violation of the existing Decree than it would apply to a claim for a new apportionment. In Count II of the Amended Petition, Nebraska tries to create some additional, colorable claims of Decree violations in the hope that the Court would accept the entire Amended Petition under a lesser standard. Even assuming a lesser standard would apply to such claims, the claims in Count II are either patently groundless or too vague to provide a basis for exercise of the Court's original jurisdiction.

---

18. The possible exception is that Nebraska registered her opposition to annual water supply contracts entered into between the U.S. Bureau of Reclamation ("USBR") and Pacificorp (formerly Pacific Power & Light) for temporary use of Glendo Reservoir storage. However, Nebraska's Amended Petition is so vague that it is impossible to tell if the USBR/Pacificorp temporary contract is the subject of Count II.

For example, the first of the new allegations asserts a violation of the Decree from operation of a 1945 Wyoming statute which became law even before the Decree was entered. The statute in question confirmed the right of all irrigation water rights then existing to divert up to an additional one cubic foot per second (cfs) per 70 acres from surplus water available after satisfaction of existing rights to one cfs per 70 acres. Act of Feb. 24, 1945, ch. 153, 1945 Wyo. Sess. Laws 189 (effective Feb. 24, 1945) (now codified at Wyo. Stat. §§ 41-4-317 to 41-4-324 (1977)). Nebraska fails to point out that the statute she cites was preceded by another statute that broadly provided for diversions of "surplus water" in excess of one cfs per 70 acres. Act of Feb. 19, 1935, ch. 105, 1935 Wyo. Sess. Laws 154 (amending Wyo. Rev. Stat. § 122-117 (1931) and now codified at Wyo. Stat. § 41-4-317 (1977)). That previous statute was the subject of specific testimony in *Nebraska v. Wyoming (I).* Transcript of Hearings Before Special Master Doherty at 19,454, 21,164, 25,988-25,991. The existence of the surplus water statute and the common practice of diverting more than one cfs per 70 acres in time of high runoff were drawn to Special Master Doherty's attention by Wyoming. Opening Brief of the State of Wyoming Before Special Master Doherty at 181-82. Special Master Doherty in turn expressly held that no limitations on diversion amounts were warranted above Whalen. Doherty Report at 135, 145, 147-48. The Court agreed and adopted Doherty's proposed injunctions tailored to limit irrigated acreage rather than diversions. *Nebraska v. Wyoming,* 325 U.S. 589, 623-24 (1945). Thus, the issue was litigated in the earlier case and there is no justification for Nebraska's attempt to relitigate it nearly 50 years later.

The remaining allegations of Nebraska's Count II are equally without substance. They lack sufficient detail to

enable Wyoming to respond. If any such claims are accepted for filing, Wyoming reserves the right to seek a summary dismissal or other disposal of such claims on the merits.

F. Accepting the Amended Petition Would Cause Undue Prejudice to Wyoming, Colorado and the Other Litigants.

The injection of new claims into the case at this time would "only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky,* 410 U.S. 641, 644 (1973).

Nearly five years ago, the parties joined issue on Nebraska's allegations that Wyoming was violating or threatening to violate Nebraska's apportionment under the Decree. The parties have spent millions of dollars getting the case ready for resolution of those claims. Wyoming has had to postpone construction of a needed municipal water project, Deer Creek Reservoir, during the pendency of this litigation.[19] Wyoming is entitled to a prompt resolution of Nebraska's claim that Deer Creek Reservoir will violate the apportionment under the Decree.

In submitting cross-motions for summary judgment, the states have agreed that the issues of construction of the existing Decree should be determined as a matter of law. The Court will soon receive a recommendation from the Special Master for resolution of the motions.

---

19. As Wyoming has pointed out to the Special Master, any further delay works as much to Nebraska's advantage as it works greatly to Wyoming's disadvantage. The cost of construction of Deer Creek Reservoir has risen sharply during the pendency of this litigation.

Wyoming hopes that the Court will decide the controlling questions of law during this term. To now allow new allegations of Decree violations would only delay resolution of the critical Decree interpretation issues that have been pending before the Court for nearly five years. The uncertainty created by Nebraska's pending claims of violation of the Decree is a source of continuing prejudice to Wyoming. Until the pending dispute over construction of the existing Decree is resolved, it is premature to consider reapportionment of the North Platte River.

The admonition of FED.R.CIV.P. 15(a) that leave to amend should "be freely given when justice so requires" must be tempered by the caution with which this Court exercises its original jurisdiction. Even in the lower federal courts, the burden to show that one is entitled to amend is substantially greater when a summary judgment motion is pending. *Verhein v. South Bend Lathe, Inc.*, 598 F.2d 1061 (7th Cir. 1979) (party seeking amendment while a summary judgment motion is pending must show affirmatively that the proposed amendment has "substantial merit"); *Carey v. Beans*, 500 F. Supp. 580 (E.D. Pa. 1980), *aff'd* 659 F.2d 1065 (3rd Cir. 1981) ("substantial and convincing evidence supporting the newly asserted claim" is also required). *See also Glesenkamp v. Nationwide Mut. Ins. Co.*, 71 F.R.D. 1, 4 (N.D. Cal. 1974), *aff'd* 540 F.2d 458 (9th Cir. 1976). The vague and unspecified claims tendered in the Amended Petition have not been shown to have substantial merit or the support of convincing evidence. Under such circumstances, a federal district court would have discretion to deny the motion to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). This Court has even

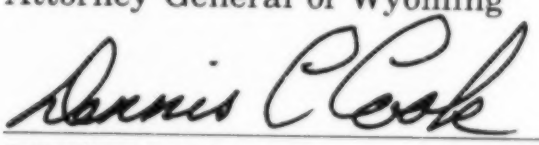
broader discretion to deny the amendment because the tendered claims are inappropriate for litigation in the original jurisdiction.

VI. CONCLUSION.

For the foregoing reasons, the Court should deny Nebraska's Motion for Leave to File Amended Petition.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming



DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

Supreme Court, U.S.
FILED
NOV 12 1991
OFFICE OF THE CLERK

No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

STATE OF NEBRASKA, Plaintiff
v.
STATE OF WYOMING, Defendant

BRIEF OF AMICUS CURIAE NATIONAL AUDUBON SOCIETY IN SUPPORT OF NEBRASKA'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION FOR APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND ASSERTION OF NEW CLAIMS

* PETER A.A. BERLE, PRESIDENT
NATIONAL AUDUBON SOCIETY
950 THIRD AVENUE
NEW YORK, NY 10022
* COUNSEL OF RECORD

HOPE M. BABCOCK
GEORGETOWN LAW CENTER
600 NEW JERSEY AVE., N.W.
WASHINGTON, D.C. 20001

MELINDA E. TAYLOR
HENRY, KELLY & LOWERRE
2103 RIO GRANDE
AUSTIN, TX 78705

November 11, 1991

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

STATEMENT OF INTEREST 2

ARGUMENT. 4

I. PLATTE RIVER ECOSYSTEM IS A UNIQUE SYSTEM OF NATIONAL AND INTERNATIONAL IMPORTANCE THAT IS DEPENDENT ON IRRIGATION SEASON AND NON- IRRIGATION SEASON FLOWS. 4

II. THE PLATTE RIVER HAS BEEN DEGRADED BY DIMINUTION IN FLOWS AND WILL DEGRADE FURTHER IF WYOMING DEPLETES NATURAL AND RETURN FLOWS DURING THE NON-IRRIGATION SEASON 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — Page

Nebraska v. Wyoming, 325 U.S. 589 (1945). 1

Wyoming v. Colorado, 259 U.S. 466 (1922). 9

STATUTES AND REGULATIONS

Endangered Species Act, 16 U.S.C. § 1531, et seq. . 7

50 C.F.R. § 17.95 (1991) 6

OTHER

P. Currier, G. Lingle and J. VanDerwalker, Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska, Platte River Whooping Crane Maintenance Trust (1985) 7

C. Safina, L. Rosenbluth, C. Pustweller, K. Strom, R. Klataske, M. Lee, and J. Beyea, Threats to Wildlife and the Platte River. National Audubon Society Report (1989) 7

USFWS, "The Platte River Ecology Study," Special Report, Northern Prairie Research Center (1981) 6

J.S. O'Brien and P. Currier, "Channel Morphology and Riparian Vegetation Changes in the Big Bend Reach of the Platte in Nebraska." Final Draft Report, Platte River Whooping Crane Maintenance Trust (1987). 8

No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

STATE OF NEBRASKA, Plaintiff

v.

BRIEF OF AMICUS CURIAE NATIONAL AUDUBON SOCIETY IN SUPPORT OF NEBRASKA'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND ASSERTION OF NEW CLAIMS

STATEMENT OF THE CASE

This is a proceeding in original jurisdiction involving enforcement of the 1945 Supreme Court Decree that apportioned the natural flow of the North Platte River among Nebraska, Wyoming and Colorado.[1] Nebraska initiated this action in 1986 when she petitioned the Court to enforce the 1945 Decree and for injunctive relief against Wyoming. The Court granted Nebraska's petition in January 1987, and referred the matter to Special Master Owen Olpin by order dated June 22, 1987.

---

[1] Nebraska v. Wyoming, 325 U.S. 589 (1945).

The National Audubon Society ("Audubon") has participated in this proceeding as litigating amicus curiae since 1988.[2] Audubon's role has been to represent the interests of its members in several hundred species of migratory birds that depend on certain stretches of the Platte River in Nebraska downstream from the Tri-State Dam. As amicus curiae, Audubon has been active by filing briefs, participating in hearings, and taking part in telephone conferences with the parties and other amici.

On October 9, 1991 Nebraska filed her Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims. Audubon submits this brief in support of Nebraska's Motion, and urges the Supreme Court to grant Nebraska leave to amend her original petition in this case. The species of concern in this proceeding are dependent on the Platte River habitat, the viability of which in turn depends upon the river's flow regime year-round.

STATEMENT OF INTEREST

Audubon has a compelling interest in the outcome of this proceeding. Audubon is a nonprofit, national conserva-

---

[2]On March 23, 1987 Audubon moved to intervene to become a full party in this proceeding. The Special Master denied Audubon's motion, but allowed Audubon to participate as liticating amicus curiae to represent the fish and wildlife interests that may be affected by the Court's decision in this case. At the hearing that took place before the Special Master in Salt Lake City on June 7-8, 1991, the Special Master invited Audubon and the other amici present to pretition the Court for reconsideration of the intervention motions, if the amici desired. In response to the Special Master's invitation, Audubon filed a Petition for Reconsideration of Motion for Leave to Intervene on August 4, 1991, which is currently before the Special Master.

tion organization with more than 550,000 members, many of whom are affiliated with one of Audubon's 500 local chapters. Audubon is dedicated to the preservation of birds and other wildlife and their habitat. Over 3,000 Audubon members reside currently in Nebraska, and five local chapters are in Nebraska.

Since 1987 preservation of the Platte River ecosystem has been one of Audubon's highest priorities. Audubon is involved in a variety of activities on the Platte. For example, Audubon owns and manages a 1,200-acre sanctuary on the river near Gibbon, Nebraska for the benefit of the river's wildlife. Audubon scientists are engaged in research on the relationship between the physical environment and the plant and animal communities of the Platte River ecosystem. Since 1984 Audubon scientists and field staff have participated in the Platte River Management Joint Study, which is a cooperative effort between the Bureau of Reclamation and the U.S. Fish and Wildlife Service to devise a comprehensive management plan that would protect endangered species that depend on the Platte. Finally, in addition to this Supreme Court proceeding, Audubon is involved in several administrative proceedings before federal and state agencies to assure that the flow requirements for wildlife are protected.[3]

---

[3]Audubon is participating in the annual and permanent relicensing proceedings for the Kingsley Dam facilities, currently pending before the Federal Energy Regulatory Commission. In the Matter of Central Nebraska Public Power and Irrigation District, Project No. 1417, and In the Matter of Nebraska Public Power District, Project No. 1835. Audubon is also a party to state administrative proceedings before the Nebraska Department of Water Resources, involving applications for instream flow appropriations for fish and wildlife, and for rights to store and release water from Lake McConaughy for the benefit of downstream fish and wildlife. Applications Nos. A-17004

ARGUMENT

In her October 9 Brief in Support of Motion for Leave to File an Amended Petition, Nebraska has noted correctly that fish and wildlife benefit from and indeed depend upon unapportioned, non-irrigation season flows and the flow regime that exists currently in the Platte River in Nebraska.[4] This amicus brief is intended to inform the Court of the unique nature of the Platte River ecosystem, and the extent to which the features of the system are a result of the river's year-round flow regime. In addition, the brief will summarize the degradation that has occurred on the Platte due to decreases in historic flows, and the additional harm that would result from any further diminution of flows.

I.

Platte River Ecosystem is a Unique System of National and International Importance That is Dependent on Irrigation Season and Non-Irrigation Season Flows

The Platte River and its major tributaries comprise one of the most important migratory bird habitats in North America. The river historically offered, and in some stretches still offers, a unique combination of features inviting to migratory waterfowl, shore birds and wading birds. The Platte lies in the middle of the Central Flyway, and therefore is of critical importance to hundreds of species of birds during their Spring and Fall migrations. Ap-

---

through A-17009, and Applications Nos. A-2374 and A-17018.

[4]Nebraska Brief in Support of Motion for Leave to File an Amended Petition at 19 (October 9, 1991).

proximately 250 species of migratory birds use the Platte to rest, nest and/or feed. As Nebraska has pointed out in her Brief in Support of Motion for Leave to File an Amended Petition, the fish and wildlife that depend on the flow regime of the river are dependent on flows in both the irrigation and non-irrigation seasons.[5]

The Platte River's historical and unique features resulted from wide fluctuations in flow during the year, including an annual low flow season in late summer and annual spring flooding when the river filled its banks. The floods carried large sediment loads and restructured the river's braided channels. Through the summer, as water flows declined, low unvegetated sandbars came to dominate more and more river channel. The sand-bottomed channel was surrounded by wet meadows -- a mix of grasslands inundated to a variety of water depths and for varying periods during the year.

The wide, shallow, braided prairie river allowed, and in certain places still allows, large numbers of wading birds to roost and shorebirds to nest in safety. Several stretches in the 53-mile long and three-mile wide "Big Bend" reach of the Platte from Lexington to Denman, Nebraska, retain the characteristics of the original braided river. The Big Bend reach included habitat that the U.S. Fish and Wildlife Service ("USFWS") has determined is critical to the continued existence of the endangered Whooping Crane.[6] The entire natural population of the Whooping Crane currently migrates through the Big Bend reach of the river

---

[5]Nebraska Brief in Support at 17.

[6]43 Fed. Reg. 20,938 (1978); 50 C.F. R 17.95 (1991).

between their wintering habitat in Aransas National Wildlife Refuge in Texas and their breeding grounds in northern Canada.[7]

In addition to the Whooping Crane, five other federally listed endangered or threatened species use the Platte below Tri-State Dam. These species are the American Bald Eagle, the Peregrine Falcon, the Interior Least Tern, the Eskimo Curley, and the Piping Plover.

The Platte River is also known for its large flocks of Sandhill Cranes, ducks, and geese that congregate on the river in the late winter and spring. More than eighty percent of the world's population of Sandhill Cranes stage annually on the Platte during their northward migration to their nesting grounds in the northern mid-continental states, Canada, Alaska, and Siberia -- the largest congregation of cranes in the world.[8] Seven to nine million ducks and geese use the area in the spring and again in the fall.[9] Approximately two-thirds of the mid-continental population of Greater White Fronted Geese stage in the Platte River valley and the

---

[7]USFWS, "The Platte River Ecology Study," Special Report, Northern Prairie Wildlife Research Center (1981).

[8]USFWS, supra.

[9]Currier, P., G. Lingle, J. VanDerwalker, Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska, Platte River Whooping Crane Maintenance Trust at 43 (1985).

adjacent Rain Water Basins each spring.[10]

In addition to the critical habitat in the Big Bend reach that USFWS identified for the Whooping Crane, USFWS has designated two areas on the river in Nebraska "Resource Category 1" (unique and irreplaceable) habitat by the USFWS: 80 miles between Overton and Chapman on the mainstem of the Platte for Sandhill Cranes and Greater White-fronted Geese; and 20 miles between Sutherland and the town of North Platte on the North Platte for Sandhill Cranes.[11]

II.

The Platte River Ecosystem Has Been Degraded by Diminution in Flows, and Will Degrade Further if Wyoming Depletes Natural and Return Flows During the Non-Irrigation Season

Only a few reaches of the Platte and North Platte in Nebraska retain the characteristics of the original braided river. Changes in the river's flows, largely attributable to man-made irrigation and hydropower projects, have altered

---

[10]USFWS, supra.; Safina, C., L. Rosenbluth, C. Pustweller, K. Strom, R. Klataske, M. Lee, and J. Beyea. Threats to Wildlife and the Platte River. National Audubon Society Environmental Analysts Department Report (1989); p. 26.

[11]"Resource Category 1" is a federal classification that recognizes significant habitat -- i.e., habitat that is unique and irreplaceable -- for non-endangered species. While not having legal significance comparable to "critical habitat" designated pursuant to section 4 of the Endangered Species Act, 16 U.S.C. 1533, the classification indicates that such habitat is unique to the nation or to the eco-region and irreplaceable, and its integrity should not be compromised.

the face of the river and reduced the quantity and quality of migratory bird habitat.

The entire river in Nebraska was once a braided stream, with a straight channel and non-cohesive banks.[12] Sandbars were transient features of the streambed. The shallow, wide character of the channel was sustained by a large sediment load and high peak discharges. Today, much of the river consists of multiple channels threading around permanent, vegetated islands. The transient river bars and islands that were once characteristic of the Platte have now stabilized. Cottonwoods and willow trees have become established over much of the former floodplain. Historic data and analyses of current conditions indicate that the river's habitat value is likely to continue to degrade, unless the flow regime on the river is adjusted.

The habitat that remains on the Platte is sustained by the river's natural flow and by return flows below the Tri-State Dam. If Wyoming is allowed to deplete the natural flow of the river or the return flows during either the irrigation or non-irrigation seasons, the habitat is likely to degrade even further.

If Nebraska's allegations in her Motion to Amend are correct, then even if the Special Master rules in her favor in the instant enforcement proceeding, which only encompasses irrigation season flows, the downstream equities would not be protected by the Court's decision. This is so because the projects at issue operate all year. If the Court enjoins Wyoming from depleting the irrigation season flows,

---

[12] O'Brien, J.S. and P.J. Currier. "Channel Morphology and Riparian Vegetation Changes in the Big Bend Reach of the Platte River in Nebraska." Final Draft Report, Platte River Whooping Crane Critical Habitat Maintenance Trust (1987).

Wyoming could offset the loss of water available to her by increasing the quantity of water stored during the non-irrigation season. By doing so, Wyoming effectively could abrogate the protection for the downstream equities that would be provided by the injunction. Increased upstream storage would result in less water available for uses downstream in Nebraska during both the irrigation and non-irrigation seasons. The downstream equities in Nebraska, which depend on instream flows, would no doubt suffer.

As Nebraska has written in her Brief in Support, there is a hydrologic relationship between the flows of the irrigation and non-irrigation seasons.[13] There is also a relationship between water use upstream and instream flows downstream; the river throughout its course is a "single stream."[14] It is apparent today that a variety of equities in Nebraska, including wildlife, depend on residual instream flows, during both the irrigation and non-irrigation seasons. The flows year-round support the habitat upon which migratory species depend. In addition, certain species that are resident on the river all year, like the American Bald Eagle, require minimum flows. It would be appropriate for the Court to allocate the non-irrigation season flows in this proceeding, and in so doing to assure the fullest protection possible for the wildlife and other downstream equities.

CONCLUSION

For all of these reasons, Audubon supports

---

[13]Nebraska Brief in Support at 21.

[14]Nebraska Brief in Support at 16, citing Wyoming v. Colorado, 259 U.S. 466 (1922).

Nebraska's Motion to Amend its Petition.

Respectfully submitted,

---

* Peter A.A.Berle
President
National Audubon Society
950 Third Ave.
New York, New York 10027
* Counsel of Record

Hope M. Babcock
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Melinda E. Taylor
Henry, Kelly & Lowerre
2301 Rio Grande
Austin, TX 78705

Attorneys for:
National Audubon Society

November 12, 1991

Supreme Court, U.S.
FILED
NOV 26 1991
OFFICE OF THE CLERK

(17)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO MOTION OF BASIN ELECTRIC FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION AND PROPOSED MEMORANDUM

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

November 25, 1991

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
POINT I: Basin's Proposed Memorandum Would Bring No New Relevant Matters to the Attention of the Court	2
POINT II: Not Only Would Basin's Proposed Memorandum Not be Helpful to the Court, it Would Misdirect the Court's Attention	4
CONCLUSION	5

TABLE OF AUTHORITIES

P

Cases

Nebraska v. Wyoming, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953) 3,

Statutes and Court Rules

Rule 37.1 of the Rules of the United States Supreme Court 1,

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MEMORANDUM IN OPPOSITION TO MOTION OF BASIN ELECTRIC FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION AND PROPOSED MEMORANDUM

INTRODUCTION

On November 12, 1991, Basin Electric Power Cooperative ("Basin") moved for leave to file a memorandum brief in opposition to Nebraska's motion to amend its petition. Basin's motion for leave should be denied for two reasons. First, pursuant to Supreme Court Rule 37.1, Basin's proposed memorandum would not bring any relevant matter to the attention of the Court that has not been raised by a party to the proceedings. More importantly, pursuant to the rationale underlying Rule 37.1, Basin's motion should be denied not only because the memorandum would not be helpful to the Court, but on the contrary would serve only to mislead the Court through its flowery mischaracterization of the provisions of the existing Decree and Nebraska's amended petition.

ARGUMENT

Point I

Basin's Proposed Memorandum Would Bring No New Relevant Matters to the Attention of the Court

Rule 37.1 of the Rules of the Supreme Court states:

> An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court. An *amicus* brief which does not serve this purpose simply burdens the staff and facilities of the Court and its filing is not favored.

Aside from Basin's fundamental mischaracterization of the purpose of the existing Decree and Nebraska's amended petition, every point made by Basin in opposition to Nebraska's motion to amend is identical to a point made by Wyoming and/or Colorado.[1] Basin argues that the pending motion to amend is the same as that filed by Nebraska in 1988. Basin's Memorandum at 3-4. Wyoming and Colorado make the same, unfounded assertions in their briefs. Wyoming Brief at 12, 27-28; Colorado Brief at 2-4, 12-15. Basin argues that the Court should utilize the standard for decid-

---

[1]The basic thesis of Basin's memorandum is that Nebraska is seeking an alteration of the existing apportionment. Excitedly, Basin argues that:

> [Nebraska] contends that, since the entry to the decree, she has actually received more water than is apportioned to her; that she has found uses for such water from which 'equities' have sprung up; and that these equities should now be accommodated by altering the current apportionment.

Basin's Proposed Memorandum at 8. Nebraska does not contend that it has received more water than it was apportioned, beyond the operational waste that Special Master Doherty and the Court recognized would necessarily pass Tri-State Dam. We have not found overlooked uses from which equities have sprung up. And we most definitely are not seeking an accommodation which would "[alter] the current apportionment."

Basin's diatribe is designed to alarm the Court — to rouse the Court to viligence over a landscape of windmills.

ing the issues on the merits in determining whether to grant the motion for leave to file the amended petition. Basin's Memorandum at 4-5. Wyoming makes the same argument. Wyoming Brief at 14-16. While Wyoming does not go quite so far, Basin argues that there is *no* unapportioned natural flow water above Tri-State Dam.[2] Basin's Memorandum at 6-7; Wyoming Brief at 16-19. Basin, Wyoming, and Colorado argue that the injury is speculative, ignoring the over-appropriated condition of the river. Basin's Memorandum at 7-17; Wyoming Brief at 16-26; Colorado Brief at 8-12. Finally, Basin reiterates Wyoming's and Colorado's arguments that resolution of the pending issues is a prerequisite to the consideration of the issues raised by the amended petition, albeit without indicating why.[3] Basin's Memorandum at 17-20; Wyoming Brief at 19-24; Colorado Brief at 16.

In sum, the matters that Basin would bring to the Court's attention would simply burden the staff and facilities of the Court. Accordingly, Basin's motion for leave to file its memorandum should be denied because it would bring no relevant matter to the Court that is not already there. The proposed memorandum is needlessly repetitive.

---

[2]Wyoming asserts that Nebraska's attempt to have the presently unapportioned, non-irrigation season flows apportioned is disingenuous. According to Wyoming, "[t]here is an existing Decree and an existing apportionment that was intended to describe all of Nebraska's rights to demand natural flow of the North Platte River." Wyoming Brief at 18. As the Court has noted and Wyoming tacitly admits, the 1945 Decree apportions irrigation water only. *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945). In this regard, Basin's ridiculously radical interpretation of the Decree will be discussed in Point II, *infra*.

[3]Granting Nebraska's motion for leave to file its amended petition would in no way interrupt the resolution of issues raised by the pending cross-motions for summary judgment. The Special Master's recommendations and the Court's ultimate decision would only provide guidance for the apportionment of the non-irrigation season flows, which would happen in due course in any event.

Point II

Not Only Would Basin's Proposed Memorandum Not be Helpful to the Court, it Would Misdirect the Court's Attention

Basin's most egregious assertion is that Nebraska's motion for leave to apportion the non-irrigation season flows is without merit because there is no unapportioned natural flow:

> The major premise of Nebraska's instant motion for leave to amend her petition, that the existing decree does not apportion all of the natural flow of the river originating above Tri-State, is patently fallacious. The decree ... leaves none of the natural flow unapportioned during either the irrigation season or non-irrigation season.

Basin's Memorandum at 6. The only support for Basin's assertion is an allusion to the Court's statement in 1945 that "all water in the stream except storage water" was apportioned. *Nebraska v. Wyoming*, 325 U.S. 589, 670 (1945). With a curious indifference to gravity, Basin argues that "[a]n imperative of the very structure of the decree is that all natural flow water originating above Tri-State that is apportioned neither to Colorado nor to Nebraska is apportioned to Wyoming."[4] Basin's Memorandum at 7. Basin concludes its argument by imagining that Nebraska's true motive — lurking "behind a phantasm of the existence of 'unapportioned' water" — is to obtain an alteration of the existing apportionment.

We respectfully submit that Basin needs a rest. Precisely what is and what is not apportioned by the Decree is set out paragraph by paragraph in Nebraska's amended petition. *Ibid.* at 2-5. Neither Basin, Wyoming, nor Colorado has attempted to dispute the provisions of the Decree or their

---

[4]Contradicting itself, Basin first asserts that "none of the natural flow [is] unapportioned," and then that the natural flow that is unapportioned must belong to Wyoming. *Id.*, at 6 and 7.

factual underpinnings. Paragraph V of the Decree, which apportions the natural flow, is limited to "[t]he natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year. . . ." 325 U.S. at 667. During the non-irrigation season, *i.e.*, October 1 to April 30, the ***unapportioned*** inchannel inflows to Nebraska from Wyoming averaged 197,400 acre feet annually, 1946-1987. In prefacing the Court's opinion in 1945, Justice Douglas was not irresponsibly argumentative when he stated that "[t]he controversy pertains to the use for irrigation purposes of the water of the North Platte River. . . ." 325 U.S. at 591. Nor did his tongue slip when he concluded that damage had been clearly proven principally because the "natural flow of the river ***during the irrigation season*** [had] long been over-appropriated." *Id.* at 608 (emphasis added). In sum, the "phantasm" that ostensibly animates Nebraska's amended petition is the case as it was presented, decided, and decreed in 1945.

CONCLUSION

It is clear that the only relevant matters that Basin would like to bring to the Court's attention in its proposed memorandum have already been brought to the Court's attention by Wyoming, Colorado, or both. The other matter that Basin wishes to discuss is clearly irrelevant because it grossly mischaracterizes the existing Decree and Nebraska's amended petition. Accordingly, pursuant to Supreme Court Rule 37.1, Basin's motion for leave to file its proposed memorandum should be denied.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682



RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN
Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Sante Fe, New Mexico 87504
(505) 983-3880

CERTIFICATE OF SERVICE

I, Richard A. Simms, hereby certify that true and correct copies of the foregoing Nebraska's Memorandum in Opposition to Motion of Basin Electric for Leave to File Memorandum in Opposition to Nebraska's Motion for Leave to File Amended Petition and Proposed Memorandum were served this 25th day of November, 1991, on each of the following parties:

The Honorable Owen Olpin (Federal Express)
Special Master, United States Supreme Court
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071-2899

Ms. Saone B. Crocker (Federal Express)
Beveridge & Diamond, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005

Ms. Nancy E. McFadden (Federal Express)
O'Melveny & Myers
Suite 500 West
555 13th Street, N.W.
Washington, D.C. 20004-1109

The Honorable Michael J. Sullivan
Governor of Wyoming
State Capitol
Cheyenne, Wyoming 82002

The Honorable Joseph B. Meyer
Attorney General of Wyoming
Wyoming Office of the Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

Mr. Dennis C. Cook (Federal Express)
Senior Assistant Attorney General
Wyoming Office of the Attorney General
State Capitol, Room 123
Cheyenne, Wyoming 82002

Mr. Charles N. Woodruff (Federal Express)
Moses, Wittemyer, Harrison & Woodruff, P.C.
1002 Walnut Street, Suite 300
Post Office Box 1440
Boulder, Colorado 80302

The Honorable Roy Romer
Governor of the State of Colorado
136 State Capitol Building
Denver, Colorado 80203

The Honorable Gale A. Norton
Ms. Lois G. Witte
Ms Wendy Weiss (Federal Express)
Attorney General's Office
Natural Resources Section
110 Sixteenth Street, 10th Fl.
Denver, Colorado 80202

The Honorable Kenneth W. Starr
United States Solicitor General
Mr. Jeffrey P. Minear
Office of the Solicitor General
Constitution Avenue & Tenth Street, N.W.
Washington, D.C. 20530

Mr. Andrew F. Walch
U.S. Department of Justice
Land & Natural Resources Division
1961 Stout Street
Post Office Box 3607
Denver, Colorado 80294

Ms. Patricia L. Weiss (Federal Express)
U.S. Department of Justice
General Litigation Section
Land & Natural Resources Division
Post Office Box 663
Washington, D.C. 20044-0663

Mr. William E. Holland
Chadbourne & Parke
30 Rockefeller Plaza
New York, NY 10112

Mr. Abbe David Lowell (Federal Express)
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

Mr. Peter A. A. Berle
Mr. John D. Echeverria
National Audubon Society
666 Pennsylvania Avenue, S.E.
Washington, D.C. 20003

Ms. Hope Babcock (Federal Express)
National Audubon Society
Georgetown Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Mr. William Madden (Federal Express)
Counsel of Record for Nebraska Public
Power District
Winston & Strong
1400 L. Street, N.W.
Washington, D.C. 20005-3502

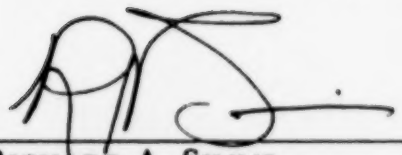
Mr. Gary Bachman (Federal Express)
Counsel of Record for Central Nebraska
Public Power & Irrigation District
VanNess, Feldman, Sutcliff & Curtis
1050 Thomas Jefferson Street, N.W.
Washington, D.C. 20017

Mr. Michael C. Klein
Central Nebraska Public Power &
Irrigation District
Anderson, Klein, Peterson & Swan
Post Office Box 133
Holdrege, Nebraska 68949

Mr. Edward Weinberg (Federal Express)
Counsel of Record for Basin
Electric Power Cooperative
Duncan, Weinberg & Miller, P.C.
1615 M Street, N.W., Suite 800
Washington, D.C. 20036

Mr. Michael J. Hinman
Mr. Claire Olson
Basin Electric Power Cooperative
1717 East Interstate Avenue
Bismarck, North Dakota 58501

Melinda Taylor
Henry, Kelly & Lowerre
2103 Rio Grande
Austin, Texas 78705



RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

Supreme Court, U.S.
FILED
NOV 26 1991
OFFICE OF THE CLERK

(18)

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S REPLY TO WYOMING'S, COLORADO'S, AND THE UNITED STATES' BRIEFS IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

November 25, 1991

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	4
POINT I: Nebraska has Attempted to Resolve the Matters Alleged in the Amended Petition with Wyoming	4
POINT II: The North Platte and Platte Rivers in Nebraska are Over-Appropriated. Planned Development in Wyoming Further Threatens the Already Inadequate Water Supply	5
A. The Waters of the North Platte and Platte Rivers in Nebraska are Over-Appropriated	6
B. Depletions in Wyoming Will Adversely Affect Existing Uses in Nebraska	11
POINT III: The Court Does Not Apply the Burden of Proof for Decision on the Merits in Deciding Whether to Accept a Case in its Original Jurisdiction	14
POINT IV: The Issues Pending as the Case is Presently Postured Will be Resolved Forthwith Whether or Not Leave to File the Amended Petition is Granted	17
POINT V: There is No Prejudice and the Amended Petition Is Not Untimely	19
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Alabama v. Arizona, 291 U.S. 286 (1934)	14, 15
Albee Homes, Inc. v. Lutman, 47 F.R.D. 258 (E.D. Pa. 1969)	19, 20
Arizona v. California, 283 U.S. 423 (1931)	10
Arizona v. California, 298 U.S. 558 (1936)	16
Arizona v. New Mexico, 425 U.S. 794 (1976)	14
Colorado v. Kansas, 320 U.S. 383 (1943)	4
Colorado v. New Mexico, 459 U.S. 176 (1982)	2, 8, 9, 10, 13, 14, 16, 17, 21
Colorado v. New Mexico, 467 U.S. 310 (1984)	2, 13
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	14
Cornell & Co., Inc. v. Occupational Safety and Health Review Commission, 573 F.2d 820 (3d Cir. 1978)	19
Cuffy v. Getty Refining & Marketing Co., 648 F. Supp. 802 (D. Del. 1986)	19
Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir. 1980)	19
Evans Products Co. v. West American Ins. Co., 736 F.2d 920 (3d Cir. 1984)	20
Idaho v. Oregon, 462 U.S. 1017 (1983)	14
Heyl & Patterson Intern. v. F.D. Rich Housing, 663 F.2d 419 (3d Cir. 1981)	19
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	14
Kansas v. Colorado, 206 U.S. 46 (1907)	9, 16
Maryland v. Louisiana, 451 U.S. 725 (1981)	9

TABLE OF AUTHORITIES (continued)

	Page
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953)	2, 9, 10, 15, 16
New York v. Illinois, 274 U.S. 488 (1927)	10
New York v. New Jersey, 256 U.S. 296 (1921)	14
Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission, 876 F.2d 109 (D.C. Cir. 1989)	9
Texas v. New Mexico, 462 U.S. 554 (1983)	4
United States v. Nevada, 412 U.S. 534 (1973)	9
United States v. West Virginia, 295 U.S. 463 (1935)	10
Universe Tankships, Inc. v. United States, 528 F.2d 73 (3d Cir. 1975)	20
Washington v. Oregon, 297 U.S. 517 (1936)	7
Wyoming v. Colorado, 259 U.S. 419 (1922)	10, 13, 16
Constitutions	
U.S. CONST. art. III, § 2	2, 9, 16
Statutes and Court Rules	
28 U.S.C. ¶ 1251(a) (1988)	9
SUP. CT. R. 17.3	14, 16
FED. R. CIV. P. 15(a)	19
Miscellaneous	
3 J.W. MOORE, R.D. FREER, MOORE'S FEDERAL PRACTICE ¶ 15.08[4] (2d ed. 1991)	20
Report of Jerome C. Muys, Special Master, *Oklahoma & Texas v. New Mexico*, No. 109, Original	14

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S REPLY TO WYOMING'S, COLORADO'S, AND THE UNITED STATES' BRIEFS IN OPPOSITION TO NEBRASKA'S MOTION FOR LEAVE TO FILE AMENDED PETITION FOR AN APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

INTRODUCTION

There is a point at which judicious argument, *i.e.*, the attempt to persuade by reason and proof, becomes baseless polemic. In their briefs in opposition to Nebraska's motion for leave to apportion the unstored, non-irrigation season flows of the North Platte River, the United States, Colorado, and Wyoming have gone well beyond that point. Each argues that Nebraska is seeking a reapportionment and amendment of the 1945 Decree. Absolutely nothing in the amended petition can be reasonably or responsibly construed to seek a change in the existing apportionment. Nothing in the amended petition can be responsibly construed to expand the scope, character, or complexity of the pending issues. Nothing would enlarge or change the nature of the claims asserted in 1986. Nothing would complicate or delay the resolution of the matters pending before the Special Master. Absolutely nothing in the amended petition is outside the scope of the Court's traditional and

guarded exercise of its original jurisdiction and responsibilities under U.S. CONST. art. III, § 2.

The North Platte River projects consist of approximately 2,400,000 acre feet of usable storage capacity, averaging approximately 1,500,000 acre feet annually of actual accrual. The storage is controlled by the Bureau of Reclamation and is distributed to irrigators in Wyoming and Nebraska pursuant to contracts. Paragraph III of the Decree does not technically apportion the water stored during each year, though "the relative storage rights" of the system's reservoirs are "defined and fixed" thereby. *Nebraska v. Wyoming*, 325 U.S. 589, 666 (1945), *modified*, 345 U.S. 981, 983-84 (1953); Nebraska's Amended Petition at 3. Nebraska does not seek to alter the storage and distribution in any way.

Additionally, the Decree apportions to Wyoming the right to store water in reservoirs above Pathfinder Reservoir in ¶ II(b), the right to irrigate 168,000 acres during the irrigation season above Guernsey Reservoir in ¶ II(a), sets the priorities of storage accruals in ¶¶ III and IV, and apportions the natural flow during the irrigation season between Whalen Dam and Tri-State Dam in ¶ V, 75% to Nebraska and 25% to Wyoming. 325 U.S. at 665-69, *modified*, 345 U.S. at 984-87. During the non-irrigation season, an annual average of 197,400 acre feet passed Tri-State Dam or crossed the state line between 1946 and 1987 as inchannel flows not controlled by the Decree.[1] Given what is already apportioned or controlled by the Decree during the irrigation and non-irrigation seasons, the unappropriated, non-irrigation season flows amount to less than

---

[1]In *Colorado v. New Mexico*, 459 U.S. 176 (1982), the most recent equitable apportionment case, a total of 4,000 acre feet was in dispute. *See also Colorado v. New Mexico*, 467 U.S. 310 (1984).

10% of the previously apportioned flows.[2] These flows are critical to the continued exercise of irrigation, hydroelectric power generation, recreation, and fish and wildlife uses in Nebraska, which have relied on the flows since the entry of the Decree.

In seeking to have these flows apportioned to protect existing equities in Nebraska from upstream development in Wyoming, Nebraska is seeking an apportionment of less than 10% of the flows of the North Platte River addressed by the Decree in 1945, *i.e.*, the flows that were not addressed. Nebraska is not, as Colorado irresponsibly argues, seeking to "reopen the Decree and expand the scope of what began as a straightforward enforcement action against Wyoming into a full-blown equitable apportionment proceeding to increase Nebraska's water supply from the North Platte River." Colorado's Brief in Opposition at 2. Nebraska is not, as Wyoming argues, "seeking to reapportion the North Platte by attempting to impose new injunctions on Wyoming which the Court found previously unnecessary." Wyoming's Brief in Opposition at 18. We do seek an equitable apportionment, but we are not, as the United States asserts, seeking "to formulate an amended decree" which would redraw the 1945 Decree in Nebraska's image. The repetitive arguments that Nebraska is attempting to reapportion the North Platte River are deceptive, misleading, and absurd.

---

[2]In *Nebraska v. Wyoming*, there was no attempt to apportion the non-irrigation season flows in 1945. They were outside the scope of the lawsuit.

ARGUMENT

POINT I

NEBRASKA HAS ATTEMPTED TO RESOLVE THE MATTERS ALLEGED IN THE AMENDED PETITION WITH WYOMING

While Wyoming suggests that Nebraska's claims "appear calculated to delay and prejudice resolution of Nebraska's original petition," Nebraska has struggled with the use and administration of the North Platte River since 1976. Wyoming's Brief in Opposition at 29. Since 1983, the dispute with Wyoming over the North Platte River has been addressed in thirty settlement negotiation meetings. The problems are not illusory. Nor were they manufactured to generate delay or prejudice.

Parties to interstate conflicts are encouraged to negotiate with one another in an attempt to resolve disputes before seeking to invoke the Court's original jurisdiction. *See, e.g., Texas v. New Mexico*, 462 U.S. 554, 575 (1983); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). Aware of its obligation in this regard, Nebraska has discussed each of the matters contained in the amended petition with Wyoming on numerous occasions. Wyoming, however, has described Nebraska's statement that it has attempted to resolve these matters before filing its amended petition as "false."

On February 8, 1990, Nebraska, Wyoming, Colorado, and the United States met for the 25th settlement conference between 1983 and 1991. At that conference, Nebraska and the United States submitted proposals to the other parties for settlement of the case. Without revealing details, Nebraska's proposal addressed the matter of Wyoming's use of its "surplus water statute." *See* ¶ 2(a) of Count II of Nebraska's Amended Petition. The settlement proposal also addressed ¶ 2(b) of Count II of Nebraska's Amended Petition, *i.e.*, the irrigation of more than 168,000 acres as allowed by the Decree. Tributary development between Whalen Dam and Pathfinder Dam was addressed in Ne-

braska's proposed settlement. *See* ¶ 2(f) of Count II of Nebraska's Amended Petition. Additionally, Nebraska has expressed a desire to negotiate the apportionment of the unapportioned, non-irrigation season flows, though Wyoming has shown no serious, continuing interest since October, 1990. *See* Count I of Nebraska's Amended Petition. Nebraska has also attempted to resolve many of the Decree violations with Wyoming at regular river operation meetings among Nebraska, Wyoming, and the United States. For instance, as early as the Natural Flow and Ownership Meeting of April 20, 1988, Nebraska brought to Wyoming's attention the matter of unauthorized depletions of storage water from the North Platte River in Wyoming. *See* ¶ 2(c) of Count II of Nebraska's Amended Petition.

In sum, the allegations in Nebraska's Amended Petition do not "lack credibility" or "substance." Nor are they "groundless." Wyoming's statement that we did not attempt to resolve these matters is either false or uninformed. Nebraska made a continuing, good faith effort to resolve these matters with Wyoming before proceeding with litigation. The controversy has not been drummed up. It is real and justiciable.

POINT II

THE NORTH PLATTE AND PLATTE RIVERS IN NEBRASKA ARE OVER-APPROPRIATED. PLANNED DEVELOPMENT IN WYOMING FURTHER THREATENS THE ALREADY INADEQUATE WATER SUPPLY

Wyoming contends that the motion for leave to file the amended petition should not be granted because the issues are too "speculative" and that Nebraska has not alleged facts which, if proven, would establish present injury to its apportionment or other equitable interests. Additionally, Wyoming represents that Nebraska's real motivation is to secure increased water at Wyoming's expense. These argu-

ments have been made and rejected before. In 1986, Wyoming filed its Brief in Opposition to Nebraska's Motion for Leave to File Petition, contending that the Court should not accept Nebraska's petition on the basis of no injury. Further, Wyoming stated that the "real relief that Nebraska seeks is . . . to secure greater rights than the existing Decree provides . . .." Wyoming's Brief in Opposition at 26. The Court rejected both arguments. In 1987, Wyoming filed a motion for summary judgment reiterating the same arguments. The Special Master denied Wyoming's motion, to which Wyoming took no exceptions. In relation to the pending cross-motions for summary judgment and Wyoming's brief in opposition to Nebraska's motion for leave to file its amended petition, Wyoming has made the same arguments a third and a fourth time, joined by Colorado.[3] The Court has rejected Wyoming's unfounded and repetitive arguments before and it should do so again.

A. The Waters of the North Platte and Platte Rivers in Nebraska are Over-Appropriated

At issue in Nebraska's petition for equitable apportionment is an annual average state line flow of 197,400 acre feet of water unapportioned by the 1945 Decree. This water passes Tri-State Dam near the Nebraska-Wyoming state line during the non-irrigation season, *i.e.*, October 31 to April 1. It represents less than 10% of the flows of the North Platte River apportioned by the 1945 Decree. Wyoming dismisses Nebraska's allegations of present and threatened injury as "speculative." Wyoming's Brief in Opposition at 19-26. To Nebraska water officials, charged with the daily administration of a fully appropriated interstate river, who must contend with the threat posed by upstream development in Wyoming, the allegations do not derive from speculation.

---

[3]The United States has previously supported Nebraska's position in this regard.

Nebraska's reliance on non-irrigation season flows developed over the period 1946-1987. The flows were not restricted institutionally and thus were available for appropriation to beneficial use in Nebraska. Although this reliance began gradually, the uses are now settled, and the need is acute. *See Washington v. Oregon*, 297 U.S. 517, 527-30 (1936) (equitable apportionment predicated on equitable reliance).

Wyoming would like the Court to believe that the North Platte and Platte rivers in Nebraska have an abundant supply of water to meet present and future needs.[4] The reality experienced by the downstream state is far different. Natural flow has been denied to appropriators in Nebraska from the state line to Lake McConaughy for all rights junior to 1894 in eight of the last ten years and to all rights junior

---

[4]Wyoming has repeatedly referred to the study by Bleed *et. al.* as stating that 400,000 acre feet of water could be diverted from the Platte River without adversely impacting fish and wildlife flows for endangered species. Conveniently, Wyoming does not indicate that this study was to develop a multi-objective screening model to select a preferred management option from over 4,000 alternatives and that instream flow requirements used in the model were crude and based on a preliminary assessment of related data. Since the report was published, revised estimates of flow requirements have been developed. In 1990, the Federal Energy Regulatory Commission required the Nebraska Public Power District to provide flows to meet endangered species' requirements that were 360,000 acre feet higher per year than those used in the model.

Wyoming also refers to a permit to divert water from the Platte River for the Catherland Project issued by the Nebraska Department of Water Resources in 1986. In granting that permit, the Director relied upon evidence presented at the hearing. Since 1986, there have been major advancements in the state of knowledge of the flow requirements of endangered species. Had such knowledge been available at the time of the Catherland hearing, the outcome would likely have been different. Furthermore, the permit was nullified by the Nebraska Supreme Court.

to 1884 in one of those years.[5] Blue Creek, one of the few tributaries to the North Platte River located between the state line and Lake McConaughy that does not rely on irrigation return flows, has been regulated every year during this same ten-year period. Additionally, Lake McConaughy, designed to hold 2,000,000 acre feet of water, is reaching all-time lows. On September 19, 1990, the level of Lake McConaughy dipped to 888,100 acre feet. A year later, on September 10, 1991, the storage content of Lake McConaughy fell to 823,988 acre feet. These are the lowest recorded levels in Lake McConaughy since 1956.

The impact has been felt by the equities asserted by Nebraska in its petition. For example, irrigators using natural flows have experienced water shortages and are threatened with further shortfalls. Adverse economic impacts have resulted. Hydroelectric power production in Nebraska has decreased. Recreational activities, both reservoir-based and stream-based, have sharply declined. Environmental groups claim that the needs of endangered species have not been met in 48 out of the last 50 years. During the last two summers, the Platte River has gone dry in certain reaches, resulting in major fish kills.

These uses rise above mere individual interests into the collective equities which the State of Nebraska represents *parens patriae* in an equitable apportionment proceeding before the Court. Accordingly, while there are other proceedings relating to the use of the North Platte and Platte rivers, the issue raised by Nebraska's petition is one of

---

[5]Colorado argues that "[a]s far as downstream equities are concerned, Nebraska's position is . . . tenuous, since Nebraska's problems are largely of its own making." Colorado's Brief in Opposition at 9. Wyoming makes a similar assertion with respect to the use of surface flows to offset ground water depletions. Wyoming's Brief in Opposition at 9. Over-appropriation, however, is ordinarily what precipitates interstate compacts or decrees. Indeed, Wyoming's Deer Creek proposal results from the demands of downstream irrigators and industrial users against the junior priorities of the City of Casper.

equitable apportionment.[6] Equitable apportionment is "the doctrine of federal common law that governs disputes between States concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). As an interstate dispute under U.S. CONST. art. III, § 2, it falls within the Court's "original and exclusive" jurisdiction. *See* 28 U.S.C. § 1251(a) (1988); *Nebraska v. Wyoming*, 325 U.S. 589, 610-11 (1945); *Kansas v. Colorado*, 206 U.S. 46, 95-102 (1907). The preference for discretionary abstention in favor of an "alternative forum" does not apply. *See, e.g., United States v. Nevada*, 412 U.S. 534, 538 (1973). Nor does Wyoming's contention that the Court should decline jurisdiction because of the technical nature of the evidence. *See* Wyoming's Brief in Opposition at 14, 28. The issues of equitable apportionment of the non-irrigation season flows cannot be treated in ongoing state and federal administrative proceedings affecting the North Platte or Platte rivers. Nebraska's amended petition is in no way dependent on the outcome of those proceedings. Under 28 U.S.C. § 1251 (a), the Court's original jurisdiction over interstate issues is exclusive. *See Maryland v. Louisiana*, 451 U.S. 725 (1981).

---

[6]Wyoming represents that any deficiency in the water supply in Nebraska is uncertain because the ratio of supply and demand depends on the outcome of proceedings unrelated to this case. The outcome of these proceedings, however, can only exacerbate — not alleviate — the over-appropriated condition of the river. Notwithstanding the present inadequate water supply, every indication is that minimum instream flows for endangered and threatened species will be required through one or several state and federal proceedings. In relation to the FERC relicensing of Kingsley Dam, the Court of Appeals for the District of Columbia has already ordered that fish and wildlife interests must be considered in determining conditions for the annual interim licenses. Accordingly, FERC ordered such releases, which undermined already short irrigation supplies. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 876 F.2d 109 (D.C. Cir. 1989). While the parties await the decision from FERC on the final relicensing conditions, there is no suspense as to the outcome. At present, however, the river is over-appropriated, quite aside from the outcome of the FERC proceedings.

The existence of an over-appropriated, interstate river, where claims exceed supply, is the controlling factor.[7] *See Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *see generally Colorado v. New Mexico*, 459 U.S. 176, 183-84 (1982). Consequently, the Court does not decline to exercise its jurisdiction where two states claim the same property. The cases cited by Wyoming are inapposite. *New York v. Illinois*, 274 U.S. 488 (1927), was a standing case, the Court finding that the record "[did] not show that there [was] any present use of the waters [by the plaintiff] . . . nor that there [was] any definite project for so using them which [was] being or [would] be affected." 274 U.S. at 489. The analogy to *Arizona v. California*, 283 U.S. 423, 462 (1931), also misses the point. With respect to each of the counts in Nebraska's amended petition — most importantly the need for an equitable apportionment of the non-irrigation season flows — Nebraska has expressly alleged injury. *See* Nebraska's Amended Petition at ¶¶ 1-39. The issue in *United States v. West Virginia*, 295 U.S. 463 (1935), is equally unrelated to Nebraska's specific allegations in this case. Wyoming has not made "a mere assertion of a right to build a dam." *Id.* at 475. Deer Creek Dam, which will cause depletions of both apportioned flows and unapportioned, non-irrigation season flows, has been designed, redesigned, and the Wyoming Water Development Commission is ready, willing, and able to build it. *See* ¶ 24(c) of Nebraska's Amended Petition.

---

[7]In 1944, Special Master Doherty determined that the North Platte River was over-appropriated. Doherty Report at 7, 37; *see also* 325 U.S. at 608. While that condition has worsened rather than improved, Doherty's determination was made in the context of non-irrigation storage supplies and the limited availability of natural flow during the irrigation season. The non-irrigation season flows now sought to be apportioned were not a part of Master Doherty's calculus.

B. Depletions in Wyoming Will Adversely Affect Existing Uses in Nebraska

Wyoming makes no direct response to Nebraska's contentions of planned development on the North Platte River in Wyoming. Instead, it couches its argument in terms of the allegedly "speculative" or "vague" nature of Nebraska's allegations. *See* Wyoming's Brief in Opposition at 16-24. Nebraska's allegations, however, are clear. The Deer Creek Dam and Reservoir will deplete the non-irrigation season supply. The Corn Creek Project will have the same effect. Wyoming will invade non-irrigation season flows guaranteed by the Grayrocks settlement agreement that Wyoming was not a party to and refuses to honor. Additionally, discovery has revealed a series of proposed projects in Wyoming in various stages of planning, some of which would deplete the non-irrigation season flows of the North Platte River to the detriment of established uses in Nebraska. Yet Wyoming has remained conspicuously silent on the question of its planned uses of the North Platte River, while simultaneously resisting any attempt to allocate the non-irrigation season flows.[8]

From a factual standpoint, some of the projects that will deplete the non-irrigation season flows are already before the Court. It is uncontroverted that the proposed Deer Creek project would cause depletions to the North Platte River during the irrigation season and during the non-irrigation season.[9] Depending on how the equities are bal-

---

[8]In prior pleadings, Wyoming has told the Master and the Court that it needs certainty and finality with respect to its entitlements to the North Platte River so that it can proceed with its "future water development." Wyoming Motion for Summary Judgment, September 11, 1987 at 107-108.

[9]Wyoming has even argued that the depletions that would be caused by Deer Creek will occur to flows below Tri-State Dam during the non-irrigation season, characterizing these flows as "surplus or flood flows." Wyoming Reply Brief in Support of Second Motion for Summary Judgment, May 24, 1991 at 60.

anced to equitably apportion the non-irrigation season flows, Wyoming may or may not be entitled to deplete the winter flows past Tri-State Dam. Following resolution of the pending issues on the Deer Creek controversy, there will still remain the question of the effects of the proposed Deer Creek Project on the non-irrigation season flows.

Additionally, cross-motions for summary judgment have been filed by Nebraska and Wyoming on entitlement to the Laramie. The precise dispute is each state's entitlement to the Laramie during the irrigation season. The resolution of the pending matters, including the cross-motions for summary judgment, will address only the irrigation season flows.[10] To ignore the non-irrigation season flows of the Laramie would therefore address only part of the problem. While Nebraska was successful in securing non-irrigation season releases in the Grayrocks Settlement of December 4, 1978, Wyoming refused to become a party to the settlement, leaving the future in doubt.[11] *See* ¶¶ 26-27 of Nebraska's Amended Petition.

---

[10]Wyoming argues that "the respective rights of the states to the Laramie River are presently at issue before the Special Master." Wyoming's Brief in Opposition at 7; *see also id.* at 20-23. The relative rights of the states are not before the Special Master, however, with respect to the non-irrigation season flows.

[11]As a measure of atonement, Wyoming tries to portray itself as water efficient while not having been able to use all of the water apportioned to it under the Decree. In particular, Wyoming touts the Kendrick Project as a big success in "saving" water. Wyoming's Brief in Opposition at 8. In reality, Kendrick is one of the most inefficient water projects in the West. The Kendrick Project was originally built to irrigate over 60,000 acres with an annual net depletion of 72,000 acre feet. Wyoming's Brief in Opposition at 8. Since the project's initiation 50 years ago, only 24,000 acres have been developed for irrigation. The remainder of the project will likely never be built because it is not economically feasible to develop the land for irrigation. The unused water does not run down the river to Nebraska, as Wyoming argues. Instead, the Kendrick Project losses to the river system over 70,000 acre feet of water each year through evaporation from the project reservoirs. As much water is lost in evaporation as the originally contemplated, annual net depletion.

While Nebraska's existing equities arising from the use of the non-irrigation season flows are being injured by present upstream depletions, the Court has held that future uses could be considered in the interstate apportionment of water: "The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote. Under such circumstances, however, the countervailing equities supporting a diversion for future use in one State may justify the detriment to existing users in another State." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982). The Court was responding to New Mexico's argument that a planned, future use of water could not be considered in equitable apportionment proceedings against an established economy. While the case was ultimately decided on the basis of burden of proof, the principle remains. *See Colorado v. New Mexico*, 467 U. S. 310 (1984).

Accordingly, the forum for resolving these questions is before the Court in the pending case. While it is not unusual for an upstream state to resist an equitable apportionment action, the Court may find it odd for Wyoming to go to the extreme length of disavowing its own equities. Nevertheless, Wyoming cannot plan the development of shared water resources by virtue of its position as the upstream state and simultaneously defeat efforts to reconcile the conflicts its plans have created. As the Court held in a similar context: "The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained." *See Wyoming v. Colorado*, 259 U.S. 419 (1922).

POINT III

THE COURT DOES NOT APPLY THE BURDEN OF PROOF FOR DECISION ON THE MERITS IN DECIDING WHETHER TO ACCEPT A CASE IN ITS ORIGINAL JURISDICTION

Wyoming's discussion of the principles governing the Court's exercise of original jurisdiction rests on the fallacy that the standard for taking a case is identical to that for relief on the merits. *See* Wyoming's Brief in Opposition at 14-16. The two are not the same. Relief on the merits in an equitable apportionment action is properly governed by a standard of clear and convincing burden of proof. *See Colorado v. New Mexico*, 459 U.S. 176, 187-88 n.13 (1982). In a compact enforcement case or a case involving construction of a decree, the evidentiary standard is one of preponderance. *See* Report of Jerome C. Muys, Special Master, *Oklahoma & Texas v. New Mexico*, No. 109, Original at 86-88. The three equitable apportionment cases cited by Wyoming affirm that the equitable apportionment standard is one of clear and convincing evidence. *See Idaho v. Oregon*, 462 U.S. 1017 (1983); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921). Each case construes the power of the Court to enjoin the activities of a state at the conclusion of trial. The cases cited do not address the question of whether or not there should be a trial by pre-judging evidence not yet in the record.

It is correct that the Court has proceeded cautiously in the exercise of its original jurisdiction and has adopted the procedure of SUP. CT. R. 17.3 to limit its original jurisdiction to "appropriate cases." *See Arizona v. New Mexico*, 425 U.S. 794 (1976); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972). The question of injury is a factor. In *Alabama v. Arizona*, 291 U.S. 286 (1934), the Court properly questioned highly abstract allegations of injury resulting from the enforcement by five states of statutes against the mar-

keting of products from prison labor.[12] The same issue does not arise in a complaint for equitable apportionment unless the complaint is shown to be factually inadequate. Wyoming has made no such showing. Wyoming's statement that "Nebraska suggests that a well-pleaded complaint in the ordinary sense under the Federal Rules of Civil Procedure should be accepted by the Court as a matter of course" misstates Nebraska's position.[13] Wyoming's Brief in Opposition at 15. Nebraska argued that "a well pleaded action for equitable apportionment meets the Court's test for justiciability because it necessarily includes the concepts of an 'imminent threat' of 'serious injury.' " *See* Nebraska's Brief in Support of Amended Petition at 31.

Nebraska's statement was made in the context of an over-appropriated interstate river. Under these circumstances, the decisions of the Court clearly demonstrate that conflicting interstate claims to an over-appropriated river present an "imminent threat" of "serious injury."[14] In any event, Nebraska made such allegations expressly. *See* Nebraska's Amended Petition at (I) ¶¶ 37, 39; (II) ¶¶ 3, 5; (III) ¶¶ 3, 5. In *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the Court

---

[12]Wyoming has overplayed *Alabama v. Arizona*, 291 U.S. 286 (1934). The passage repeatedly quoted states that the allegations of threatened injury must be of serious magnitude and imminent. Wyoming's Brief in Opposition at 15. Both are expressed in the allegations in Nebraska's complaint for equitable apportionment. Nebraska's Amended Petition at (I) ¶¶ 37, 39; (II) ¶¶ 3, 5; (III) ¶¶ 3, 5.

[13]For its part, Colorado adopts the same over-simplification, attributing to Nebraska the argument that the Court is bound to accept a case "simply because it is phrased in terms of an equitable apportionment." Colorado's Brief in Opposition at 15.

[14]Wyoming agrees that a controversy over "an over-appropriated and water-short interstate system is generally appropriate for the exercise of the Court's original jurisdiction." Wyoming's Brief in Opposition at 16.

affirmed *Wyoming v. Colorado*, 259 U.S. 419, 466 (1922) to the effect that:

> . . . *Wyoming v. Colorado, supra*, indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. If there were a surplus of unapportioned water, different considerations would be applicable. *Cf. Arizona v. California*, 298 U.S. 558. But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States, we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

325 U.S. at 610. The Court does not robotically accept every claim containing the phrase "equitable apportionment." Evaluation is necessary. That is the purpose of the procedure established by SUP. CT. R. 17.3, which in equitable apportionment cases is designed to allow a facial determination of whether claims exceed supply. *See Nebraska v. Wyoming, supra*. Parties opposing the petition are therefore required to present evidence or credible argument on the point. Wyoming and Colorado have not done so. Accordingly, the complaint is well pleaded and presents factual issues framing an "appropriate case" for decision under U.S. CONST. art. III, § 2. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Kansas v. Colorado*, 206 U.S. 46 (1907).

The Court has also held that the exercise of its jurisdiction is appropriate when a petition for equitable apportionment makes a *prima facie* showing of interstate competition for the waters of a fully appropriated river. In its petition in *Colorado v. New Mexico*, No. 80, Original, Colorado alleged that the exercise of an undeveloped, inchoate water right awarded to C.F. & I. Steel Corporation in Colorado had been enjoined in the United States District Court for the

District of New Mexico.[15] *See* Colorado Complaint, July 18, 1978 at ¶¶ 7, 8. New Mexico's Brief in Opposition pointed out that the Vermejo River was fully appropriated in New Mexico. *See* New Mexico's Brief in Opposition to Motion for Leave to File Complaint, October 11, 1978 at 12-31. The Court accepted jurisdiction, presumably because of interstate competition over a fully appropriated interstate river, notwithstanding that the "competing" right in Colorado did not exist in fact but merely as a possibility. In this case, the North Platte is clearly over-appropriated. The only distinction between this case and *Colorado v. New Mexico* is that here one of the upstream projects has been constructed, the construction of a second — which bears on the irrigation and non-irrigation season flows — has been delayed pending a determination of whether it can be constructed under the Decree, and Wyoming has filed a lawsuit in federal district court in an attempt to end-run the previous apportionment of 46,000 acre feet annually of non-irrigation season flows to Nebraska. Otherwise, Wyoming, like Colorado in *Colorado v. New Mexico*, has not one but numerous planned projects for future development.

POINT IV

THE ISSUES PENDING AS THE CASE IS PRESENTLY POSTURED WILL BE RESOLVED FORTHWITH WHETHER OR NOT LEAVE TO FILE THE AMENDED PETITION IS GRANTED

Wyoming and Colorado suggest that if the Court grants Nebraska's motion for leave to file its amended petition, the resolution of the pending matters raised in the original petition will somehow be interrupted. They go so far as to suggest that Nebraska is intentionally trying to "avoid or postpone resolution of the pending issues by amending her petition." *E.g.*, Wyoming's Brief in Opposition at 13. Fur-

---

[15]The transmountain diversion works needed to exercise the alleged "right" had neither been constructed nor designed.

ther, Wyoming claims that the matters raised in Court II "appear calculated to delay and prejudice resolution of Nebraska's original petition." Wyoming's Brief in Opposition at 29; *see also id.* at 19, 21, 31-32. Neither the apportionment of unapportioned, non-irrigation season flows nor the additional claims of Decree violations by Wyoming will delay the resolution of the pending issues, including the cross-motions for summary judgment. Contrary to Wyoming's assertion, it is in Nebraska's best interest to obtain an expeditious resolution of the cross-motions for summary judgment.

Equitably apportioning the non-irrigation season flows involves determining the unapportioned, non-irrigation season water supply available for apportionment and determining the equities in each state and their water needs. The pending issues relate to interpretation and enforcement of a Decree that apportions water for irrigation uses. An apportionment of the unappropriated, non-irrigation season flows will not affect the waters apportioned by the Decree.

Similarly, the allegations of Decree violations contained in Count II of the amended petition will not affect the resolution of the allegations contained in the original petition. Nebraska's original petition alleged that Wyoming was then violating and was threatening to violate Nebraska's equitable apportionment by depleting the flows of the Laramie, by constructing the proposed Deer Creek Project, and by actions of Wyoming officials to prevent the continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska.[16] Nebraska's amended petition alleges that Wyoming has depleted and continues to deplete the natural flow of the North Platte River by the use of its "surplus water

---

[16]*See* Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, October 6, 1986.

statute," by allowing ground water hydrologically connected to the North Platte River to be used in conjunction with surface water to irrigate more than 168,000 acres as permitted by the Decree, by additional consumption on tributaries of the North Platte River below Alcova Reservoir, by depletions of storage water for unauthorized uses, by depletions of return flows, and by failing to prepare and maintain complete and accurate records of irrigated acreage and storage waters. The additional claims are unrelated to the matters presently before the Court. They represent distinct and separate violations of the Decree.

In sum, resolution of the issues raised in the original petition is not a prerequisite to the consideration of the issues raised by the amended petition. The former can and should proceed without delay.

POINT V

THERE IS NO PREJUDICE AND THE AMENDED PETITION IS NOT UNTIMELY

Wyoming and Colorado also raise the defense of untimeliness. They argue that Nebraska's amended petition was filed five years after the initiation of the litigation, asserting that the time span is inherently prejudicial. Neither state explains how it has been prejudiced, however. As explained in Nebraska's Brief in Support of Amended Petition of October 9, 1991, "prejudice" has a specific meaning under FED. R. CIV. P. 15(a). It means that a party was "deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Heyl & Patterson Intern. v. F.D. Rich Housing*, 663 F.2d 419, 426 (3d Cir. 1981); *see also Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802, 806 (D. Del. 1986). Delay by itself is not prejudicial. *See, e.g., Davis v. Piper Aircraft Corp.*, 615 F.2d 606 (4th Cir. 1980); *Cornell & Co., Inc. v. Occupational Safety and Health Review Commission*, 573 F.2d 820 (3d Cir. 1978); *Albee Homes, Inc. v. Lutman*, 47 F.R.D. 258 (E.D.

Pa. 1969); *see generally* 3 J.W. MOORE, R.D. FREER, MOORE'S FEDERAL PRACTICE ¶ 15.08[4] (2d ed. 1991).

As Nebraska pointed out in its opening brief, after the pending cross-motions for summary judgment are resolved, what will have taken place thus far is the separation of triable issues of fact from issues dispositive as a matter of law. Substantial time and resources have not been spent on the factual development of the case. While additional investigations will have to be made in defense of the amended petition, work already performed in relation to the pending claims will not somehow become moot or worthless merely because additional claims are made. The assertion of additional allegations at this point in the litigation does not deny Wyoming a fair opportunity to present its case or to defend against these claims or to offer evidence in its defense. *See Evans Products Co. v. West American Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984), *citing Universe Tankships, Inc. v. United States*, 528 F.2d 73, 76 (3d Cir. 1975).

Wyoming and Colorado have also intimated that the increased expense of litigating the matters raised in the amended petition is unreasonable. Increased expense caused by an upstream state's violations of a decree of equitable apportionment, however, is no defense to the violations.

CONCLUSION

Not granting Nebraska's motion for leave to file its amended petition to apportion the unapportioned, non-irrigation season flows would be tantamount to apportioning 100% of those flows to Wyoming. The Court's true choice is between an equitable distribution of the remaining 8% of the North Platte River or a *de facto* apportionment to the upstream state.

The amended petition demonstrates that there are existing uses of the unapportioned, non-irrigation season flows

in Nebraska for irrigation, hydroelectric power generation, recreation, and fish and wildlife purposes. The amended petition also demonstrates that the river is over-appropriated and that existing and planned developments in Wyoming threaten Nebraska's equitable interests. Accordingly, the controversy is justiciable under the law of equitable apportionment. The justiciability of Nebraska's amended petition is best reflected by the Court's decision in *Colorado v. New Mexico*, 459 U.S. 176 (1982). If an upstream state with no present or historical use of the waters of an over-appropriated interstate stream is entitled to avail itself of the original jurisdiction of the Court, it follows *a fortiori* that a downstream state is entitled to protection on an over-appropriated river against presently planned, identifiable development in an upstream state.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

MOTION FILED
FEB 6 1987

(29)

No. 108, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

STATE OF NEBRASKA, Plaintiff

v.

STATE OF WYOMING, Defendant

MOTION OF AMICUS CURIAE NATIONAL AUDUBON SOCIETY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF NEBRASKA'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION

---

*Peter A.A. Berle, President
National Audubon Society
666 Pennsylvania Ave., S.E.
Washington, D.C. 20003
*Counsel of Record

Hope M. Babcock
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Melinda E. Taylor
Henry, Kelly & Lowerre
2103 Rio Grande
Austin, TX 78705

No. 108, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF NEBRASKA, Plaintiff

v.

STATE OF WYOMING, Defendant

MOTION OF AMICUS CURIAE NATIONAL AUDUBON SOCIETY FOR LEAVE TO FILE A BRIEF IN SUPPORT OF NEBRASKA'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION

The National Audubon Society ("Audubon") moves for leave to file a brief in support of Nebraska's Motion for Leave to File an Amended Petition for Apportionment of Non-Irrigation Season Flows and Assertion of New Claims. Audubon submitted to the court its Brief in Support of Nebraska's Motion on November 11, 1991. In support of this motion, Audubon states the following:

1. Audubon has participated in this proceeding

before Special Master Owen Olpin as litigating amicus curiae since 1988. As an amicus, Special Master Olpin defined Audubon's role as to "ensure the ultimate protection of [environmental] interests . . . and, as traditional friends of the court, to aid in full exposition of the issues." Seventh Memorandum of Special Master at 7 (April 1, 1988). Since the Special Master ruled that Audubon could participate, Audubon has done so during all stages of the case by filing briefs and participating in oral argument at the hearings. Currently pending before the Special Master and this Court is Audubon's Petition for Reconsideration of Motion for Leave to Intervene to become a full party to the proceeding, which Audubon filed on August 2, 1991 in response to the Special Master's invitation to do so. Hearing June 7-8, 1991, transcript pp. 292-293.

2. Audubon and its members have a vital interest in the outcome of the proceeding. Audubon is a national, non-profit conservation organization dedicated to the preservation of birds and other wildlife and their habitat. Audubon has over 550,000 members, more than 3,000 of whom reside in Nebraska. Audubon staff and members are involved in numerous activities related to the Platte, including: (1) management of a 1,200-acre sanctuary on the river near Gibbon, Nebraska for the

benefit of the river's wildlife; (2) participation in the Platte River Management Joint Study with the U.S. Fish and Wildlife Service and the Bureau of Reclamation; and (3) participation in this proceeding before the Special Master as amicus curiae, and several federal and state administrative proceedings to represent its members' interest in the river's wildlife.

3. The Platte River and its tributaries comprise one of the most important migratory bird habitats in North America. The river provides habitat to approximately 250 species of migratory birds, including the endangered Whooping Crane, Bald Eagle, Piping Plover, and Least Tern. Several segments of the so-called "Big Bend" reach of the Platte from Lexington to Denman, Nebraska have been declared "critical habitat" for the Whooping Crane by the U.S. Fish and Wildlife Service. 43 Fed. Reg. 20,938 (1978); 50 C.F.R. § 17.95 (1991). The value of the river as habitat for the species is dependent on the maintenance of minimum instream flows.

4. The court's decision in this case will affect the rights of the parties to the natural flow of the Platte. As a result, the court's decision will control the degree to which flow is available downstream in Nebraska. Audubon and the other parties to this proceeding are involved in separate administrative proceedings in

Nebraska to allocate the river's flow in the state among competing uses, including wildlife.

5. Granting Audubon leave to file a brief would contribute to the Court's analysis of the issues in Nebraska's Motion for Leave to File an Amended Petition by bringing relevant information to the Court's attention that has not been covered adequately by the parties in their briefs. In particular, Audubon's brief would describe the value of the Platte River ecosystem to the migratory birds that depend on it, and the effect that further diminumtion of flows, during the irrigation or non-irrigation seasons, would have on the species.

6. Audubon submitted its Brief in Support of Nebraska's motion on November 11, 1991. Audubon did not file an accompanying motion for leave to file the brief at that time, because it did not appear from the Supreme Court rules that such a motion was necessary. Rule 17 requires that a motion for leave to file preface the initial pleading in any original action. Sup. Ct. R. 17.3. Audubon's brief in support of Nebraska's Motion for Leave to Amend was not an initial pleading. Rule 37 specifies several situations in which a motion for leave to file a brief amicus curiae is necessary that are inapplicable in this proceeding. For example, Rule 37 requires a motion for leave to file a brief amicus curiae in connection with a petition for a writ of certiorari, or

in a case before the Court for oral argument. Sup. Ct. R. 37. In this case, Audubon has played a unique role for an amicus, which was defined by the Special Master, by participating along with the parties in all aspects of the proceeding.

Though it appeared unnecessary, two of the four amici who filed briefs in response to Nebraska's motion included with their briefs motions for leave to file. The Court granted those motions on January 21, 1992. Audubon files this motion for leave to file the brief it previously submitted in the event that the court deems such a motion necessary.

Respectfully submitted,

Peter A.A. Berle
*Counsel of Record
President
National Audubon Society
666 Pennsylvania Ave., S.E.
Washington, D.C. 20003
(202) 547-9009

Hope M. Babcock
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001

Melinda E. Taylor
Henry, Kelly & Lowerre
2103 Rio Grande
Austin, TX 78705

John Echeverria
Litigation Counsel
National Audubon Society

MOTION FILED
FEB 10 1992

(19)

No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1986

Before the Honorable Owen Olpin
Special Master

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

CAUTIONARY MOTION OF AMICUS CURIAE PLATTE RIVER TRUST FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF NEBRASKA'S AMENDED PETITION FOR APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

*ABBE DAVID LOWELL
MAX HATHAWAY
SUE ELLEN RUSSELL
Counsel of Record

Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:
EUGENE GRESSMAN
Seton Hall University School of Law

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

CAUTIONARY MOTION OF AMICUS CURIAE PLATTE RIVER TRUST FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF NEBRASKA'S AMENDED PETITION FOR APPORTIONMENT OF NON-IRRIGATION SEASON FLOWS AND FOR THE ASSERTION OF NEW CLAIMS

The Platte River Whooping Crane Critical Habitat Maintenance Trust ("the Trust") submits this cautionary motion for leave to file its Memorandum In Support of Nebraska's Amended Petition filed with this Court on November 12, 1991. In support of its motion, the Trust states as follows:

1. The Trust is a non-profit organization whose mission is to protect and enhance the Platte River critical habitat and other migratory and resident bird

habitat regions of the Platte and North Platte Rivers. Since its organization in 1980, the Trust and its staff of scientists have been engaged in studying and reclaiming the Platte River habitat.

2. A three-person Board of Trustees governs the Trust. The State of Nebraska, the Missouri Basin Power Project, and the National Wildlife Federation each appoint one trustee. Because of the diverse interests appointing its trustees, the Trust has become an excellent source of objective scientific information based on the Trust's long-term direct studies and expertise.

3. On April 1, 1988, Special Master Owen Olpin granted the Trust amicus curiae status in this case which concerns the apportionment of irrigation season flows of the North Platte River among Nebraska, Wyoming, Colorado, and the United States. On March 13, 1991, the State of Nebraska requested that the Special Master recommend to this Court an apportionment of the *non-irrigation* season natural flows of the North Platte River. The Trust supported Nebraska's motion. The Special Master denied Nebraska's motion, suggesting that Nebraska should instead file an amended petition directly with the Court.

4. On October 9, 1991, Nebraska filed her motion with the Court for leave to file an amended petition to apportion the non-irrigation season flows. Nebraska's motion included a request for the assertion of new claims, as well as a brief in support ("Nebraska Amended Petition" and "Nebraska Brief").

5. On November 12, 1991 the Trust filed a brief in support of Nebraska's motion for leave to file an amended petition. The Trust argues that (1) the Court

may invoke its original jurisdiction over the amended petition, (2) the close relationship between irrigation and non-irrigation season flows requires that the Court exercise its original jurisdiction, and (3) to avoid irreversible injury to the wildlife habitat the Court must exercise its original jurisdiction.

6. As the Trust filed its brief in response to the Special Master's suggestion and the Court's rules do not appear to require an accompanying motion for leave to file, the Trust filed its brief without an accompanying motion.

7. The Trust submits its cautionary motion at this time in the event that the protocol of the Supreme Court does require such a motion.

Respectfully submitted,

*ABBE DAVID LOWELL
MAX HATHAWAY
SUE ELLEN RUSSELL
* *Counsel of Record*

Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:
EUGENE GRESSMAN
Seton Hall University School of Law

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, *et al.*,

Defendants.

OWEN OLPIN, SPECIAL MASTER SECOND INTERIM REPORT ON MOTIONS FOR SUMMARY JUDGMENT AND RENEWED MOTIONS FOR INTERVENTION

April 9, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
GLOSSARY OF SELECTED TERMS	vi
I. INTRODUCTION	1
A. Background	1
B. The Current Proceedings	4
C. Summary Judgment Standards	10
D. Substantive Bases for Decision	13
E. Disposition of Legal Issues	16
1. Inland Lakes	16
2. The Laramie River	17
3. Deer Creek	18
4. Below Tri-State Dam Issues	18
5. Intervention Motions	19
II. THE INLAND LAKES	19
A. History of the Inland Lakes	23
1. The Original Proceedings	26
2. After the Decree	28
B. Wyoming's Evidence	30
C. Discussion and Conclusion	32
III. THE LARAMIE RIVER	35
A. The Motions for Summary Judgment	41
1. Background: The Decrees	41
2. The Record Through 1945	44
a. The Decrees, Opinions and Special Master Doherty's Report	44

TABLE OF CONTENTS—Continued

	Page
b. The Record in the Original Proceedings: Inclusion of Laramie Waters in the Whalen to Tri-State Apportionment	49
3. Conduct of the Parties Since 1945	60
B. Grayrocks and Corn Creek	64
1. Grayrocks	65
2. Corn Creek	69
IV. THE DEER CREEK PROJECT	71
A. The Effect of Threatened Tributary Storage Capacity	74
B. The Municipal Exemption	77
1. The Nature and Scope of the Exemption	78
2. The Application of Paragraph X to the Deer Creek Project	83
a. The Uses to be Served and the Need for Additional Supplies	83
b. Project Operation and Water Rights Administration	85
3. Conclusion	88
V. DOWNSTREAM OF TRI-STATE	89
A. Background	89
B. Wyoming and Colorado Motions	92
C. Nebraska's Motion for Partial Summary Judgment	99
VI. THE RENEWED MOTIONS FOR INTERVENTION	101
A. Background	101
B. The Platte River Trust and Audubon Intervention Motions	103

TABLE OF CONTENTS—Continued

	Page
C. The Basin Intervention Motion	108
D. The Central Intervention Motion	108
VII. CONCLUSION: PROPOSED FORM OF ORDER	109
APPENDIX A	A-1
APPENDIX B	B-1

TABLE OF AUTHORITIES

CASES **Page**

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 10, 11, 12, 35
Arizona v. California, 460 U.S. 605 (1983) 34
California v. Southern Pacific Co., 157 U.S. 229 (1895) 101
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 11
Colegrove v. Green, 328 U.S. 549 (1946) 102
Colorado v. Kansas, 320 U.S. 383 (1943) 13
Colorado v. New Mexico, 467 U.S. 310 (1984) 13
Grayson v. Virginia, 3 U.S. 320 (3 Dall. 320) (1796) 101
Kentucky v. Indiana, 281 U.S. 163 (1930) 102
Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990) 11, 77
National Audubon Society v. Superior Court, 658 P.2d 709, 33 Cal. 3d 419 (1983) 107
Nebraska v. Basin Electric Cooperative, No. 78-1775 (D. Neb. Dec. 4, 1978) 6, 65, 66, 67
Nebraska v. Wyoming, 295 U.S. 40 (1935) 20
Nebraska v. Wyoming, 304 U.S. 545 (1938) 20
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) ..... *passim*
Nebraska v. Wyoming, 483 U.S. 1002 (1987) 6
Nebraska v. Wyoming, 485 U.S. 931 (1988) 7
Nebraska v. Wyoming, 492 U.S. 903 (1989) 8
New Jersey v. New York, 283 U.S. 336 (1931) 107
New Jersey v. New York, 345 U.S. 369 (1953) 102
Texas v. New Jersey, 379 U.S. 674 (1965) 102
United States v. Glenn-Colusa Irrigation District, 1992 WL 41634 (E.D. Cal. Jan. 9, 1992) 108
Utah v. United States, 394 U.S. 89 (1969) (*per curiam*) 102, 103
Wyoming ex rel. Christopulos v. United States, No. C86-0370-B (D. Wyo. Oct. 3, 1986) 20
Wyoming v. Colorado, 259 U.S. 419, *amended*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957) ..... *passim*
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992) 34

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES	Page
National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4322	107
Fed. R. Civ. P. 24	102
Fed. R. Civ. P. 56	10
S. Ct. R. 17.2	10, 101

MISCELLANEOUS	
3B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* (2d ed. 1987)	102
18 Wright, Miller & Cooper, Jurisdiction	47
J.H. Friedenthal, *Increased Participation by Non-Parties: The Need for Limitations and Conditions*, 13 U.C. Davis L. Rev. 259 (1980)	102
Paul A. Johnsgard, *The Platte: Channels in Time* (1984)	3
Paul J. Currier, Gary R. Lingle, John G. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985)	7
Restatement (Second) of Contracts (1981)	15

GLOSSARY OF SELECTED TERMS

An "*acre foot*" is that quantity of water that will cover an acre of land to the depth of one foot. It is the equivalent of 43,560 cubic feet. It is common to refer to a right to a specified number of acre feet in a water year or during an irrigation season.

A "*call*" is a demand made by or on behalf of senior water appropriators requiring the holders of more junior appropriation rights to refrain from diverting and using water until the senior's prior rights have been met.

There will be many references to the priorities, requirements, and supplies of "canals." In such instances the word "*canal*" is used as representative of the lands under or served by the canal.

"*Consumptive use*" refers to the water lost by evaporation and transpiration in the course of diversion and use. It is represented by the difference between the water diverted and that which returns to the stream.

"*Instream use*" refers to nondiversionary use by leaving water in the stream to support wildlife, recreational and other values served by the natural stream environment.

"*Irrigation requirement*" is the quantity of water (including unavoidable waste), exclusive of precipitation, that is required for crop production.

"*Irrigation season*" is used in this Report as defined in the Decree to include the months of May through September during which irrigation deliveries to lands are made in the North Platte Basin.

"*Natural flow*" or "direct flow" refers to all water in a stream except that which comes from storage water releases.

The western law of "*prior appropriation*" is the body of water law adopted widely by arid western states, including Colorado, Wyoming and Nebraska, under which

water rights are administered on a priority of appropriation basis with senior water rights holders being entitled to receive their entire requirements before more junior rights come into priority.

"*Return flow*" is the residual which returns to a stream of water which has been diverted and used. It may be "visible" or "invisible" depending upon whether it takes the form of surface flows or underground percolation.

"*Second foot*" is an abbreviated expression for "one cubic foot per second of time." It is a unit of measurement of the flow of water.

"*Water year*" as used herein means the twelve months between and including October 1 of each year and September 30 of the following year. This is the water year of Nebraska, Wyoming and Colorado, and is the standard water year employed by the United States Geological Survey.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, *et al.*,

Defendants.

OWEN OLPIN, SPECIAL MASTER SECOND INTERIM REPORT ON MOTIONS FOR SUMMARY JUDGMENT AND RENEWED MOTIONS FOR INTERVENTION

April 9, 1992

I. INTRODUCTION

A. Background

The North Platte River originates in the mountains of northern Colorado and then flows north along the eastern slope of the Continental Divide into southeastern Wyoming about eighty miles west of Cheyenne. It continues in a generally northerly direction to Casper, Wyoming, collecting along the way the flows of its most significant tributaries including the Medicine Bow and the Sweet-

water Rivers. Near Casper, the river curves and flows in a southeasterly course to the Wyoming-Nebraska line twenty miles upstream of Scottsbluff, Nebraska. It then continues on a more easterly course until it joins the South Platte River at the town of North Platte, Nebraska, to form the Platte River. The Platte River then arcs first southeasterly and then mostly northeasterly through Nebraska and joins the Missouri River, a short distance downstream of Omaha.[1]

As early as about 1870, settlers started to use the North Platte River for irrigation by direct diversions of natural flows, and by 1913 Pathfinder Dam was built and in operation forty miles upstream of Casper. Pathfinder, the second dam to be completed in the United States under the 1902 Reclamation Act, impounds North Platte flows in a 1,016,507 acre-foot capacity reservoir. Pathfinder stores the entire river at that point during much of the year, and during those periods an essentially new river rises at the Alcova Dam element of the Kendrick Project a short distance below Pathfinder Dam. That new river is entirely fed by return flows and downstream tributary contributions.

The construction of Pathfinder Dam as a component of the Bureau of Reclamation's North Platte Project started a chain of development in the North Platte Basin that has continued ever since. As a result, by the 1930's the North Platte and many of its major tributaries were—as they still are—over-appropriated.[2] Increased

---

[1] The North Platte River's length is about 70 miles in Colorado, 435 miles in Wyoming and 183 miles in Nebraska. Maps of the North Platte drainage basin are attached as Appendix A-1 and Appendix A-2.

[2] *See, e.g.*, Report of the Honorable Michael J. Doherty, Special Master (1944) ("Doherty Report") at 37 ("The North Platte River has long been the subject of potential controversy between three litigating States. This has been due to the central fact that the dependable natural flow of the river during the irrigation season

human consumption and the network of on-stream reservoirs regulating flows have greatly reduced average flows and significantly altered the river's channel in the important wildlife habitat areas in central Nebraska.[3]

Traditionally, the North Platte River has been appropriated for agricultural uses and, to a much lesser extent, for municipal and industrial uses. In-stream values—aesthetic, recreational, ecological, environmental and historic—have remained backstage until quite recently. Today, though, the traditional water-using interests face claims demanding that a share of the North Platte flows remain in the river to serve wildlife, recreational, and other instream values.

The Supreme Court first apportioned the waters of the North Platte River by decree in 1945, after eleven years of litigation involving the states of Colorado, Wyoming, and Nebraska as well as the United States.[4] *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) ("the Decree").[5] (This early litigation is referred to in this Report as "the original proceedings.")

During the original proceedings, the Court examined whether upstream junior appropriators in Wyoming and Colorado wrongfully were depriving senior appropriators in Nebraska of North Platte waters. At that time the

---

has long been over-appropriated. So far as this river is concerned, neither Wyoming nor Colorado has ever recognized any extension of priorities across state lines, nor have they ever limited or regulated diversions by their appropriators in subordination to or for the benefit of senior appropriators of a lower State.")

[3] *See, e.g.*, Paul A. Johnsgard, *The Platte: Channels in Time* at 82 (1984).

[4] The United States was an intervenor in the original proceedings leading to the 1945 Order and Decree and has remained as a party in the current proceedings.

[5] The Decree, as modified in 1953, is attached as Appendix B.

Court referred the matter to Special Master Michael Doherty, whose final report (the "Doherty Report") formed the basis for the Decree that emerged. The Decree's polestar is its allocation of natural flow waters in the "pivotal" reach of the North Platte mainstem, between Whalen Dam in Wyoming, forty miles upstream of the Wyoming-Nebraska state line, and the Tri-State Diversion Dam in Nebraska, one mile downstream of the state line. The Decree apportioned natural flows in this section of the mainstem 75 percent to Nebraska and 25 percent to Wyoming during the May 1 through September 30 irrigation season. Decree ¶ V. In so doing, the Decree recognized some priorities across state lines, and protected the pivotal reach against both certain further Colorado development, *id.* ¶ I, and certain further upstream Wyoming development. *Id.* ¶¶ II, IV.

B. The Current Proceedings

Nebraska petitioned the Court to enforce the Decree and for injunctive relief on October 6, 1986,[6] and Wyoming answered and counterclaimed on March 18, 1987.[7] The current proceedings are before the Court pursuant to the "changed conditions" or "reopener" provision of the Decree, under which the Court retained jurisdiction for the purpose of any "order, direction, or modification" of the Decree.[8] Since the Decree was entered, development has in no sense stood still on the North Platte River. Aside from 1953 stipulated modifications to the Decree,

---

[6] Petition For An Order Enforcing Decree And For Injunctive Relief (Oct. 6, 1986) ("Nebraska Petition").

[7] Wyoming Answer To Petition, Motion For Leave To File Counterclaim And Counterclaim (Mar. 18, 1987) ("Wyoming Answer and Counterclaim").

[8] Changed conditions, Decree ¶ XIII(f), and threatened construction in Nebraska or Wyoming, *id.* ¶¶ XIII(b)-(c), are examples of events set forth in the Decree that might prompt the Court's review.

however, more than forty years of interstate administration under the Decree went by before North Platte apportionment issues returned to the Court in 1986.

In her petition, Nebraska alleges that Wyoming unlawfully is depleting and threatening to deplete the flows of the North Platte River by her intended administration of Grayrocks Reservoir's operations and releases on the Laramie River, by her intended construction of the Corn Creek project diversion facility at the Laramie's confluence with the North Platte River, by her proposed construction of a storage reservoir on the Deer Creek stream, which enters the North Platte between Pathfinder and Guernsey Dams, and by her efforts to prevent the United States Bureau of Reclamation from continuing historic off-season storage in the Inland Lakes in Nebraska. Nebraska Petition ¶ 3.

Wyoming counterclaims that Nebraska is circumventing the Decree by demanding natural flows for diversion by irrigation canals at and above Tri-State Dam in excess of the irrigation requirements of lands entitled to water under the Decree, and by demanding both natural flows and storage water from sources above Tri-State Dam and diverting those waters to uses below the Tri-State Dam that are not recognized by the Decree. Wyoming Answer and Counterclaim at 8-9.

Since 1986, the parties' positions have evolved and been shaped by the proceedings. Thus, the issues presented for decision in the context of the summary judgment motions before me are in some instances somewhat different from the literal claims of the initial pleadings. Indeed, even the summary judgment motions as originally articulated have evolved during the course of several rounds of briefings and hearings.

In a nutshell, the following events have occurred in the current proceedings. The matter was referred to me as Special Master on June 22, 1987, together with the five

then-pending motions to intervene.[9] The would-be intervenors were Basin Electric Power Cooperative ("Basin"), the operator of Grayrocks Dam and Reservoir on the Laramie River in Wyoming; the Central Nebraska Public Power and Irrigation District ("Central") and the Nebraska Public Power District ("NPPD"), downstream water users in Nebraska; the Platte River Whooping Crane Critical Habitat Maintenance Trust ("Platte River Trust");[10] and the National Audubon Society ("Audu-

---

[9] The Court's June 22, 1987 Order referring this matter to me states:

> It is ordered that Owen Olpin, Esquire, of Los Angeles, California, be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

Nebraska v. Wyoming, 483 U.S. 1002 (1987).

[10] The Platte River Trust was established in 1978 by Basin as a result of litigation over the construction of the Grayrocks Dam and Reservoir in Wyoming. Grayrocks supplies process and cooling water to the Laramie River Station, a large coal-fired steam electric power generating plant. Both the reservoir and the power plant were built by the Missouri Basin Power Project, a consortium of consumer and publicly-owned utilities supplying power in eight states, including Nebraska and Wyoming. *Amicus* Basin operates the power plant and reservoir. In 1978, Nebraska joined a lawsuit filed by several environmental groups in federal district court in Nebraska challenging loan guarantees by the Rural Electrification Administration and issuance of a section 404 permit by the Army Corps of Engineers, and seeking an injunction against construction of Grayrocks on the grounds of non-compliance with the National Environmental Policy Act of 1969 and the Endangered Species Act of 1973. The case settled, creating the Platte River Trust as part of the settlement. Agreement of Settlement and Compromise, *Nebraska v. Basin Electric Cooperative*, No. 78-1775 (D. Neb. Dec. 4, 1978) ("1978 Settlement Agreement"). The Platte River Trust has a mandate to protect and maintain the habitat for migratory bird species on the Platte River.

bon"). The latter two speak for wildlife interests downstream of Tri-State Dam, including threatened and endangered species such as the whooping crane, and critical wildlife habitat in the Big Bend Reach of the Platte River in central Nebraska. The Big Bend Reach is an important migratory route or staging area for numerous species of migratory birds, including the whooping crane and the sandhill crane.[11]

I denied the motions for intervention on April 1, 1988, but invited the five movants to participate in the case as *amici*, to represent wildlife and other interests and to assist in the development of expert evidence.[12] All but one of the *amici* have participated actively since then, filing briefs and memoranda and arguing at hearings. I reported to the Court on June 14, 1989 the reasons for my 1988 denial of the intervention motions. *See* Special Master, First Interim Report (June 14, 1989) ("First Interim Report") at 6-14.

The wildlife issues downstream of Tri-State Dam were also invoked by Nebraska in her January 11, 1988 petition to the Court to amend her earlier October, 1986, petition primarily to enforce and modify, if necessary, the Decree to protect instream uses in Nebraska. Nebraska noted that "the principal in-stream use of the waters of the North Platte and its tributaries has been for the development and protection of critical wildlife habitat."[13] The Court denied that motion without explanation. *Nebraska v. Wyoming*, 485 U.S. 931 (1988).

---

[11] *See generally* Paul J. Currier, Gary R. Lingle, John G. VanDerwalker, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985).

[12] *See* Seventh Memorandum Of Special Master And Order Regarding *Amicus Curiae* Status Of The National Audubon Society, The Platte River Trust, Basin Electric And The Nebraska Districts (Apr. 1, 1988) ("Seventh Memorandum") at 4, 14.

[13] Brief In Support Of Motion To Amend Petition For An Order Enforcing Decree And For Injunctive Relief (Jan. 11, 1988) at 2.

On September 11, 1987, Wyoming moved for summary judgment on all the questions raised in Nebraska's October, 1986 petition. Wyoming acknowledged that Nebraska's petition accurately described Wyoming's proposed developments on the North Platte River and its tributaries and conceded impacts on North Platte flows. Wyoming's position, however, was that, given that the basis of Nebraska's petition was to enforce (not to modify) the Decree, all the contested developments and activities were sanctioned in some manner by the Decree. Thus, Wyoming contended that there were no material factual issues and that the case could be resolved as a matter of law on the face of the Decree. As reported in June, 1989, in my First Interim Report, I denied Wyoming's motion for summary judgment in its entirety but left open the possibility of summary adjudication following further factual development. The Court received and ordered the First Interim Report to be filed without inviting the parties to file exceptions. *Nebraska v. Wyoming*, 492 U.S. 903 (1989).

An intensive period of discovery followed my denial of Wyoming's motion, during which I toured the North Platte River and examined the various developments along its entire course. I later returned to the Big Bend Reach of the Platte River in central Nebraska to observe the spring migration of the sandhill crane and other migratory bird species. Following my original field trip to the North Platte Basin in August, 1990, I convened a status conference during which it became clear to me that, as a consequence of the factual development during the previous year, the parties believed summary adjudication might be appropriate on some issues in the case. Accordingly, I set a briefing schedule for the present motions for summary judgment.

During February and March, 1991, all the parties moved for summary judgment on one or more of the

issues.[14] Those motions were briefed and a hearing was held on the motions in Salt Lake City, Utah on June 7 and 8, 1991. Subsequently, the parties filed post-hearing briefs. At the Salt Lake hearing, I also invited the *amici* to re-petition for intervention if appropriate. Three of the *amici* renewed their earlier petitions to intervene and those petitions were briefed in the ordinary course.

---

[14] The motions for summary judgment, in a nutshell, are as follows. Nebraska moved for summary judgment to the effect that: (1) The Inland Lakes have a December 6, 1904, priority date; (2) Nebraska is entitled to all flows of the Laramie River over and above Colorado's and Wyoming's entitlement as set forth in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *amended*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957); and (3) the equitable apportionment between Nebraska and Wyoming was predicated upon adequate return flows below Tri-State Dam derived from appropriations along the mainstem and, thus, Nebraska has enforceable rights in those return flows. *See* Nebraska's Motion For Partial Summary Judgment And Brief In Support Of Motion (Mar. 1, 1991).

Wyoming has moved for summary judgment to the effect that: (1) The Laramie River was fully apportioned between Colorado and Wyoming in *Wyoming v. Colorado*, and Wyoming has unrestricted use of the Laramie River as against Nebraska, and the Decree does not apportion Laramie flows to Nebraska; (2) the proposed Deer Creek Project would not violate Nebraska's apportionment under the Decree and partial summary judgment should confirm that Deer Creek qualifies as an exempt municipal use under paragraph X of the Decree; and (3) with respect to Tri-State issues, Nebraska's apportionment is limited by the Decree to specifically determined upstream canal rights. *See* Wyoming Second Motion For Summary Judgment And Brief In Support (Feb. 22, 1991).

Colorado has also asked for partial summary judgment that Nebraska is not entitled to assert claims for uses that do not divert at or above Tri-State Dam in an action to enforce the Decree. *See* Colorado's Motion For Partial Summary Judgment (Feb. 25, 1991).

The United States has moved for summary judgment that Wyoming may not contest the legal validity of the water rights of the Interstate Canal to divert and the Guernsey and Glendo reservoirs to store temporarily for the Inland Lakes with a priority date of December 6, 1904. *See* United States Motion For Summary Judgment On The Inland Lakes (Mar. 14, 1991).

This Second Interim Report addresses my disposition of the various summary judgment motions and intervention motions.

C. Summary Judgment Standards

The majority of the issues I consider in this Report arise in the context of motions for summary judgment. Before turning to discussion and analysis of the substantive issues, therefore, it is appropriate to set forth the summary judgment rule and how it has guided my considerations and decisions here.

Summary judgment is appropriate when there is "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Although Rule 56 is a useful guide, its application must be tempered in an original jurisdiction case such as this. The Federal Rules of Civil Procedure are not applied inflexibly in original actions, but govern where they are deemed appropriate. S. Ct. R. 17.2. Furthermore, as I noted in my First Interim Report (at 18) and my Tenth Memorandum (at 16-18),[15] the Court had already reviewed the factual adequacy of Nebraska's case before it referred the action to me as Special Master, and, therefore, I have inferred that the Court has preliminarily determined that there are factual issues in dispute.

With these considerations in mind, I examine the summary judgment standards recently spelled out by the Court. "The inquiry performed is the threshold one of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[A] party seeking summary judgment always bears the initial responsibility of in-

---

[15] Tenth Memorandum of Special Master (Mar. 2, 1989) ("Tenth Memorandum").

forming the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In considering the motion, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Liberty Lobby*, 477 U.S. at 255. But these inferences do not relieve the nonmoving party of its own burden when opposing summary judgment. Rule 56 requires the nonmoving party "to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. Factual issues must be resolved in favor of the nonmoving party, and a motion for summary judgment denied, only "where the facts specifically averred by that party contradict facts specifically averred by the movant." *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3188 (1990).

The "facts" involved must be material facts. The materiality of a given fact will be determined by the substantive law involved. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Liberty Lobby*, 477 U.S. at 248. In this original jurisdiction proceeding, the material facts consist, for several of the issues raised, of the facts determined and set forth in the Record[16] and opinions in the original (and related) proceedings, and the conduct of the parties since the entry of the Decree. Where this is the case, the facts are largely undisputed.

---

[16] The "Record" referred to here and throughout this Report is the transcript of the hearings, exhibits and other documents generated in the course of the original proceedings.

Applying these standards to the issues presented here (as more fully explained below), I find that there are no material facts in dispute (1) concerning the Inland Lakes priority and (2) on the absence of diversion ceilings for the canals in the pivotal reach upstream of Tri-State Dam. I am therefore recommending that the Court grant summary judgment as requested by Nebraska and the United States on those issues. There are also no factual disputes over the Laramie issues, but the undisputed facts provide no basis on which to grant judgment in the form requested by either party and, hence, I recommend that the Court deny all motions on Laramie issues.

Finally, I find that there do remain disputes of material fact, precluding summary judgment, on the Deer Creek and the other below Tri-State issues. In these latter instances, where the facts do appear to be in dispute, I conduct the further inquiry required under Rule 56: whether the evidence presented as showing a need for trial would be sufficient to establish an essential element of the nonmovant's claim. For "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmovant]." *Liberty Lobby*, 477 U.S. at 252. Thus, consideration of a summary judgment motion when the facts are disputed "necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits." *Id.*

The parties differ on the appropriate substantive evidentiary standards and corresponding burden of proof. Wyoming insists that the "clear and convincing evidence" standard, invoked in many interstate water rights cases within the Court's original jurisdiction, applies here. Wyoming Second Motion For Summary Judgment And Brief In Support (Feb. 22, 1991) ("Wyoming Brief") at 91, 100-01. Nebraska, on the other hand, points out that while this standard is properly used in actions for equitable apportionment, it should not apply here because this proceeding entails enforcement of a prior equitable apportionment (the Decree), not whether there should be an

apportionment.[17] Instead, in Nebraska's view, the nonmoving party need only present "sufficient evidence to establish the existence of essential elements of a claim." Nebraska Response at 66.

None of the motions before me, however, properly presents the question of what standard applies. As recounted in detail in the sections that follow, where the facts are disputed the nonmoving party's evidence clearly meets even the most stringent civil standard in establishing the essential elements of the claim involved or, as the case may be, in contradicting the moving party's factual claims. Nonetheless, I conclude that the clear and convincing evidence standard is inapplicable to the issues in these proceedings. The Court requires states to bear a heavier burden than the usual civil litigant only where interference with another state's actions is requested in the first instance. *Colorado v. Kansas*, 320 U.S. 383, 399 (1943). Here, the interference has already occurred by the entry of the Decree. *Cf. Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

D. Substantive Bases for Decision

In ruling on the pending summary judgment motions, my primary task is to interpret the 1945 Decree from the original proceedings and then apply that interpretation to resolve the various issues presented by the motions. It is appropriate, therefore, to explain how I have approached this task.

To begin with, I have regarded the plain language of the Decree as controlling when the Decree's meaning is clear and unambiguous. For example, some Deer Creek issues may be resolved partly by a plain reading of paragraph X of the Decree, which provides that "or-

---

[17] Nebraska's Response To Wyoming's And Colorado's Motions For Summary Judgment And Basin Electric's Memorandum In Support Thereof (Apr. 25, 1991) ("Nebraska Response") at 65 n.30.

dinary and usual" municipal uses and consumption of water in Colorado and Wyoming are neither affected nor restricted by the Decree. The issues that remain with respect to the exemption, therefore, are those involving the extent to which Wyoming's proposed Deer Creek Project qualifies as a municipal use, the effect of any non-municipal uses on the delicate balance of the river, and whether its anticipated operation and water rights administration impacts will comport with equitable apportionment principles.

I have found it necessary, in dealing with some issues, to probe beyond the Decree's language. When that has been required, I have turned to a number of primary sources to determine what the Decree means. These sources include the Court's 1945 Opinion, the Report of Special Master Doherty and the voluminous Record of the decade of proceedings before the Special Master in the original proceedings.[18] I have found these materials a reliable guide to interpreting the Decree.[19]

In addition, on some issues I have given weight to the course of conduct of the parties in living with the Decree and in its administration after 1945. Although it could be posited that parties constrained by a Decree cannot contribute to divining the Court's intent, two independent considerations justify some reliance on post-Decree ac-

---

[18] The parties collaborated to produce and make available the more than 30,000-page Record. This task proved particularly difficult when it was discovered that the original Record could not be scanned electronically or otherwise reproduced except by manual retyping. The retyped Record is electronically searchable and has been used extensively by the parties as well as by me and my assistants in preparing the case.

[19] I find these materials more dependable, for example, than is legislative history to the interpretation of statutes. The manner of their creation in the course of the adversary process eliminates risks inherent in the legislative process where materials are unconstrained by rules of evidence and are introduced occasionally with no purpose other than to promote a particular interpretation.

tions. First, at the end of the original proceedings, Special Master Doherty sponsored a process for fashioning the Decree's language by consensus, and much of that language emanates from that collaborative effort. Thus, it is appropriate to consider the conduct of the parties as evidence of the practical construction of the Decree, drawing on well-established principles of contract interpretation. *See* Restatement (Second) of Contracts § 202 (1981). Second, and more important, equitable principles weigh strongly in favor of respecting the reliance of the parties and water users in all three states on long-standing water administration practices and resulting equities under the Decree.

I have also relied on the body of equitable apportionment jurisprudence set forth in the opinions of the Court dealing with other interstate water disputes. In the course of considering that jurisprudence, I have taken appropriate account of the equitable nature of the proceedings and of the equitable considerations presented by the parties and the *amici*. For example, I respect principles of equitable estoppel in my ruling on the Inland Lakes issue. The long history of the administration of the Inland Lakes based on a 1904 priority water right, and Wyoming's participation in the original proceedings, which assumed that the pattern would continue, must be taken into account. Wyoming cannot equitably now be heard to deny that the Bureau of Reclamation has a valid 1904 Wyoming appropriative water right to divert non-irrigation season flows for storage in the Inland Lakes and subsequent release to Nebraska's irrigators during the ensuing irrigation season.

Finally, I have relied heavily on principles of western prior appropriation law. Those principles of first-in-time, first-in-right, have long been followed by Colorado, Wyoming and Nebraska, and they guided the Court's initial fashioning of the Decree in 1945. The Court took into account the numerous factors appropriate to consider

in equitable apportionment cases, but observed that "[p]riority of appropriation is the guiding principle." 325 U.S. at 618. Thus, the Decree ordered the states to respect certain relative priorities across state lines in a manner consistent with their administration of intrastate priorities.

E. Disposition of Legal Issues

1. *Inland Lakes*

With respect to the Inland Lakes, in her petition Nebraska alleges that Wyoming is attempting to "prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska." [20] Nebraska has moved for summary judgment that the Inland Lakes have a priority date of December 6, 1904 for that storage. The United States seeks similar relief, requesting judgment that the Interstate Canal has a priority of that date to divert North Platte waters for Inland Lakes storage and that the Guernsey and Glendo reservoirs have the right to store the water temporarily for the Inland Lakes. In response, Wyoming seeks judgment that the Inland Lakes do not have a storage right under state law or the Decree.

On this issue, I recommend that the Court grant the respective summary judgment motions of Nebraska and the United States, ruling that the Inland Lakes have the same December 6, 1904, priority date as the other initial elements of the North Platte Project including the Pathfinder Reservoir and the Interstate Canal. I therefore also recommend that the Court deny Wyoming's motion for partial summary judgment.

---

[20] Nebraska Petition at 3-4.

2. *The Laramie River*

Both Nebraska and Wyoming have moved for summary judgment with respect to the Laramie River. Wyoming argues in essence that, under the Court's 1922 Laramie River Decree and the 1945 North Platte River Decree, she may dewater Laramie flows up to the confluence of the Laramie and North Platte Rivers. Nebraska, on the other hand, seeks a ruling that she has an apportionment of Laramie flows. In her petition, Nebraska alleges that Wyoming unlawfully is depleting North Platte flows through her intended administration and operation of releases from the Grayrocks Dam and Reservoir on the Laramie River, and her intended construction of the Corn Creek Project for additional storage facilities and related pumping and diversion facilities at the confluence of the Laramie and North Platte Rivers.[21] During the years since 1986, Nebraska's stance has evolved, and she now claims that Grayrocks operations will not harm her apportionment if Wyoming allows them to proceed in accordance with a 1978 Settlement Agreement that is discussed later in this report.

I recommend that the Court deny summary judgment to both Nebraska and Wyoming. I find, simply, that historic Laramie contributions to the North Platte were counted in the Decree, and so they still are, despite the fact that the Laramie, like the North Platte, was over-appropriated in 1945 and remains so today.

Nebraska fears that two Wyoming projects on the Laramie—Grayrocks Dam and the proposed Corn Creek project—may injure her. I conclude that the Grayrocks issue currently does not pose a tangible threat to Nebraska's or the United States' rights under the 1978 Settlement Agreement or to apportionments under the Decree. I recommend that the Court provide that relief be made available at the foot of the Decree if this changes.

---

[21] Nebraska Petition at 3.

I shall hold a status conference to determine whether trial is necessary on Corn Creek issues.

3. *Deer Creek*

Nebraska has also alleged that Wyoming unlawfully will deplete North Platte flows through the proposed construction and operation of a storage reservoir—to serve allegedly municipal uses—on Deer Creek, a tributary entering the North Platte River between the Pathfinder and Guernsey Reservoirs. Nebraska Petition at 3. Wyoming has moved for summary judgment that the development of Deer Creek will not violate Nebraska's apportionment and in any event is exempt under the Decree's exemption for "ordinary and usual domestic, municipal and stock watering purposes and consumption." Decree ¶ X.

I recommend that the Court deny Wyoming's motion because material factual issues remain as to how Deer Creek actually will be operated and thus whether it might "disturb the delicate balance of the river," 325 U.S. at 625, or, alternatively, whether and to what extent it is an exempt municipal use under the Decree that will be operated and administered in a manner consonant with interstate equities.

4. *Below Tri-State Dam Issues*

The Decree did not apportion to Nebraska in 1945 any North Platte waters for canals diverting below Tri-State Dam because the Court concluded that lands east of Tri-State could be satisfied from local supplies, including North Platte Project return flows. 325 U.S. at 596; *see also id.* at 607, 654-55. Nebraska has moved for summary judgment that such return flows were part of the "regimen of the river" contemplated by the Decree in which she has enforceable legal rights. Wyoming and Colorado, conversely, have each moved for a summary ruling that Nebraska has no interests protected by the Decree in return or other flows below Tri-State inde-

pendent of her upstream apportionment for lands served by canals diverting at and above Tri-State Dam.

For the most part, I recommend that the Court deny the motions for summary judgment on the below Tri-State issues as premature because they lack an evidentiary record identifying either downstream of Tri-State injury or causes of any such alleged injury. I recommend that the Court grant partial summary judgment in favor of Nebraska and against Wyoming, however, that the beneficial use requirements determined in the original proceedings for the canals diverting between Whalen and the Tri-State Dam are not absolute ceilings for Nebraska's diversions on a canal-by-canal basis.

5. *Intervention Motions*

Three *amici*—the Platte River Trust, Audubon and Central—repetitioned to intervene following my invitation to them to consider doing so during the June, 1991, hearing. Because none of these *amici* has carried its burden of demonstrating changed circumstances since my initial denial of intervention in 1989, I recommend that the Court deny all three motions but invite the *amici's* continued active participation in these proceedings.

II. THE INLAND LAKES

The Inland Lakes are four off-channel reservoirs in Nebraska constructed early in the century as part of the United States Bureau of Reclamation's ("Bureau") large North Platte Project. These reservoirs receive water through another project element, the Interstate Canal, which diverts from the North Platte at the Whalen Dam in Wyoming to make project deliveries to lands north of the river, both in Wyoming and far into Nebraska. From the time the North Platte Project commenced operations in 1913, it has been the Bureau's practice to divert water for storage in the Inland Lakes during the non-irrigation months of October, November, and April to reduce the

irrigation season demands of the Nebraska lands that are served by the Interstate Canal.

At the time the North Platte Project was initiated, the Bureau applied for and obtained Wyoming state water permits with a priority date of December 6, 1904 for the large upstream Pathfinder Reservoir, the Interstate Canal, and other project canals.[22] Apparently no Wyoming permit was issued that specifically mentioned the Bureau's contemplated non-irrigation season diversions through the Interstate Canal for storage in the Inland Lakes. It is the absence of such a specific permit that has enabled Wyoming to draw into question the Bureau's right to continue the long-standing practice of diverting and storing non-irrigation season flows in the Inland Lakes based on the December 6, 1904 priority.

In 1986, Wyoming brought suit against the Bureau in Wyoming state court ("Christopulos Suit") to require the Bureau to obtain permits under Wyoming law for the diversion and storage of waters in the Inland Lakes during the non-irrigation season.[23] In a clear

---

[22] In an opinion rendered early in the original proceedings, the Court denied Wyoming's motion to dismiss on the ground that the Secretary of the Interior was a necessary party. The Court noted that the Secretary and his agents had obtained project permits from the state and concluded that an adjudication necessarily would bind him and that consequently "Wyoming will stand in judgment for him as for any other appropriator in that state." *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Later, however, the United States determined it should participate in the case and was granted leave by the Court to intervene. *Nebraska v. Wyoming*, 304 U.S. 545 (1938).

[23] The United States removed the Christopulos Suit to federal district court. The federal court stayed the lawsuit pending resolution of related issues in this case. *Wyoming ex rel. Christopulos v. United States*, No. C86-0370-B (D. Wyo. Oct. 3, 1986). *See* Appendix To Wyoming Brief In Response To Motions For Summary Judgment Of Nebraska And The United States ("Wyoming Appendix") at C-265 to C-271. In 1990, the federal district court dismissed the suit without prejudice. Order of Dismissal Without Prejudice (Aug. 31, 1990), Wyoming Appendix at C-272 to C-273.

reference to the Christopulos Suit, Nebraska alleged in her 1986 petition that Wyoming state officials were taking certain actions designed to prevent federal officials from diverting natural flow from the North Platte for storage in the Inland Lakes.[24]

In her first motion for summary judgment, Wyoming urged that the Court rule "as a matter of law that the Wyoming lawsuit does not violate the Decree." [25] I reformulated the issue presented. The question was not whether the lawsuit itself would violate the Decree but rather whether its possible outcome would violate the Decree.[26] Having found that the Inland Lakes issues are "inextricably entwined with the 1945 Decree," I denied Wyoming's first motion and concluded that the parties should develop the relevant evidence and litigate the Inland Lakes issue in these proceedings rather than in the Wyoming federal district court. Tenth Memorandum at 23.

In the current round of summary judgment motions, both Nebraska and the United States have filed motions for summary judgment on the Inland Lakes.[27] Nebraska

---

[24] Nebraska was not a party to the Christopulos Suit.

[25] Motion Of The State Of Wyoming For Summary Judgment And Brief In Support Of Motion (Sept. 11, 1987) at 103; *see also id.* at 98-99.

[26] In my First Interim Report, I framed the issue as follows:

> [W]hether the Inland Lakes enjoy a water priority date under Wyoming law of December 6, 1904, and certain water rights for their historical administration under the Decree, and, if so, whether the Christopulos Suit is an attempt to circumvent the Court's apportionment in the 1945 Decree through the authority of a lower court decree to which Nebraska is not a party.

First Interim Report at 19-20.

[27] Nebraska's Motion For Partial Summary Judgment And Brief In Support of Motion (Mar. 1, 1991) ("Nebraska Brief") at 1, 73-74; Brief In Support Of United States Motion For Summary Judgment On The Inland Lakes (Mar. 5, 1991) ("United States Brief") at 1-3.

seeks a ruling that the right of the Inland Lakes to store 46,000 acre-feet of natural flow during October, November, and April with a priority of December 6, 1904, is part of Nebraska's apportionment; Nebraska also asks me to rule that this question was litigated during the original proceedings and is therefore *res judicata*. The United States' motion is only slightly different. The United States asks for judgment that Wyoming is barred from challenging the December 6, 1904, priority right of the Interstate Canal to divert natural flow from the North Platte for storage in the Inland Lakes or to store the water temporarily in the Guernsey or Glendo reservoirs before transfer to the Inland Lakes. Although the Christopulos Suit is not currently a live controversy, Nebraska requests equitable relief that would preclude Wyoming from taking any future action to interfere with the continuation of historic Inland Lakes storage practices. Nebraska Brief at 73. Wyoming opposes the motions of Nebraska and the United States and asks instead for partial summary judgment confirming that the Inland Lakes have no storage priority under her state law or under the Decree.[28]

I recommend that the Court grant both the Nebraska and the United States motions and rule that the Inland Lakes have a December 6, 1904 priority date. This ruling would bar Wyoming from any action that is inconsistent with a 1904 priority. I also recommend that the Court deny Wyoming's motion on this issue. I observed in my First Interim Report that, on the state of the evidence at that time, Wyoming faced a "daunting burden" in overcoming the position of the United States and Nebraska

---

[28] Wyoming Brief In Response To Motions For Summary Judgment Of Nebraska And The United States (Apr. 26, 1991) ("Wyoming Response") at 104-05. Wyoming also requests rulings on subsidiary matters that I have determined are unnecessary to the resolution of the fundamental legal issue posed.

that the Inland Lakes enjoy a 1904 priority right.[29] First Interim Report at 21. Upon consideration of the arguments and evidence subsequently presented by the parties, I conclude that Wyoming has failed to meet her burden.

A. History of the Inland Lakes

The North Platte Project and the historic operations of the Inland Lakes are described in my Tenth Memorandum to the parties and in Appendix A to my First Interim Report.[30] Nonetheless, I will reiterate some of this history for it forms the basis for my ruling on the present motions.

The North Platte Project, authorized shortly after passage of the 1902 Reclamation Act, provides irrigation water to extensive land areas in southeastern Wyoming and western Nebraska. Major project components include the Pathfinder Reservoir in Wyoming (upriver from the town of Casper), with a capacity of 1,016,507 acre feet, and the Whalen Diversion Dam, which diverts water into two canals: the Fort Laramie Canal on the south side of the North Platte River and the Interstate Canal on the north side supplying water to the Pathfinder Irrigation District during the irrigation season and to the Inland Lakes for storage in the non-irrigation season.

---

[29] In 1988, during oral argument, the United States moved for summary judgment on the Inland Lakes issue but did not brief its motion. I delayed consideration of the motion because Wyoming had not then had a full opportunity to present evidence on the issue. *See* Tenth Memorandum at 35.

[30] Tenth Memorandum at 25-27. The Doherty Report, the Opinion of the Supreme Court, and the First Affidavit of David G. Wilde dated August 15, 1988 ("First Wilde Affidavit") also detail the history and operations of the North Platte Project. *See* Doherty Report at 30-32; 325 U.S. at 594-56; First Wilde Affidavit ¶¶ 5-43, attached to Response Of The United States To Wyoming's Motion For Summary Judgment ("United States Response") (Aug. 22, 1988).

The Inland Lakes—Lake Alice, Little Lake Alice, Lake Minatare and Lake Winters Creek—are four off-channel reservoirs in Nebraska supplied by the Interstate Canal. They have a combined storage capacity of about 75,000 acre feet. To this day, and "[s]ince April 1913, the natural flow of the North Platte River has been diverted through the Interstate Canal during the non-irrigation season to the Inland Lakes for later use." First Wilde Affidavit ¶ 19; *see also id.* ¶¶ 5-9. Because of icing conditions, the Interstate Canal does not always operate during the winter months. Accordingly—and by agreement of Nebraska, Wyoming, and the United States—water destined for the Inland Lakes is often temporarily stored in Guernsey Reservoir and, as of 1960, in Glendo Reservoir, for release to the Inland Lakes during March, April, or May.[31]

On December 6, 1904, the United States filed applications in Wyoming for the construction and operation of Pathfinder Reservoir and the Interstate Canal. First Wilde Affidavit ¶¶ 15-16 & Exhibits 3, 4.[32] These applications, deemed by the Supreme Court to have been accepted by state officials as adequate under state law,[33] fixed a priority date of December 6, 1904 for both Pathfinder Reservoir[34] and the Interstate Canal.[35]

---

[31] Affidavit of Stanley M. Christensen (Mar. 1, 1991) ("Christensen Affidavit") ¶ 6, attached to Nebraska Brief.

[32] Bureau of Reclamation records reflect that a General Statement was attached to these original applications describing the North Platte project elements and making clear that water could be either diverted directly or stored. The General Statement also announced an intention to build several small reservoirs along the lines of the canals for storage to meet seasonal demands. *See* note 41 *infra*.

[33] 325 U.S. at 613.

[34] *Id.* at 602, 649; First Wilde Affidavit ¶ 16.

[35] 325 U.S. at 649; Doherty Report at 204; First Wilde Affidavit ¶¶ 8, 15.

During the early years of the North Platte Project's operation, Wyoming did voice some concern over the Inland Lakes' storage of water without the appropriate Wyoming storage permits.[36] Wyoming, however, has never disputed that the Inland Lakes form an essential component of the North Platte Project.[37] Indeed, in a summary of the status of the Interstate Canal system operation written in 1934, the Wyoming State Engineer reiterated Wyoming's concern that the Inland Lakes lacked individual state permits, but conceded that if the Inland Lakes could be shown to be "an integral part of the original plan filed December 6, 1904," they would have to be accorded a 1904 priority date. Edwin W. Burritt, *Water Supply Report Casper-Alcova Project, Wyo.* (Dec. 31, 1934) at 33, 37-38, Nebraska Appendices at A-62 to A-65.[38] This status was acknowledged during the

---

[36] Wyoming Brief In Response To Motions For Summary Judgment Of Nebraska And The United States (Apr. 26, 1991) at 49-61; *see also* Nebraska Brief at 75-78.

[37] *See, e.g.*, Answer Of Wyoming To Colorado Cross-Bill at 7; Wyoming Proof Of Appropriation (June 28, 1934) ("Answer"), Appendices To Nebraska's Motion For Partial Summary Judgment And Brief In Support Of Motion ("Nebraska Appendices") at A-40 to A-42; Preliminary Draft Of North Platte River Compact For Consideration Of Commissioners (Jan. 4, 1927), Nebraska Appendices at A-50 to A-54.

[38] Burritt wrote:

> The Casper-Alcova Project, when constructed [with a 1904 priority date as Wyoming was then claiming], would be neither better off nor worse than the 58,000 acre feet enlargement of the Pathfinder Reservoir, the storage right in Lake Alice and Lake Minatare and the direct flow right of the Fort Laramie Canal, as the establishment of these claims also must depend in their entirety upon the one point, that is, that each of them is an integral part of the original plan filed December 6, 1904, in the office of the State Engineer of Wyoming and protected by inclusion in the general statement concerning the North Platte Project.

Nebraska Appendices at A-65.

original proceedings by both the Court and the Special Master. *See* 325 U.S. at 594-95; Doherty Report at 30.

1. *The Original Proceedings*

The use and requirements of the Inland Lakes were litigated by Colorado, Wyoming, Nebraska and the United States during the original proceedings. *See, e.g.*, Record at 208, 480-81, 26151-53, 26227-28, 26760-83. Despite Wyoming previously having made known to the United States that the Inland Lakes were not individually permitted, she did not assert any such concern during the original proceedings.[39] To the contrary, at that time both Wyoming and Colorado urged that storage of natural flows in the Inland Lakes during the non-irrigation season could serve to reduce the flow requirements of the Interstate Canal during the high-demand irrigation season. Record at 26755-83. Both states, therefore, recommended essentially that the entire capacity of the Inland Lakes (75,000 acre feet) be allocated and that Nebraska's allotment of natural flows during the irrigation season be correspondingly reduced. Doherty Report at 60-61; 325 U.S. at 646. While Special Master Doherty and the Court ultimately rejected the storage quantity advocated by Wyoming and Colorado, both nonetheless embraced the concept that some quantity of natural flow water would be stored in the Inland Lakes during the non-irrigation season. Those natural flow diversions could then be deducted to determine the overall Interstate Canal irrigation season requirement.

The Master recommended that 46,000 acre feet be charged against the Inland Lakes and correspondingly deducted. He stated:

> During the months of October, November, and April, the Interstate Canal diverts at Whalen and trans-

---

[39] *Cf.* Record at 20417-23, 21345-47, 21475, 26228-30, 27846-47, 28598-99, 29414, 29447-48; *see also* United States Exhibit No. 132, Nebraska Appendices at A-68; Wyoming Exhibit No. 160, Nebraska Appendices at A-70 to A-71.

> ports to the inland reservoirs in Nebraska—Lake Alice and Minatare—variable quantities of water which are released in the following irrigation season for use on the lands of the Pathfinder Irrigation District. *Such storage water reduces the irrigation season demand of the canal on the river at Whalen.* . . . My conclusion is that 46,000 acre feet should be adopted as the charge against the Interstate seasonal requirement for water storable in Lake Alice and Minatare. *This deducted from the total Interstate requirement* of 419,000 acre feet leaves a net seasonal requirement of that canal at Whalen of 373,000 acre feet, and reduces the total net seasonal requirement of all canals diverting in the Whalen-Tri-State Dam section to 1,027,000 acre feet.

Doherty Report at 60-61 (emphasis added, footnote omitted).[40] Further, Special Master Doherty recommended that, "[s]hould it be found in the future that a dependable winter supply of more than 46,000 acre feet is divertable to Alice and Minatare, the seasonal demand on the river of Interstate should be accordingly reduced." *Id.* at 61 n.3.[41]

---

[40] In calculating the Interstate Canal's demand during 1931-40, Special Master Doherty emphasized that his calculation included flows to the Alice and Minatare reservoirs. Doherty Report at 76, Table VII. Moreover, despite the fact that the Record contains obvious inconsistencies in the basic descriptions of the Inland Lakes (*compare* U.S. Exhibit 132 (listing three lakes with Minatare constructed in 1915) *with* Doherty Report at 30 (two lakes, Minatare completed in 1914)), these inconsistencies were not examined seriously by the parties or Special Master Doherty, lending additional support to the conclusion that the sole Inland Lakes issue considered was the extent of their putative supply to the overall North Platte Project scheme. Because the focus was on overall supply and storage, it was apparently not deemed relevant whether the Lakes were individually permitted.

[41] *See also* "General Statement" at 1, regarding the North Platte project components, attached to First Wilde Affidavit ("It is proposed to store all the unappropriated waters of the North Platte River, and application is made for all such unappropriated water,

Adopting Special Master Doherty's recommendations, the Court agreed that the Inland Lakes formed an essential component of the North Platte Project. 325 U.S. at 595. The Court also agreed that natural flow diversions into the Inland Lakes during the non-irrigation season should be deducted from Nebraska's irrigation season Interstate Canal natural flow apportionment, the approach advocated by Wyoming and Colorado. *Id.* at 646. Finally, the Court recognized a December 6, 1904 water right priority for the North Platte Project, implicitly according the same priority to the Inland Lakes as was accorded to Pathfinder Reservoir, the Interstate Canal, and the other initial project elements.[42] *Id.* at 613, 648-49 & n.2; *see also* Doherty Report at 86-87.

2. *After the Decree*

Since the Decree was entered in 1945, the Inland Lakes have been administered on the same priority basis as Pathfinder Reservoir and the Interstate Canal for up to 46,000 acre feet during October, November and April.[43]

---

which, however, may be taken direct from the river at the headgates of any of the canals constructed by the Government of the United States . . . or may be stored, as appears to the best interests and of the greatest benefit to said reservoir canals and the users of water thereunder."); *id.* at 2 ("It is expected to construct numerous small reservoirs along the lines of the several canals, in order to meet the demand for large amounts of water during the short period of maximum use. These reservoirs have not been definitely located."). Bureau of Reclamation records reflect that this Statement was filed with the original permit application to the Wyoming State Engineer.

[42] This status is not inconsistent with that of the Guernsey Reservoir, which is also part of the North Platte Project but has a 1923 priority. The Guernsey Reservoir was not included in the original applications filed in 1904, and construction of the Dam did not begin until 1925. By contrast, the Inland Lakes were included in the initial design of the North Platte Project. *See* First Wilde Affidavit ¶¶ 7-8, 16-19.

[43] *Id.* ¶¶ 28-29 & Exhibits 11-14; *see also* North Platte Storage Ownership Accounting Statement, attachment to letter from James

There is some evidence that, beginning in 1959, Wyoming reasserted her argument that the Inland Lakes lacked individual state permits. *See* Wyoming Response at 75-77. Nevertheless, even after 1953, with Glendo Reservoir newly on line, Wyoming did nothing to limit the continuing project operations of the Inland Lakes based on a December 6, 1904 priority. *See* Nebraska Brief at 83.

It was not until the annual planning meeting for the North Platte operations in April of 1985, shortly before she filed the Christopulos Suit, that Wyoming for the first time affirmatively requested that the historic storage and accounting procedures for the Inland Lakes be changed. Wyoming would thereby have shifted the Inland Lakes to last in priority on the river behind the priorities of Guernsey and Glendo Reservoirs. First Wilde Affidavit ¶ 30; *see also* Nebraska Brief at 84.[44] Then, in 1986, Wyoming sought to achieve this junior Inland Lakes priority by filing the Christopulos Suit.

L. Ogilvie to Earl Lloyd and Dan S. Jones, Jr. (Apr. 22, 1960), Nebraska Appendices at A-105 to A-110. The published reports of the North Platte Storage Ownership Accounting procedure statements up to 1984 show that the historic filling patterns for the Inland Lakes were as mandated by Special Master Doherty in his Report. *See, e.g.*, North Platte Storage Ownership Accounting Statement (Oct. 1, 1970), Nebraska Appendices at A-196 ("It is assumed that the river gains below Alcova during the months of October, November, and April will accrue to [the Inland Lakes], up to a total of 46,000 acre-feet and at a rate not to exceed 910 second-feet."). This assumption that only gains downstream of Alcova (a short distance downstream of Pathfinder Dam) would reach the Inland Lakes was grounded on the fact that the Pathfinder Dam captured virtually all upriver accretions during the non-irrigation season.

[44] At about the time this position was taken, Wyoming was involved in preparing environmental documentation for the proposed Deer Creek project that reflected an additional 50% annual yield for project users if the Wyoming Deer Creek priority could be established as senior to the Inland Lakes. Final Environmental Impact Statement for Regulatory Permits: Deer Creek Dam and Reservoir (Wyoming, Sept. 1987) ("Deer Creek FEIS") at vii. *See infra* note 104.

B. Wyoming's Evidence

Wyoming makes three basic arguments to support her motion for partial summary judgment and to counter the evidence compiled by Nebraska and the United States. First, Wyoming maintains that the Inland Lakes have no valid water rights priority under her state law. Wyoming's case rests heavily upon this contention, and the bulk of her efforts have been directed at proving that no individual permit applications were filed for Inland Lakes storage and that Wyoming has raised this point with the United States over the years. Wyoming Response at 45-90. As proof, Wyoming has offered correspondence showing that Wyoming state officials have called to the attention of the United States[45] the absence of an official, separate storage permit for the Inland Lakes under Wyoming law.[46] *See* Wyoming Response at 49-61.

---

[45] The United States does not concede that the Inland Lakes have no valid water rights under state law. United States Reply To Wyoming's Response To Motion For Summary Judgment On The Inland Lakes (May 24, 1991) ("United States Reply") at 4 & n.9. The United States acknowledges that the Inland Lakes priority may not have been obtained by the "traditional route" but stresses that the interstate nature of the Inland Lakes operation and their functional significance to the overall North Platte Project made such routes unsuitable. *Id.* at 4 n.11, 9-10 & n.24; *see also* Nebraska Reply To Wyoming's, Colorado's, The United States', And Basin Electric's Responses To Nebraska's Motion For Partial Summary Judgment And Brief In Support Of Motion (May 23, 1991) ("Nebraska Reply") at 3 ("Nebraska further believes that valid permits for the Inland Lakes exist in both states.").

[46] Wyoming points to the following documents: Eleventh Biennial Report Of The State Engineer To The Governor Of Wyoming, 1911-1912 at 46, Nebraska Appendices at A-33; Letter from A.J. Parshall, Wyoming State Engineer, to Andrew Weiss, North Platte Project Engineer (May 2, 1914), Wyoming Appendix at C-71; Report On History Of Water Rights, North Platte Project, by Brooks Fullerton, District Counsel (Oct. 31, 1925), Wyoming Appendix at C-98; Memorandum by W.J. Burke, District Counsel (Sept. 2, 1932) at 71-72, 100, Wyoming Appendix at C-117 to C-119.

Wyoming's second argument rests on negative implication and absence of evidence. She notes that the Court, in the original proceedings, did not explicitly adjudicate the priority rights of the Inland Lakes. This omission, according to Wyoming, establishes that no such priority right exists. *Id.* at 90, 94-97. Wyoming points out that the Supreme Court omitted any specific reference to the Inland Lakes in paragraph III of the Decree, which sets forth the relative priorities of the Pathfinder and Guernsey Reservoirs of the North Platte Project and the Seminoe and Alcova Reservoirs of the subsequent Kendrick Project, which serves only Wyoming lands. This omission allegedly was repeated in 1953 when the Court amended the Decree to deal with the then-proposed Glendo Reservoir. *Id.* at 94-95. In Wyoming's view, too, the Inland Lakes can have no meaningful priority right because nowhere is there specified the ordinary administrative elements of water rights such as point of diversion, diversion rate and nature of use.[47]

Finally, Wyoming contends that the scheme of storing natural flow waters in the Inland Lakes resulted from ad hoc, year-to-year agreements rather than from formal administration of priority storage rights, claiming it was merely an effort "to allow operation of the Inland Lakes to continue despite the lack of a water right specified by state law permit or the Decree." Wyoming Response at 100; *see also id.* at 70, 85, 100. Characterizing the years 1945 through 1986 as a period of "cooperative effort to avoid confrontation on the Inland Lakes dilemma," Wyoming sets forth a history of the Inland Lakes operation which coincides in large part with that presented by Nebraska and the United States. *Id.* at 70-85; *see also* Nebraska Reply at 3. Where Wyoming parts company from Nebraska and the United States is in her repeated

---

[47] Wyoming Supplemental Brief Regarding Summary Judgment (July 25, 1991) ("Wyoming Supplemetal Brief") at 2 n.2.

citation to documents and correspondence that fail to refer to a specific Inland Lakes storage right.[48]

C. Discussion and Conclusion

Although Wyoming has made a valiant effort to meet her "daunting burden" to marshall evidence in support of her theories with respect to the Inland Lakes and to challenge the summary judgment motions of Nebraska and the United States, I have determined that her effort is to no avail. In many ways, Wyoming's evidence and the arguments she makes beg the critical question. The issue is not whether Wyoming issued to the Inland Lakes separate, identifiable storage permits. Her facts are not disputed on that score, but they are immaterial to whether the Inland Lakes ultimately enjoy a 1904 priority right.

The key material fact is that since 1913 the Inland Lakes have been used for storage of natural flows during the non-irrigation season. Unlike Guernsey Reservoir, these off-river channel reservoirs were an integral component of the North Platte Project from the outset, were part of the original design proposed for the Interstate Canal, and were constructed within the first phase of the North Platte Project contemporaneously with the construction of the Interstate Canal itself. First Wilde Affidavit ¶¶ 7-8, 16-19. The Inland Lakes, as the evidence shows, have been treated throughout the century as having a December 6, 1904 priority. I conclude that the priority date of December 6, 1904, *see* 325 U.S. at 613, 648-49 and n.2, applies to the Inland Lakes as an original and essential element of the design, construction and operation of the Interstate Canal as well as to the temporary storage of water in the Guernsey and Glendo reservoirs.[49]

---

[48] *See* Wyoming Response at 71-74, 77 (identifying letters from the United States).

[49] It is noteworthy that the Interstate Canal was sized so that it cannot deliver the total requirements of the lands it serves unless

As the United States concluded in its reply brief, "in an overappropriated river, a water right is only as good as its priority." United States Reply at 8. It is clear that the Special Master recommended and the Court recognized in the Decree a right to store in the Inland Lakes 46,000 acre feet of natural flow during the non-irrigation season to meet Nebraska's apportionment. This amount was counted in the apportionment and used correspondingly to reduce irrigation season natural flow deliveries to the Interstate Canal, making this priority a vital underpinning of the ultimate apportionment. Had the Inland Lakes not been granted this right, the apportionment may well have been different. The Court did not accord an empty right.

The initial North Platte Project components continue to depend upon the right of the Inland Lakes to store water and thus upon a priority commensurate with the other components. *See, e.g.*, First Wilde Affidavit ¶ 47. This fact alone suffices to defeat Wyoming's motion. Furthermore, without priority protection for the Inland Lakes, the entire apportionment scheme for the North Platte Project could be severely disrupted.[50] I have determined that neither the Special Master nor the Court intended such a disruption to occur.

The administration of the Inland Lakes since the Decree supports this interpretation. Wyoming may have questioned the Inland Lakes' permit status over the years, but she has only recently seriously challenged the Inland Lakes' entitlement.[51] Because of Wyoming's historic ac-

---

non-irrigation flows are already in place in the Inland Lakes at the beginning of the irrigation season. Transcript of Summary Judgment Hearing, Pasadena, California (Nov. 11, 1988) at 136-38.

[50] First Wilde Affidavit ¶¶ 44, 45; Table 4, ¶ 47; Table 5, ¶¶ 48-51; Table 6; Table 7, ¶¶ 73-82, 89(c) & (d).

[51] Despite Wyoming's protestations to the contrary, I cannot help but consider that there may indeed be a relationship between Wyoming's posture with respect to Inland Lakes and her proposed Deer Creek Project. *See, e.g.*, Nebraska Reply at 18 n.12; *see also supra* note 44; *infra* note 104.

quiescence, both Nebraska and the United States based their summary judgment motions in part on principles of *res judicata*. While such principles may not have full application in an original jurisdiction proceeding (*cf. Wyoming v. Oklahoma*, 112 S. Ct. 789, 796 (1992)) equitable concerns most certainly do. On that basis alone, I am convinced that the time for Wyoming to have challenged the alleged lack of individual permits for the Inland Lakes was certainly no later than during the original proceedings. Given the history of this case and the many decades of uninterrupted operation of the North Platte Project with the Inland Lakes storing natural flow in October, November and April, equitable considerations do not allow interference with this longstanding practice.

Lack of specific state permits is not fatal to the priority right of the Inland Lakes. Nor do I find persuasive Wyoming's concern about administering the priority rights of the Inland Lakes without the specific administrative elements normally required in state permit applications. Based on my review of the evidence, I find that Wyoming has not identified any problems attributable to the practice of storing in the Inland Lakes during the non-irrigation season. Such problems as may arise in the future can be addressed by the parties or, in default thereof, brought back to the Court.

Even if it were established that errors were made in according the Inland Lakes operations a 1904 priority in the earlier litigation, that determination should not now be set aside. *See Arizona v. California*, 460 U.S. 605, 621, 626 (1983). The Decree was based in part on the historic administration of the North Platte Project as though the Inland Lakes shared a 1904 priority with the initial elements of the North Platte Project including the Interstate Canal. Were such a priority denied and the Inland Lakes made junior to other uses such as Wyoming's proposed Deer Creek project, it would violate

the Supreme Court's admonition in *Nebraska v. Wyoming* that to the extent possible, "established uses should be protected." 325 U.S. at 618. It would be inequitable at this point to tamper with Nebraska's apportionment by altering the priority status of the Inland Lakes.

The foregoing review of the Record demonstrates that there is no issue for trial and that insufficient evidence exists for a factfinder to return a verdict for Wyoming. *See Liberty Lobby*, 477 U.S. at 249. At the same time, Nebraska and the United States have shown the absence of a genuine issue of material fact by demonstrating that the Inland Lakes were always and remain an integral component of the original North Platte project. In sum, I recommend that the Court deny Wyoming's motion for partial summary judgment and grant the motions of Nebraska and the United States. I recommend that the Court rule that the Inland Lakes operations, including the temporary winter storage of Inland Lakes water in the Guernsey and Glendo reservoirs, enjoy the same priority as the other original components of the North Platte Project—December 6, 1904—to store at least 46,000 acre feet of natural flow during October, November, and April.[52] I also recommend that an injunction issue barring any actions by Wyoming inconsistent with that priority.

III. THE LARAMIE RIVER

The controversy over entitlement to Laramie waters grows out of the "polestar" of the Decree, paragraph V.[53]

---

[52] The Special Master did not intend the 46,000 acre feet to be an immutable limit. "Should it be found in the future that a dependable winter supply of more than 46,000 acre feet is divertible . . . the seasonal demand on the river of Interstate should be accordingly reduced." Doherty Report at 61 n.3.

[53] The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska

That paragraph apportions during the irrigation season all natural flows in the river section from Guernsey Dam (just above the Whalen Dam) in Wyoming to the Tri-State Diversion Dam (just across the Wyoming-Nebraska state line) in Nebraska, 75 percent to Nebraska and 25 percent to Wyoming. The Laramie River empties into the North Platte in this section and, therefore, the Laramie's actual inflows to the North Platte have been subject to the Decree's apportionment.

Nebraska and Wyoming have taken point-counterpoint positions with respect to their rights in the waters of the Laramie River, and each state seeks summary judgment in her favor. Wyoming claims that by virtue of the Court's 1922 Laramie River Decree in an original action between Wyoming and Colorado,[54] and by virtue of the statement in the 1945 North Platte Decree that the Laramie Decree would remain undisturbed, 325 U.S. at 667, Nebraska's apportionment does not include any rights to Laramie flows. Wyoming maintains, therefore, that, as against Nebraska, she may with impunity dewater the Laramie river to its confluence with the North Platte River.[55]

Nebraska claims, on the other hand, that she is entitled to continue to rely on those Laramie flows that historically have reached the North Platte and that the

---

> on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska . . .

Decree ¶ V.

[54] *Wyoming v. Colorado*, 259 U.S. 419, *amended*, 260 U.S. 1 (1929), *vacated and new decree entered*, 353 U.S. 953 (1957) ("Laramie Decree").

[55] In her current motion, Wyoming asks that Nebraska's claim respecting Grayrocks and Corn Creek be declared invalid, rather than directly posing the issue as stated in the text—which is how she had stated it in her 1987 motion. The ultimate question is the same, however, for Nebraska's claims could not be deemed summarily invalid unless Wyoming may dewater the Laramie.

Court included the North Platte apportionment in the original proceedings. Nebraska's briefing theory in her motion for summary judgment was that the Supreme Court made a finite apportionment to Nebraska of Laramie flows over and above a defined apportionment to Wyoming to irrigate identified acreage. Nebraska Brief at 91-92. At the hearing on the motions, Nebraska announced a new theory that, during the original proceedings, Wyoming offered to Nebraska downriver reconstructed Laramie flows, which thereby became part of Nebraska's apportionment.[56]

Earlier in the current proceedings, Wyoming moved for summary judgment on the Laramie and other issues. For the reasons set forth in my First Interim Report in 1989, I denied that motion and directed the parties to proceed to trial on the Laramie issues. I did, however, leave open the possibility of later summary adjudication, suggesting to the parties that they pursue the following paths of inquiry: "practical construction of the Decree as it has affected the Laramie, including metering activities, accounting procedures, and recording procedures. . . . [and] additional factual development respecting any Nebraska equities tied to the remaining Laramie flows . . ." First Interim Report at 26-27. These questions derived from my conclusion that the record in the North Platte Decree case fails to reveal a clear interpretation of the Laramie Decree by either Special Master Doherty or the Supreme Court, and that even the 1922 Laramie Decree itself did not address the apportionment of the Laramie beyond what was needed to make an equitable apportionment between the litigating states (which did not include Nebraska). Because the North Platte Decree simply

---

[56] Transcript of Proceedings, Salt Lake City, Utah (June 7-8, 1991) ("June 1991 Transcript") at 76; Nebraska's Post-Hearing Brief On Nebraska's, Wyoming's, Colorado's And The United States' Motions For Summary Judgment (July 26, 1991) ("Nebraska's Post-Hearing Brief") at 14 n.7.

acknowledged and respected the Laramie Decree on its face, I directed the parties to focus not only on the history of the two Decrees, but also on the range of equitable considerations pertinent to the apportionment as set forth by the Supreme Court in *Nebraska v. Wyoming*.[57] First Interim Report at 27.

I recommend that the Court deny the motions for summary judgment of both Nebraska and Wyoming. Both states posit that the Laramie issue is susceptible of a crisp resolution. Yet I, like Special Master Doherty, who spent a decade with the original proceedings in this case, find that a crisp result eludes me on the Laramie. Special Master Doherty, by the end of the original proceedings, remained puzzled by the place of the Laramie in the litigation:

> After reviewing the matter I am left in some uncertainty as to Nebraska's position respecting the Wheatland Project and the Laramie River in general. . . . The other parties appear to take the view that the Laramie is removed from the present case by the decree in *Wyoming v. Colorado*, except for such contribution as the Laramie may make to the North Platte after any use by Colorado and Wyoming permitted under the terms of that Decree.

Doherty Report at 270-71.

---

[57] In the original proceedings, the Court explained that:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative not an exhaustive catalogue.

325 U.S. at 618.

In the current proceedings, after reviewing the voluminous filings associated with the cross-motions for summary judgment that are before me, as well as the transcript of the hearings held on June 7 and 8, 1991, I find I cannot discern the respective states' positions during the original proceedings. What also remains murky, however, is the intent of the Court and the Special Master. And despite the states' current protestations, I conclude that the definitive answer that each claims to have found simply does not exist. Neither the Court nor the Special Master made any precise disposition of the disputed flows.

Wyoming has not pointed to specific facts in the Record supporting her dewatering license theory. I therefore have determined that the Decree does not grant the right to Wyoming, after honoring Colorado's apportionment, to dewater the Laramie to its confluence with the North Platte. For it is clear that, notwithstanding the facially persuasive language contained in the Decrees and especially in a 1957 replacement Laramie Decree,[58] all the waters of the Laramie River were not fully and finally apportioned to Colorado and Wyoming either in 1922 or 1945, nor were those waters treated that way at that time or since then.

I also find, based on my review of the earlier cases and the Record, that Special Master Doherty and the Supreme Court in 1945 treated some Laramie flows as part of the North Platte water supplies to the extent that

---

[58] *Wyoming v. Colorado*, 353 U.S. 953-54 (1957) (vacating Laramie Decree and entering new decree, stating, *inter alia*, that "[t]he State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie river and its tributaries after [] diversion and use in Colorado" as specified). Even if this 1957 Decree were relevant to interpreting the 1945 and 1922 Decrees, my conclusions would not change. Whatever rights Nebraska had to Laramie contributions prior to the 1957 Decree would not have been affected by that new Decree to which she was not a party.

those flows were expected to enter the Whalen to Tri-State reach. In the drought conditions that existed at the time of the original proceedings, the over-appropriated Laramie actually was contributing flows to the North Platte's natural flows, and the Court expected some flows to continue to reach the North Platte even in dry years.

On the other hand, I find that Special Master Doherty and the Court did not affirmatively apportion Laramie flows by requiring Wyoming to deliver particular quantities of Laramie waters to the North Platte confluence. Nebraska fails to persuade to the contrary via her earlier theory of a finite apportionment to her, or her later theory that Wyoming was obligated by the Decree to deliver reconstructed flows and route them downstream to the North Platte. Like Wyoming, Nebraska has not shown that the Record supports her contentions.

Indeed, as will be explored more fully below, there is a marked absence of evidence to establish that either party is entitled to the judgment each seeks as a matter of law. As Wyoming correctly observed, the underlying facts are not in dispute. Wyoming Brief at 3. The legal import of these facts is in dispute, but it is not merely a matter of legal interpretation. The facts are not such that judgment can be entered thereon in favor of either party, and it appears that no further material facts exist in the Record. In any event, as a practical matter, granting summary judgment to Wyoming based on her dewatering theory would give her only a phyrric victory. Both the North Platte and the Laramie Rivers continue to be over-appropriated, as they were in 1945. There is a delicate balance in the North Platte Basin that causes new depletions anywhere in the system to have effects elsewhere in the Basin.[59]

---

[59] *Cf.* June 1991 Transcript at 50-51 (Ms. P. Weiss); *id.* at 247-48 (Mr. Sievers).

Denial of both motions for summary judgment does not necessarily require the parties to proceed to trial on Laramie issues, however. This is so because the Grayrocks issue can be resolved during this summary judgment proceeding, leaving only the issue whether at this time the Corn Creek project in the Laramie basin poses any present or imminent threat to Nebraska's apportionment. I shall hear the parties on this issue in a status conference and proceed to trial if appropriate.

A. The Motions for Summary Judgment

1. *Background: The Decrees*

The origins of this dispute lie in a suit filed in 1911 by Wyoming against Colorado and resolved by a Supreme Court decree in 1922. *Wyoming v. Colorado*, 259 U.S. 419, *amended*, 260 U.S. 1 (1922) ("Laramie Decree"). Wyoming sought to prevent Colorado from making transbasin diversions from the upper reaches of the North Platte in Colorado that allegedly would have injured senior Laramie appropriators in Wyoming.

In the Laramie River case, the Supreme Court examined the nature and quantity of Laramie flows, the existing uses of these flows, and their priority dates. Observing that the stream's flow "varies greatly" from one season to the next as well as from year to year, 259 U.S. at 471, the Court determined how much water would be available for use in Wyoming after satisfying senior diversions in Colorado. "It results that, in our opinion, the entire supply available for the proposed Colorado appropriation and the Wyoming appropriations, down to and including the diversions for the Wheatland district, is 288,000 acre-feet." *Id.* at 488; *see also* Doherty Report at 269. Because this supply could not satisfy Wyoming's demands as well as the proposed transbasin diversion, the Court determined relative priorities, concluding that Colorado's proposed project was junior to the priorities of

approximately 181,500 acres of land dependent on Wyoming appropriations. The Court then calculated that:

> [t]he amount of water appropriated and reasonably required for the irrigation of these [Wyoming] lands is 272,500 acre-feet. A much larger amount is claimed, but our finding restricts the amount to what the evidence shows is reasonably required. . . . As the available supply is 288,000 acre-feet, . . . there remain 15,500 acre-feet which are subject to this junior appropriation in Colorado.

259 U.S. at 496.

Accordingly, the Laramie Decree enjoined Colorado "from diverting or taking from the Laramie River and its tributaries in the state of Colorado more than 15,500 acre-feet of water per annum." 260 U.S. 1-2. Although the Court's Opinion speaks of specific water quantities to which Wyoming's senior appropriators were entitled, and apparently only considered water uses down to and through the Wheatland project,[60] the injunctions in the Laramie Decree explicitly curtail only Colorado's uses, not Wyoming's.

A persistent drought during the 1930's led to the original proceedings between Nebraska and Wyoming. As explained earlier, Nebraska brought suit in 1934 to settle each state's (Nebraska, Wyoming and Colorado) equitable share of the North Platte, alleging that the two upstream states' diversions for irrigation were depriving Nebraska's senior appropriators of waters to which they were entitled. *See* 325 U.S. at 591-92. Wyoming and Colorado joined in the request for equitable apportionment, but only Colorado expressly sought to exclude the Laramie (and the South Platte) from the Court's consideration. Thus, in footnote 1 to its Opinion the Court observed:

---

[60] *E.g.*, 259 U.S. at 488 ("the diversion for the Wheatland district (the lowest diversion we are to consider) . . . .").

> The waters of the South Platte and the Laramie were previously apportioned—the former between Colorado and Nebraska by compact (44 Stat. 195), the latter between Colorado and Wyoming by decree. . . . Those apportionments are in no way affected by the decree in this case.

Id. at 592 n.1.

In the original proceedings, Special Master Doherty examined the geography of the North Platte and its uses, including irrigated acreages and priorities. The Court agreed with the Special Master that "the dependable natural flow of the river during the irrigation season has long been over-appropriated." *Id.* at 608; *see also id.* at 621. Based upon the Special Master's detailed findings, the North Platte Decree generally restricted prospective developments that would interfere with existing uses of North Platte flows and protected established Wyoming and Nebraska uses from certain further upstream developments.

In accordance with the Special Master's findings, the Court also characterized the short, 40-mile Whalen to Tri-State section—the reach where the Laramie empties into the North Platte—as the "pivotal section of the entire river" in which, apart from the Bureau of Reclamation's junior priority Kendrick project, "the demand for water is as great . . . as in the entire preceding 415 miles from North Park to Whalen." *Id.* at 604. The Decree established an apportionment of 75 percent to Nebraska and 25 percent to Wyoming of the natural flow of this section during the irrigation season. As indicated in footnote 3 of the Court's Opinion,[61] this apparently straightforward division was derived from the Special Master's calculations of flows in that reach of the river, figures that were based on diversions, priorities

---

[61] That footnote simply reproduces figures from the Special Master's Report to the Court. *Compare* 325 U.S. at 593 n.3 *with* Doherty Report at 67 & Table III.

thereof, and sources for the natural flow. One of those sources counted by the Special Master was the Laramie. Notwithstanding this inclusion, which the Court's Opinion does not expressly acknowledge (it merely repeats the Special Master's figures), the North Platte Decree itself states that it does not affect "the apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River." Decree ¶ XII(d), 325 U.S. at 671. This seeming contradiction between a surficial plain-meaning reading of the Opinion and the Decrees (that the North Platte apportionment does not implicate the Laramie apportionment) and the factual basis for the North Platte apportionment (the counting of Laramie flows) requires going beyond the bounds of the Laramie and North Platte Decrees themselves to interpret and apply them.

It is against this backdrop that the current motions for summary judgment are considered.

2. *The Record Through 1945*

a. *The Decrees, Opinions and Special Master Doherty's Report*

I observed earlier that the language of the North Platte and Laramie Decrees and the Doherty Report did not resolve the Laramie issues and I will not revisit that discussion. *See* First Interim Report at 22-27. Each state has nonetheless presented further briefing and factual materials contending that these support judgment in her favor. This additional evidence has not, however, swayed my initial conclusions.

Wyoming contends that, apart from what she deems the conclusive language of the opinions and decrees themselves,[62] further examination of the two Decrees and the

---

[62] For example, footnote 1 in *Nebraska v. Wyoming* (quoted earlier) could be read as affirming or assuming that the Laramie Decree fully apportioned every drop of the Laramie between Colorado and Wyoming. *See* First Interim Report at 23-26.

Doherty Report confirms that she was allocated all Laramie flows except for Colorado's explicit upstream share of 15,500 acre feet. Looking first at the Laramie Decree, Wyoming argues that a specific apportionment of Laramie flows to her was unnecessary. Because the Laramie was over-appropriated, the Laramie Decree adopted a "dependable supply" formula. This formula, which assumed a certain degree of storage and conservation, entailed determining what flows were "dependable"[63] and then calculating what share of the entirety of these flows Colorado appropriators would receive under strict prior appropriation law.[64] Wyoming claims that this formula depleted what dependable flows there were at that time and that, therefore, there was no need to specify an allocation to her. Wyoming Brief at 5. Furthermore, Wyoming points out that no limitations were needed on her share because the severe water shortages that prompted the litigation in the first place would curb Wyoming's use sufficiently. *Id.* at 9.

Turning to the North Platte Decree, Wyoming finds support in the fact that it imposed various restrictions on Wyoming's uses in other sections of the North Platte Basin to ensure sufficient natural flows for the Whalen to Tri-State reach, but imposed no express limitations on Wyoming's uses of the Laramie. That silence, she maintains, represents an implicit acknowledgement of her rights to all Laramie flows not allocated to Colorado.

Finally, Wyoming points to sections of the Doherty Report where the Special Master arguably would have mentioned or incorporated the Laramie had he intended to apportion any of it to Nebraska or, conversely, to limit Wyoming's uses thereof. For example, in describing the drainage basin of the North Platte, Special Master Doherty omitted a description of the Laramie drainage.

---

[63] 259 U.S. at 483-84.

[64] *See id.* at 489-90.

Doherty Report at 20. Similarly, he excluded the Laramie Basin when recounting the history and extent of irrigation in the three states. *Id.* at 29.

Nebraska counters two of these arguments. Insisting that she cannot be bound by the Laramie Decree in any event because she was not a party in *Wyoming v. Colorado*, Nebraska also disputes Wyoming's interpretation of the Laramie Decree's "dependable flow" language, arguing instead that it reveals a deliberate decision *not* to apportion the entire flow between Colorado and Wyoming, because it was too variable. Nebraska Brief at 93-94.

As for the absence of restrictions on Wyoming's use of the Laramie in the North Platte Decree, Nebraska points out that no explicit limitations were placed on Wyoming's use of the mainstem of the Whalen to Tri-State section or any sources thereof.[65] Therefore, Nebraska concludes, the lack of restrictions on Wyoming's use of the Laramie has no significance.

Nebraska does not address Master Doherty's failure to include the Laramie in the portions of his Report describing drainage and irrigation in the North Platte Basin. But, as will be explored below, it ultimately matters little whether these exclusions signified a decision not to consider the Laramie issues already covered in the 1922 Decree or simply reflected the use of exhibits that did not include these data.[66]

Nebraska also makes the interesting argument, based on the North Platte Decree, that her entitlement to Lara-

---

[65] Nebraska Response at 28.

[66] For example, the table showing drainage area came from a Colorado exhibit, *see* Doherty Report at 20. Colorado never wavered from the position that the Laramie had been completely apportioned and that *no* Laramie waters should be included in any determinations concerning the North Platte. *See, e.g.*, Record at 14390-91 (Counsel for Colorado stating that entire Laramie "has been fully allocated" and that "there isn't any water for Nebraska").

mie River waters is *res judicata* because "the inclusion of Laramie River contributions as well as the calculation of the requirements below Tri-State Dam were necessary in determining the overall supplies and demands [and] directly affected the final apportionment of flows between Wyoming and Nebraska." Nebraska Brief at 65. Under *res judicata*, or more accurately issue preclusion, an issue of fact or law that actually was litigated and determined by a valid and final judgment is conclusive in a subsequent action between the parties. 18 Wright, Miller & Cooper, Jurisdiction § 4421. Here, it is clear that this issue was *not* actually litigated, either as a legal or factual matter. Neither the Decree nor the Doherty Report makes any reference to the question of Nebraska's entitlement to the Laramie.[67] Nothing in the Doherty Report nor the Court's Opinion reflects any consideration, much less final resolution, of this question.

While the quantities of water from each source of the Whalen to Tri-State reach were a part of the total flow available for apportionment of the North Platte's Whalen to Tri-State section, the amount of water in the aggregate is what was important—or, more accurately, the deficiency of the total natural flow in that section. *See* 325 U.S. at 605. The Laramie inflows were not thereby converted into an "essential" factual predicate to the decision. Further, there is no explicit language on this subject in the 1945 Opinion aside from the introduction concerning the sources of water for the North Platte. Rather, the Court focused on storage requirements, requirements of existing appropriators, canal diversions, priorities, and total flows. *Id.* at 638-46. The Special

---

[67] *See* Record at 18624-29. In an exchange among counsel at the hearings in 1939, Nebraska's attorney expressed surprise at the suggestion that his state was bound by the Laramie Decree, "since there were no pleadings filed alleging that." *Id.* at 18624. Soon thereafter, Wyoming asserted that all flows in excess of the amounts mentioned in the Laramie opinion belonged to Wyoming. *Id.* at 18626.

Master devised (and the Court adopted) the method of apportionment based on percentages of daily natural flows. In the absence of any specific language in the Decree itself[68] or findings concerning apportionment of the Laramie, I decline Nebraska's invitation to apply the powerful doctrine of issue preclusion. Preclusive effect cannot be given to an implication of apportionment. The same answer must be given to Wyoming's claim that the facts establish complete apportionment to her.

Yet, I do find it significant that Special Master Doherty expressly included Laramie flows in his tabulation of waters that were available for apportionment in the Whalen to Tri-State section. He mentioned Laramie inflows when discussing tributary contributions to that reach. Doherty Report at 22. He incorporated its flows in his summary of Colorado's and Wyoming's "contributions to the [North Platte] river system by way of original production of water in acre feet and percentages." *Id.* He tabulated contributions of natural and return flows from the Laramie River to the North Platte, as presented in Wyoming Exhibit 170, in determining long-term mean supplies to the reach. *Id.* at 63. He counted Laramie inflows in his analysis of requirements and supplies for the 1931-1940 period in the Whalen to Tri-State section. *Id.* at 67. These instances demonstrate that the Laramie's contributions were considered in the original proceedings, and that fact cannot be ignored.

---

[68] At the hearing on these motions, I questioned why Spring Creek was explicitly mentioned in the North Platte Decree as included in the Whalen to Tri-State reach while the Laramie was not. June 1991 Transcript at 89-91. Nebraska has satisfactorily answered this question and the record supports her explanation. The express inclusion was necessitated by an omission from an exhibit Wyoming submitted and the Special Master's failure to include the subsequent corrections. Thus, the Supreme Court remarked that the Spring Creek accretions, accidentally left out of the Special Master's computations, "should be taken into account in computing Nebraska's requirement of water from Wyoming." 325 U.S. at 648. *See* Nebraska Post-Hearing Brief at 14-17.

Finally, although the Special Master prefaced the decree he recommended to the Supreme Court with the words, "[w]ith respect to the water of the North Platte River and its tributaries, *except* the Laramie River," Doherty Report at 177 (emphasis added), in the final Decree the Supreme Court did not include this exclusionary language. While I am not inclined to inflate the significance of this omission, it may be interpreted as a reluctance to accept that wholesale exclusion. The Court, instead, addressed the Laramie with the following language in the Decree:

> This decree shall not affect . . . [t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River. . . .

Decree ¶ XII(d). This language echoes the Court's observation at the outset of its Opinion that the Laramie had previously been apportioned and that the prior apportionment would not be disturbed. *Id.* at 592 n.1. These pronouncements do not amount to declarations of new legal rights or reinterpretations of existing legal rights. They represent, rather, the confirmation of the status quo, a status quo in which rights to Laramie flows that were in excess of the dependable supply were not specifically apportioned.

Having found little enlightenment on the Laramie question in either the Decrees or the Doherty Report, I discuss below the more important Record evidence on this issue.

b. ***The Record in the Original Proceedings: Inclusion of Laramie Waters in the Whalen to Tri-State Apportionment***

As already noted, flows from the Laramie River were included in the Special Master's and Supreme Court's tabulation of natural flows available in the Whalen to Tri-State Reach.[69] The parties do not dispute that in the

---

[69] *See* Doherty Report at 67, Table III; *see also* First Interim Report at 24-25 n.48. Special Master Doherty reported that from

original proceedings they introduced substantial evidence and testimony concerning the Laramie River and its contribution to the North Platte.[70] In particular, Wyoming used Laramie flows in her allocation proposals for that stretch of the North Platte River. Further, all parties agree that any Laramie waters that actually flow into the North Platte River mainstem between Whalen and Tri-State were and still are subject to the apportionment under the North Platte Decree. *E.g.*, Christensen Affidavit ¶ 9; Nebraska Brief at 70.

The meaning of these facts, however, is unclear. Why was such evidence introduced? Why did Special Master Doherty include Laramie flows in that critical section of the river after announcing that the Laramie Decree would not be disturbed? And did the inclusion signify any intent on the part of the Special Master concerning the further apportionment of Laramie flows? The explanations offered by the parties are inconclusive and

---

Whalen to the Nebraska state line, average annual contributions from 1895 to 1939 to the North Platte River, "including the Laramie," amounted to 281,940 acre feet. He also noted, in a chart setting forth contributions by state, that Wyoming's share included the Laramie. Doherty Report at 22 & Table n.3. The Supreme Court adopted these figures and cited them in its Opinion. 325 U.S. at 593 n.3.

In computing average usable water supplies in the Whalen-Tri-State reach from 1931 to 1940, the Special Master also expressly included Laramie flows. In Table III, titled "Analysis, Requirement, and Supply 1931-1940 Whalen-Tri-State Dam Section," there is a column listing Laramie River inflows for those years. Doherty Report at 67. The Special Master used the figures from that column in turn in a column labeled "Usable Increment Whalen to State Line," in Table IV of his Report, a table listing requirements and natural flow supplies 1931-1940 in the Whalen to Tri-State section. *Id.* at 71.

[70] Wyoming may be said to have assumed at the outset that some Laramie flows belonged in the North Platte. In her Answer in the original proceedings, Wyoming described the North Platte River as "augmented by tributary contributions, including those made by the Laramie River in the State of Wyoming." Answer at 16.

leave these matters in doubt. Painstaking review of the Record provides little enlightenment and provides no legal basis for granting summary judgment to either state on the propositions each advances.

Although it appeared before the recent round of briefing on the summary judgment motions that neither state sought a complete adjudication of Laramie River issues in 1945, First Interim Report at 24 n.48, Wyoming insists that Nebraska "got her day in court" on these issues and, therefore, cannot bring the present claims. Indeed, in hearings during the original proceedings—but apparently not in the briefs—Nebraska did raise the argument that she was entitled to Laramie waters. For example, at one point counsel for Nebraska protested that "[w]e have throughout the case made complaint[s] about the Laramie River, as well as other tributaries of the North Plate, that might supply water for Nebraska." Record at 18575.[71] But that does not alter my conclusion that the North Platte Decree cannot be read as a rejection of Nebraska's rights to Laramie waters. Other specific facts contradict this view. Although Special Master Doherty did state that he would not disturb the Laramie Decree, and prefaced his proposed Decree with the words "except the Laramie River," he made no express ruling that Nebraska had no rights in that stream. Given Nebraska's persistence on this matter, it may be assumed that Special Master Doherty would have analyzed or at least mentioned his rejection of Nebraska's rights in the Laramie somewhere in his lengthy report had he intended to resolve that question. Furthermore, a definitive resolution of the question is inconsistent with Special Master Doherty's actions in counting Laramie waters to determine available supplies for the apportionment in the North Platte's Whalen to Tri-State Reach.

Part of the solution to these puzzles may lie in Wyoming's and Nebraska's proposed methods for allocating

---

[71] *See also supra* note 67.

the North Platte. Wyoming argued for a system of mass allocation similar to that adopted in *Colorado v. Wyoming*. Nebraska urged a system of interstate administration of all relevant water rights based on then-existing priorities. It was in the context of promoting these divergent approaches that the parties introduced data concerning the contributions of Laramie River inflows to the North Platte River.

Two Wyoming Exhibits offered to Special Master Doherty—170 and 173—are particularly instructive in this regard. These Exhibits were part of a series of tabulations and reconstructions of historical river flows accounting for then-extant development conditions.[72] Wyoming Exhibit 170 showed natural and return flows from the Laramie River below Wheatland entering the North Platte River and serving Nebraska lands irrigated by the North Platte Project. *See* Nebraska Appendices at A-204 to A-206. Exhibit 173 calculated accretions to the North Platte above the Nebraska state line, specifically suggesting that 85,000 acre feet per year from Laramie inflows would be available for downstream use. *See id.* at A-207. The latter Exhibit formed the basis for the above-mentioned Table III in the Doherty Report, which included computations for Laramie flows, *see* Doherty Report at 67, Table III, Col. 3 & n.2, and in turn ended up in the composite contributions mentioned in the Court's opinion.[73] 325 U.S. at 593 n.3.

Other such evidence was also introduced. For example, Wyoming Exhibit 86, which summarized North Platte River stream flows and canal diversions from 1930-1938 for the section between Whalen and Tri-State Dam,

---

[72] Wyoming Witness Elmer K. Nelson used reconstructed river flows for 1904 to 1930 and actual historical flows for 1931 to 1940. Record at 27554, 27559.

[73] Exhibit 173 also formed the basis for Nebraska's recent theory that she was apportioned reconstructed flows offered downstream by Wyoming.

showed average Laramie flows for that period to be 31,000 acre feet during the irrigation season. Nebraska Appendices at A-232 to A-235. Nebraska witness R.I. Meeker, a consulting engineer, testified that between 1931 and 1937 the Laramie River contributed average yearly flows of 125,000 acre feet to the North Platte River. Record at 26584-85 (discussing Nebraska Exhibit 618). Meeker also included Laramie flows in calculating what Nebraska claimed was the supply available to senior appropriators in Nebraska below Tri-State. *Id.* at 26516-17 (discussing Nebraska exhibit 631); *see also id.* at 21070.

Special Master Doherty also heard evidence that the Laramie River contributed to the North Platte supply for Nebraska lands irrigated by the North Platte project.[74] From these Exhibits, and especially from the use of Wyoming Exhibit 173 in Table III, Nebraska deduces that the Special Master and the Court implictly apportioned to her the included Laramie flows. Nebraska also advances the interesting theory that Wyoming *wanted* to apportion Laramie waters to Nebraska, or at least believed that those flows belonged to Nebraska and not to Wyoming. And Wyoming witness Elmer K. Nelson did testify that Laramie inflows would be available for use below Guernsey. *See id.* at 27536-37.

---

[74] *See, e.g.*, Wyoming Exhibit 146 (Nebraska Appendices at A-228) ("North Platte River: Means for 1931-1940. Summary of Stream Flows and Canal Diversions—in Acre Feet. Section: Below Whalen to Wyoming Nebraska Line."; Laramie River is listed as original water supply contributing mean of 42,910 acre feet during the non-irrigation season and 23,220 acre feet during the irrigation season.); Nebraska Exhibit 302 (Nebraska Appendices at A-240 to A-249) (Tables: 1936 Daily, Monthly, and Yearly Discharge Of Principal Tributaries Of North Platte River, Whalen Dam To North Platte, Nebraska); Nebraska Exhibit 361 (Nebraska Appendices at 250) (Average Yearly Mountain Runoff, 1909 to 1935, North Platte River Basin, Colorado and Wyoming, including figures for "Laramie River Basin Reconstructed Runoff").

Wyoming's use of evidence on the Laramie in the original proceedings arguably undermines the claim that she was protecting her rights to all flows of the Laramie beyond Colorado's share. Wyoming, however, insists that she presented the evidence solely to promote a mass allocation scheme and to free up North Platte supplies upstream for additional consumptive uses in Wyoming. As Wyoming explains it, under her mass allocation proposal Wyoming would have had a fixed obligation to Nebraska but no fixed source from which she had to fill that obligation—the overall supply in the basin would be a single "fund." "Wyoming would still have been free to completely dry up the Laramie but, if she did so, she would have to meet the delivery obligation [that would have obtained had the mass allocation proposal prevailed] at the state line by restricting uses of the North Platte above Whalen." Wyoming Brief at 20. In other words, Wyoming argues that she maintained rights to the entirety of the Laramie (minus Colorado's portion), but voluntarily chose to offer up a share of her entitlement.

In any event, Wyoming suggests that the evidence concerning the Laramie was meant only to show its insignificance to the North Platte. Nebraska witness R.I. Meeker did note the paucity of the flow:

> In the Laramie basin the up-river water, except a small amount of return flow, is consumed within the Laramie basin, and the only flows of water that reach the North Platte river from the Laramie river, are composed of waters from the North Laramie creek, the Sybil[l]e creek, and Chugwater creek, and such waters as flood spurts, and extreme high water, although there is a small amount of winter flow.

Record at 130. In later testimony concerning an exhibit illustrating the North Platte region, he explained:

> The Laramie River basin has been colored with a heavy yellow to indicate the extent of that river basin, and . . . to show that there is no dependable water

> reaching the North Platte there, [from] that drainage basin during the irrigation season.

Id. at 176-77. A witness for the United States also testified that the Laramie River was over-appropriated and that all its waters were already in use. *Id.* at 21549. From this testimony, Wyoming concludes that "Nebraska was left with no case for an apportionment of Laramie River water because her own evidence showed the insignificance of any contribution of the Laramie River after full development by Wyoming and Colorado" and thus the Special Master excluded the Laramie from the Decree. Wyoming Brief at 16.

Nebraska disagrees that the flows were so undependable as to be insignificant, noting the average annual flow figures quoted above. And if these flows were so insignificant, it is also counterintuitive that Wyoming would press for their inclusion as an important source for a North Platte mass allocation. In any event, whether the flows were great or small does not appear to be particularly relevant; they were obviously significant enough to be counted by the Special Master.

Wyoming also highlights two instances in the Record where Nebraska failed to protest and, in Wyoming's view, should have protested to preserve whatever stake she believed she had in the Laramie. First, Wyoming charges that Nebraska abandoned any claim to Laramie waters when she failed to take exception to the Special Master's decision not to disturb the Laramie Decree. Nebraska's answer to this is simple and persuasive—there was nothing to take exception to if she believed that she was entitled to that portion of the Laramie that reached the Whalen to Tri-State reach after Colorado's and Wyoming's uses under the Laramie Decree. But even if Nebraska did not believe she was entitled to specific Laramie flows, she justifiably could have assumed that the supply from the Laramie was not threatened, because Wyoming herself pushed for its inclusion, and the Special Master obliged.

A second omission Wyoming points to is Nebraska's failure to include the Laramie River in the interstate priority administration studies prepared for Special Master Doherty. *See* Nebraska Exhibits 400, 432, 619-22 (in Wyoming's Reply Brief, Appendix C); *see also* June 1991 Transcript at 67. "Had Nebraska wanted to continue her claim to an apportionment of the Laramie, she surely would have included Laramie River rights in her studies," Wyoming argues. "Instead, she asserted that Table XVII of the Doherty Report (pp. 86-87), which included no Laramie River rights, *contained all the information necessary* for an interstate priority schedule." [75] The commonsense appeal of Wyoming's argument here is not sufficient, however, to counter the Record evidence that Nebraska did purport to challenge all rights on the Laramie. *See, e.g.*, Record at 12388-89; Doherty Report at 271.

Finally, Wyoming finds support for her position in the fact that there also was evidence before the Special Master of her proposed future uses of the Laramie, uses that had been permitted but not yet developed. Wyoming Brief at 14-16. If the Special Master and the Court had intended to foreclose further use of the Laramie waters by Wyoming, she insists, they would have done so ex-

---

[75] Wyoming Supplemental Brief Regarding Summary Judgment (July 25, 1991) ("Wyoming Supplemental Brief") at 20-21 (citing Brief of State of Nebraska, Complainant (before the Supreme Court) at 28-30, 43, Wyoming Appendix at A42 to A43, A45) (emphasis in original).

Although Special Master Doherty asked Nebraska to revise that study, he did not ask her to include the Laramie. Wyoming suggests that had Special Master Doherty intended to include the Laramie specifically as Nebraska now suggests, surely he would have asked Nebraska to include the Laramie in the revised study. Wyoming Supplemental Brief at 20-21. The revisions he requested, however, concerned proposals to limit Nebraska canal uses in this reach and to exclude Nebraska uses below Tri-State. *See* Doherty Report at 103. The failure to focus on the Laramie thus proves nothing.

pressly, given their awareness of these proposals. Again, despite its superficial appeal, this argument fails to lock up the inquiry. Counsel for the United States offered a convincing explanation during the recent hearings on these motions:

> Ms. P. WEISS: That brings me to your question Doherty saying that Wyoming could dry up the Laramie. I believe it's very clear that he would not. It's simply not plausible that he would conceive that the flows he relied on, in part, to achieve the apportionment [would not continue]. . . . And he had the assurance that those flows would be there because, as of 1945, there was no better claim to the flows . . . that accrued in the Laramie River below Wheatland. . . . And that is shown by the fact that Nebraska, Wyoming and the United States all show the Laramie flows as available for apportionment.

June 1991 Transcript at 94-95. At that time, Wyoming was not threatening those flows nor apparently intending to make any claims to those flows. The Special Master merely shared all the parties' assumptions as to the sources of that stretch of the North Platte.

Counsel for the United States has also pointed out that the Supreme Court in an equitable apportionment proceeding would not deal with hypothetical future uses:

> Ms. P. WEISS: [T]he Supreme Court never gives blocks of water to anyone for an unspecified use. When you have contested water with competing uses, there is the investigation which the Supreme Court carried out in this case, of what the establish[ed] use is . . .
>
> [I]t simply doesn't make sense under any equitable apportionment jurisprudence to say that the Supreme Court would have told a state, yes, I know you don't have any intended use for this block of water. And, yes, there is that other state standing there just dying for the water. But I'm going to tell you that you may keep it, and when you think

> up a use for it, it's yours. That just doesn't happen in an apportionment case.

Id. at 100-01. The evident common sense and truth of this statement has not been challenged by the other parties nor, I believe, could it be.

I find that the essential facts that emerge from delving further into the Record are these: at that time, as now, the Laramie River was over-appropriated and its flows undependable and often insubstantial. Even so, both states introduced evidence of the Laramie's contributions to the North Platte below Whalen, with Wyoming insisting that the Laramie could and should be counted on to supply 85,000 acre feet a year in her then-proposed mass allocation to Nebraska. Although it is nowhere explicitly stated, it appears likely that the flows Wyoming envisioned would be supplied by the Laramie were those in excess of the beneficial uses considered in formulating the Laramie Decree.[76] Neither state satisfactorily explains the apparent contradiction in declaring that an over-appropriated stream could be relied upon to contribute flows on a regular basis. Despite Wyoming's explanation that the evidence was merely part of its litigation strategy,[77] Wyoming obviously believed that—and behaved as if—that stretch of the North Platte should draw Laramie flows.[78] Nonetheless, the states accepted the status quo

---

[76] *See* 259 U.S. at 495-96 ("The evidence shows that the Wyoming appropriations having priorities senior to the one in Colorado, and which are dependent on the available supply before named, cover 181,500 acres of land, and that the amount of water appropriated and reasonably required for the irrigation of these lands is 272,500 acre-feet.").

[77] That is, she was including Laramie waters as part of a larger "fund," but could choose to use other sources instead.

[78] Near the end of the original proceedings, in its brief of exceptions to the Special Master's Report to the Supreme Court, Wyoming wrote that the natural flow of the Whalen to Tri-State section of the North Platte River was comprised of "the inflow of the Laramie

when the North Platte Decree issued: some Laramie flows were counted on for the pivotal reach of the North Platte that was apportioned 75 percent to Nebraska and 25 percent to Wyoming.

It is not the case, as Nebraska would have it, that Wyoming advocated *apportioning* specific Laramie flows to Nebraska. Even a generous reading does not support converting the use of the flow figures into a legal conclusion that Laramie waters were precisely apportioned. I find that the Special Master and the Court merely took account of waters that historically and at that time contributed to the Whalen to Tri-State reach and assumed that those same sources would continue to contribute.

Thus, both states err in framing the question in terms of how or to whom the Laramie flows were apportioned in the North Platte Decree. I find that they simply were not apportioned, although their continued contribution to the North Platte was assumed. The 1945 decision may have been based on a supposition that ultimately was not carefully examined.[79] I agree with the United States' observation that "no *precise* entitlement to [these] flows was actually determined" by the Special Master or the Court.[80] This conclusion does not entail accepting Wyoming's claims to all waters beyond Colorado's decreed share. Instead, the Record teaches that up to and through

---

River, and the other accretions between Whalen . . . and Tri-State." Wyoming Brief (1944) at 41.

[79] As Nebraska's Assistant Attorney General pointed out, the persistent drought conditions during the original proceedings might have led to the assumption that there would not be (because there could not be) future additional uses of the Laramie. June 1991 Transcript at 258.

[80] Memorandum For The United States In Response To The Motions For Summary Judgment Of Nebraska, Wyoming, Colorado, Basin Electric, And The Platte River Trust (Apr. 26, 1991) (emphasis added).

the North Platte litigation there were no better claims to those flows of the Laramie below Wheatland. The Special Master's "painstaking approach to figuring out what the available water was to be apportioned, just would not make sense, if he assumed that Wyoming could come in later and take that water away." June 1991 Transcript at 98. Finally, it must be remembered that in such cases water is not given for unspecified uses. *Id.* at 100.

The foregoing review of the Record in the original proceedings confirms my hypothesis that Special Master Doherty and the Supreme Court, in developing the North Platte Decree, failed to examine the Laramie Decree exhaustively, and essentially went no further than to honor it as it stood. *See* First Interim Report at 24 n.48. I conclude that, although the disputed Laramie flows were not apportioned to Nebraska, neither were they apportioned to Wyoming. Rather, an assumption was made: the Laramie was one of the sources of water for the North Platte, and it would continue to be so. And, as will be discussed below, that assumption has governed the administration of the North Platte Decree from its entry until the onset of this litigation.

3. *Conduct of the Parties Since 1945*

The measurements and procedures used to accomplish the 75/25 division of Laramie water actually arriving in North Platte have not changed significantly since the Decree's inception.[81] The basic question concerning the post-Decree conduct of the parties is how the parties have regarded the flows from the Laramie River in the context of the natural flows in the Whalen to Tri-State reach.

According to Wyoming, the significant facts are these: the Decree itself imposes no monitoring or reporting re-

---

[81] *See* Affidavit of Floyd A. Bishop (Feb. 19, 1991) ("Bishop Affidavit") ¶ 6, attached to Wyoming Brief; Affidavit of Ann S. Bleed (Apr. 25, 1991) ("Second Bleed Affidavit") ¶ 2, attached to Nebraska Response.

quirements on Wyoming regarding her uses of the Laramie. Neither Nebraska nor the United States has ever requested Wyoming to account for diversions or uses on the Laramie. To the extent that administration of the Decree has taken the Laramie River into account, it has only been regarded as making an incidental contribution.[82] Finally, post-1945 depletions by Wyoming uses in the Laramie basin have never been accounted for in determining Wyoming's 25 percent mainstem entitlement. Second Fassett Affidavit; Bishop Affidavit.

Those facts, although undisputed, do not have the significance Wyoming attaches to them. Although Nebraska, Wyoming, and the United States keep separate accounting systems for determining the supply and allocation of natural flow in the Whalen to Tri-State reach, they all use the same formula to calculate the supply:

1. Calculate total supply of water in section by summing all outflows from section (all diversions plus flows passing Tri-State, all measured daily);
2. Subtract from that total supply in the section the amount of storage water (adjusted for decreed evaporative losses) in river at Whalen Dam;
3. The resulting total natural flow supply is divided (according to Decree) 75/25.

Wyoming Brief at 28. Thus, as Nebraska states, no tributary inflow is singled out in the operating and accounting procedures used to implement the Decree. Indeed, no measurements of natural flow inflows from any tributaries are used in calculating the apportionable natural flow and, thus, the Laramie has never been treated differently from any other natural flow contributions to this reach. The important facts, rather, are that "[t]he daily accounting of natural flow available in the Whalen

---

[82] *See* Bishop Affidavit; Second Affidavit of Gordon W. Fassett (Feb. 19, 1991) ("Second Fassett Affidavit"), attached to Wyoming Brief; Wyoming Brief at 26-27, 41-42.

Diversion Dam to Tri-State Dam section has included the Laramie River flows since 1945," Christensen Affidavit ¶ 9,[83] and that Wyoming has participated uncomplainingly in these accountings.

Furthermore, it is significant that Laramie River inflows are counted explicitly when there has been channel loss in the section. As explained by Floyd A. Bishop, consultant and former State Engineer of Wyoming, the reach occasionally experiences heavy channel losses, and to keep

> natural flows from absorbing the full amount of these channel losses, Wyoming, Nebraska, and United States Bureau of Reclamation agreed in 1965 to apportion the channel loss between storage and natural flow according to the percentage of each which was in the river section at the time. . . . Laramie River inflows comprise one part of the sum of the tributary inflows used in the channel loss formula.

Bishop Affidavit ¶ 7. Thus, in the one instance when tributary contributions are actually measured in ad-

---

[83] *See also* Bishop Affidavit, Exhibit A ¶ 4 (North Platte River—Formula for computing natural flow and storage flow above the Tri-State Dam, agreed to by U.S. Bureau of Reclamation, Wyoming and Nebraska ("For natural flow in the Guernsey-Tri-state Dam Section—Compute as follows: Natural Flow below Tri-state dam plus total canal diversions Tri-state to Guernsey, less storage release at Guernsey reduced by storage losses below Guernsey.")); Exhibit B at 2, 4, 6; Exhibit C at 1. *See also* Second Bleed Affidavit, explaining the agreed-upon formula for calculating natural flow:

> This method is merely a simple means of arriving at a natural flow number. Theoretically it arrives at the same result that would be achieved by carefully measuring and summing all natural flow inflows to the section. Thus, the lack of use of the gaged inflow from the Laramie River should not be construed to mean that the contributions of the Laramie River are unimportant or incidental. On the contrary, the Laramie River is the major tributary inflow to the section.

Second Bleed Affidavit ¶ 2.

ministering the North Platte Decree, the Laramie flows have been included.

Nebraska also characterizes the post-Decree contributions of the Laramie to the North Platte River from 1946 to 1979 as significant, averaging 46,982 acre feet per year during the irrigation season and 35,406 acre feet per year during the non-irrigation season. Affidavit of Ann S. Bleed (Mar. 1, 1991) ("First Bleed Affidavit") at 32, Table 2, attached to Nebraska Brief. A former state hydrologist for Nebraska, consultant H. Lee Becker, asserts that "[t]he flows of the Laramie River constitute the major contribution to the natural flow in the Whalen Dam to Tri-State Dam reach" and, from 1946 to 1987, represented "approximately 65 percent of the gaged May through September tributary inflow to this section." [84]

Since 1945, Laramie flows have been counted in and have made measurable contributions to the waters subject to the 75/25 apportionment. That no specific demands have been made on Wyoming respecting these flows means little in light of the overwhelming evidence of acceptance of the status quo: that some Laramie waters were always expected to be in the North Platte. Like the Record in the original proceedings, the conduct of the parties since 1945 reveals no more and no less than this finding.

In summary, I conclude that the Laramie question cannot be resolved in the manner either state wishes and I therefore recommend that the court deny both the Nebraska and Wyoming motions for summary judgment.

---

[84] Affidavit of H. Lee Becker (Mar. 1, 1991) ("First Becker Affidavit") ¶ 8, attached to Nebraska Brief. *See also* Wyoming Brief, Appendix E at E-22 (speech by John Neuberger, Director, Nebraska Department of Water Resources, Mar. 16, 1979) ("Even after you consider the water uses in Wyoming the Laramie River has been contributing around 12 percent of the average annual flow across the [Wyoming-Nebraska] state line.").

Neither Special Master Doherty nor the Supreme Court appears to have delved into the fate of waters in excess of dependable flows. The North Platte Decree, by respecting but not modifying the Laramie Decree, neither adds to nor subtracts from the analysis in the *Wyoming v. Colorado* opinions. I conclude that the Decrees grant no license to Wyoming to dewater the Laramie, and accord no specific apportionment to Nebraska. I have determined, however, that Nebraska has equities to be considered based on contributions the Laramie has made and continues to make to the Whalen to Tri-State section.

B. Grayrocks and Corn Creek

Nebraska has sought injunctive relief with respect to one existing and one proposed project in the Laramie River basin, the existing Grayrocks Reservoir and the proposed Corn Creek Project.[85] Nebraska Brief at 91-92. Having found from the Record that Laramie waters are part of the North Platte supply system and were counted in the waters reaching the North Platte mainstem by Special Master Doherty and the Court, and that Nebraska therefore has equities to be considered respecting the Laramie's contributions to the mainstem, relief may be required if injury to Nebraska's equities can be shown. Nebraska has made a sufficient showing to proceed to the next step on these issues. As in the original proceedings, the states here are claiming rights in "a river whose dependable natural flow during the irrigation season has long been over-appropriated, claims based not only on present uses but on projected additional uses as well." 325 U.S. at 610. Also, like then, the record is at this juncture "inconclusive in showing the existence or extent of actual damage to Nebraska." *Id.* But Nebraska should now have the opportunity to show injury. As the Court has explained:

---

[85] Both projects are described in Appendices B and C to the First Interim Report. *See* First Interim Report at 9a-14a.

> [W]e know that deprivation of water in arid or semi-arid regions cannot help but be injurious. That was the basis for the apportionment of water made by the Court in *State of Wyoming v. Colorado*, supra. There the only showing of injury or threat of injury was the inadequacy of the supply of water to meet all appropriative rights. . . . If this were an equity suit to enjoin threatened injury, the showing made by Nebraska might possibly be insufficient. But . . . where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination.

Id.

1. *Grayrocks*

Grayrocks Dam, which supplies process and cooling water to a coal-fired power generating plant, was completed in 1980. The issues respecting Grayrocks [86] were litigated in 1978 in federal court and later resolved by a settlement among the United States Department of Justice, the United States Rural Electrification Administration, the United States Army Corps of Engineers, Nebraska, Basin, and others, including the National Wildlife Federation and Audubon. The 1978 Settlement Agreement limited the annual water consumption of the power plant and provided for certain minimum releases and flows to benefit Nebraska.[87] While Nebraska has re-

---

[86] *Amicus* Basin operates the power plant and reservoir at Grayrocks. *See supra* note 10.

[87] The 1978 Settlement Agreement provides, in relevant part:

> 1. The maximum annual consumptive water use by the power plant at the Laramie River Station will be limited to 23,250 acre feet per year.

Paragraph 2 sets forth the sources for the 23,250 acre-feet and provides that:

> The Project shall not obtain any water or water rights within the Laramie River drainage other than those set out above and enumerated in Exhibit A, or store any water in the Grayrocks Reservoir except pursuant to water rights set out above

affirmed in the current proceedings that Grayrocks will not harm her if operated in accordance with the 1978 Settlement Agreement,[88] and while Basin agrees with Wyoming that Wyoming has so far not interfered in the

---

and enumerated in Exhibit A, or cause the other obligations of this Agreement to be satisfied by water or water rights from within the Laramie River drainage other than by those set out above and enumerated in Exhibit A, except that: . . .

(b) This provision shall not preclude acquisition of water or water rights of Corn Creek Irrigation District by the Project to satisfy the other provisions of this Agreement out of water rights or applications for water rights of Corn Creek Irrigation District existing as of the date of this Agreement.

Paragraph 4 provides:

4. (a) The Project agrees to release adequate flows from Grayrocks Reservoir to insure that flows at a minimum, as measured at the first gauging station below the dam, are 40 cfs during April, and 40 cfs or 75% of the natural flow at the same gauging station during the remaining five months of the year (May through September, inclusive), whichever is greater. The Project agrees to operate the Grayrocks Reservoir so as to provide for the delivery of 40 cfs at the mouth of the Laramie River during six months of the year (October through March, inclusive), 50 cfs during April, and 40 cfs or 75% of the natural flow of the Laramie River at its mouth during the remaining five months of the year (May through September, inclusive), whichever is greater: provided, that the Project will not be required to release more than 200 cfs at any one time nor more than 12,000 acre-feet during any month.

. . . .

(c) Whenever total reservoir storage drops below 50,000 acre-feet, the flow levels to be maintained by the Project shall be 20 cfs from October through March, and 40 cfs from April through September, as measured at the mouth of the Laramie River.

[88] *See, e.g.*, Nebraska Response at 37 n.16 ("Nebraska supports the Grayrocks Settlement Agreement and considers itself duty bound to uphold it. Assuming no interference from Wyoming, the Settlement Agreement guarantees minimum non-irrigation season instream flows, as well as protecting the substance of Nebraska's rights to Laramie waters under the North Platte Decree.").

operation pursuant to the 1978 Settlement Agreement,[89] Wyoming has repeatedly declined my several invitations to give assurances that she will in the future support Basin's obligations to maintain flows against would-be Wyoming junior appropriators. Wyoming recently commented on this matter at the hearings on the summary judgment motions:

> MR. OLPIN: [T]here are a lot of equities in [seeing] that the benefit[s] of the bargain made in '78 are not taken away from Basin. A part of that bargain has water flowing downstream between the Grayrocks Dam and the mainstem. I am unclear on what Wyoming is saying about the future of those flows. I have never heard anything as crisp as I would like to hear on what Wyoming thinks about those flows and their future. Would you enlighten me?
>
> MR. WOODRUFF: The Grayrocks Settlement Agreement provided for a regimen of flows, mainly some flows from the mouth of the Laramie River. Basin Electric Power Cooperative is obligated to maintain those flows at the mouth. There is no dispute about that. . . . It's also . . . undisputed that Wyoming has never done anything to interfere with Basin's obligations.
>
> MR. OLPIN: I want to look to the future, though, Mr. Woodruff.
>
> MR. WOODRUFF: Okay. Let's look to the future. Wyoming does not contend that the Grayrocks Settlement Agreement violates Wyoming law, or is illegal in any way. They do contend that it does not supersede Wyoming law. Wyoming law is, the use of water under storage permit, like the use of water in a direct flow permit, is subject to the terms of that permit.
>
> And, if the permit does not provide for delivery of water to the mouth of the river, or it maintains flows

---

[89] June 1991 Transcript at 105; Basin Brief at 4, 8.

> for instream value reasons, that is not part of the permits as a matter of Wyoming law. We can't change that.
>
> . . . .
>
> . . . *State law very simply says, that if there is water in the river that is not subject to a permit, not part of a water right, it's unappropriated water, it's subject to diversion. The law is the same in Nebraska.*
>
> They took that into account by saying, well, okay. Let's make sure that these releases that are going to require the Basin, are delivered to the mouth and not just delivered below the dam. And that puts the obligation on Basin. It's undisputed that Wyoming is not trying to interfere with that. . . . The only purpose for enjoining Wyoming from interfering with the private agreement between two parties would be, I guess, to aid one or the other of the parties. I think you have to find some reason to do that.

June 1991 Transcript at 68-70, 74 (emphasis added).

In view of Wyoming's refusal to assure that she will support the 1978 Settlement Agreement,[90] her insistence that the depletion of Grayrocks releases by new appropriators[91] could be permitted under Wyoming law despite the terms of the 1978 Settlement Agreement, and her lack

---

[90] At the March 9, 1992, hearing held in Pasadena, California to afford parties and *amici* an opportunity to comment on a draft of this report, Wyoming reiterated this point:

> We think that interstate apportionment was worked in 1945 upon the Laramie River. We are certainly not willing at this point to allow a settlement arrived at in a case in front of the District Court of Nebraska to work an apportionment of the Laramie River that was not otherwise achieved in the Supreme Court.

Transcript of Proceedings, Pasadena, California (Mar. 9, 1992) ("March 1992 Transcript") at 74.

[91] At the March, 1992 hearing, Nebraska alleged that such Wyoming appropriators are already on the scene. *See* March 1992 Transcript at 123.

of participation in the Grayrocks proceedings—an equitable consideration—I recommend that paragraph XIII of the Decree be amended to make relief available at the foot of the Decree. Such a provision would allow Nebraska or the United States to request relief if a circumstance arises in the future making the case for a need to prevent injuries that could attend Basin's inability to comply with flow releases under the 1978 Settlement Agreement by reason of Wyoming's administration of her water laws. Such a Decree provision presently will take care of the Grayrocks issue.[92]

2. *Corn Creek*

Corn Creek is a proposed irrigation project that would irrigate lands in Goshen County, Wyoming south of the confluence of the Laramie and North Platte Rivers. The 1978 Settlement Agreement also sets forth a method for handling future depletions caused by operation of Corn Creek, with Basin and Nebraska agreeing to bear the burden of the depletions equally.[93]

---

[92] I find such a provision necessary despite Basin's ability to participate in potential water rights proceedings in Wyoming because several other interests and equities, apart from Basin's, might be affected. *See* March 1992 Transcript at 74-75.

[93] The 1978 Settlement Agreement provides the following with respect to Corn Creek:

> 5. When and if the Corn Creek Irrigation District constructs its diversion and delivery system and the District begins using water from the Laramie River Basin, the Project will deliver into the mouth of the Laramie River on an annual basis an amount of water equal to the minimum flows specified in Section 4 minus 22,500 acre-feet and, in addition, will deliver into the North Platte River on an annual basis 11,250 acre-feet, subject to adjustment as provided below. The Project may meet this obligation (subject to the limitations in Section 2) with any flows from the Laramie River which exceed the number of acre-feet derived by subtracting 22,500 from the minimum flow figures in Section 4. Alternatively, at its option, the

Until recently, there was conflicting testimony in the Record concerning the likelihood the Corn Creek project will be developed.[94] At the March 9, 1992, hearing in Pasadena on the preliminary draft of this second interim report, however, Wyoming testified that Corn Creek is a live project:

> MR. COOK: [M]y old friend Stanley K. Hathaway, former Governor of the State of Wyoming, . . . asked me to declare positively the Corn Creek project, in the eyes of his client, Corn Creek Irrigation District, is an active and vital project.

March 1992 Transcript at 72. There is also some concern that the blueprint in the 1978 Settlement Agreement for handling depletions of Laramie flows caused by Corn Creek might be subject to challenge on account of a mutual mistake of material fact. Nebraska maintains

---

> Project may acquire a portion of this amount or an equivalent amount of water from sources in Wyoming and/or the North Platte Basin in Nebraska and deliver it to the North Platte. This obligation shall continue for as long as the Laramie River Station remains in commercial operation.

1978 Settlement Agreement ¶ 5.

[94] *See, e.g.*, June 1991 Transcript at 260:

> MR. SIEVERS: Yesterday, Mr. Weinberg sat—stood here—I overheard him chastising Mr. Rich because the Department of the Interior had not acted upon Corn Creek's request for waters for Corn Creek. It's a live project, they're trying to get water out of the Interior.

See also id. at 268-69:

> MR. WEINBERG: I should say something about Mr. Sievers quoting me in the conversation with Mr. Rich. I think he said I chastised Mr. Rich because the Bureau hasn't yet awarded—given a Glendo water contract to Corn Creek.
>
> Well, neither Mr. Rich, nor I, nor Mr. Sievers are witnesses in this case. But . . .—what I was talking about with Mr. Rich was an effort to find out where that matter stands in the Interior Department, and, at the risk of being accused of testifying, from what I understand it makes the prospect of Corn Creek even more remote than we have stated in our brief and Wyoming has stated in its brief.

that she entered that part of the 1978 Settlement Agreement concerning Corn Creek on the implicit understanding that there would be return flows from Corn Creek, now a proposition that is questioned.[95]

Accordingly, with respect to Corn Creek, I propose to hold a status conference to determine whether to proceed to a full trial on that issue. At that conference, I propose to consider such of the following questions, among others, as may be fruitful: was there a mutual mistake of material fact underlying the 1978 Settlement Agreement, and will the operation of Corn Creek disturb the delicate balance of the North Platte River and thereby cause injury to Nebraska's apportionment under the Decree? If Nebraska sustains her evidentiary burden at that status conference, we will then proceed to a trial on appropriate Corn Creek issues.

IV. THE DEER CREEK PROJECT

Nebraska seeks an injunction barring Wyoming from proceeding with plans to construct and operate a 60,000 acre foot capacity reservoir on Deer Creek, a right-bank tributary of the North Platte entering the mainstem between the Pathfinder Reservoir and the downstream Guernsey Reservoir.[96] The Deer Creek Project would add storage capacity and thus potentially implicates the Court's retained jurisdiction to review:

> The question of the effect of the construction or threatened construction of storage capacity not now existing on the tributaries entering the North Platte

---

[95] *See, e.g.*, June 1991 Transcript at 260, 269. The issue of return flows was apparently not expressly addressed during the negotiations leading to the 1978 Settlement Agreement. *See* March 1992 Transcript at 100-01.

[96] As previously indicated, both the Pathfinder and the Guernsey Reservoirs are components of the United States Bureau of Reclamation's North Platte Project.

River between Pathfinder Reservoir and Guernsey Reservoir.

Decree ¶ XIII(c).[97]

The Project presents the question of the relationship between two paragraphs of the Decree, the above-quoted paragraph XIII(c) and paragraph X, a broadly stated exemption for domestic, municipal and stockwatering uses, under which Wyoming claims the Deer Creek Project falls. The Project's stated purposes are to provide a reliable municipal water supply for Casper and other Wyoming communities and, secondarily, to provide for their future growth. Deer Creek FEIS at i. Wyoming has also contemplated using the project's yield for non-municipal purposes until the full annual yield is needed for municipal uses. First Interim Report at 28. Because Deer Creek enters the North Platte downstream of Casper, the State of Wyoming plans to make water available to Casper through a system of exchanges. The Deer Creek Project will make available water releases to downstream appropriations having senior Wyoming appropriative water rights while Casper continues to divert from the mainstream under its more junior appropriations. *Id.*[98]

---

[97] Nebraska's 1986 petition invokes this provision by asserting that Wyoming is threatening to deplete North Platte River "by the proposed construction of storage capacity on the tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." Nebraska Petition at 2.

[98] After expressing some inconsistent views earlier in the present proceedings, Nebraska is now in agreement with Wyoming that the municipal water rights of Casper and the other Wyoming communities are properly administered in priority with other Wyoming water rights. March 1992 Transcript at 39-40. This shared view is consistent with paragraph XII(a) of the Decree, which provides that the relative rights of water users within the three States are not affected "except as may be otherwise specifically provided herein." There is no Decree provision that specifically calls for a contrary administration of municipal water rights.

Under both Wyoming and Nebraska law, preference is accorded municipal uses to the extent "that a municipal use could deprive a

For the second time Wyoming has moved for summary judgment on Nebraska's claims regarding Deer Creek. In June, 1989, I denied Wyoming's first motion because I concluded there were genuine issues of material fact precluding summary judgment. First Interim Report at 27-32. Wyoming brings this second motion claiming that extensive discovery conducted since then has established that, as a matter of law on two separate grounds, Deer Creek will not violate Nebraska's apportionment under the Decree. I recommend denying this second summary judgment motion for the same reason—genuine issues of material fact still preclude summary judgment.

The first ground Wyoming invokes is that Nebraska has not proffered the required factual showing respecting threatened injury from the construction and operation of Wyoming's proposed project on the Deer Creek tributary. Thus, Wyoming contends that Nebraska is not entitled to a trial on the effect of threatened construction of new storage capacity on the tributaries between Pathfinder and Guernsey Reservoirs under paragraph III(c) of the Decree. Wyoming invokes the summary judgment standards recently articulated by this Court. *See supra* at 10-13.

As a separate ground for summary judgment, Wyoming asserts that Deer Creek, or at least the major part of it, is exempted from challenge under the Decree by paragraph X, which provides that the Decree shall not "affect or restrict" Colorado and Wyoming water uses

---

senior irrigator or other nonpreferred user of water only if compensation were paid for the taking." Wyoming Hearing Memorandum On The Question Of Whether Paragraph X Of The Decree Exempts Municipal Uses In Wyoming And Colorado From The Operation Of The Individual States' Law Of Prior Appropriation (Mar. 9, 1992) at 6. Wyoming has declared that "[n]either state ever asserted that a municipal water right should be exempt from the intrastate law of prior appropriation." *Id.* Those principles of intrastate administration pose vexing questions for the interpretation and application of paragraph X, some of which are addressed briefly at 86-87 *infra*.

"for ordinary and usual domestic, municipal and stock watering purposes and consumption." [99]

For the reasons explained below, Wyoming's motion for summary judgment cannot be granted on either basis.

A. The Effect of Threatened Tributary Storage Capacity

In the original proceedings Special Master Doherty concluded that the run-off from the tributaries below Pathfinder and above Guernsey did not then require reg-

---

[99] The United States and Nebraska take the position that municipal projects on the tributaries between the Pathfinder and Guernsey Reservoirs stand on the same footing under paragraph XIII(c) of the Decree as do nonmunicipal water projects on tributaries in that reach of the river. Thus, it is argued, paragraph X does not foreclose the paragraph XIII(c) inquiry concerning the effect of threatened construction of new tributary municipal storage capacity in this reach. I do not accept this reading as there is nothing on the face of paragraph X to support such a narrowing of the municipal exemption.

Moreover, the applicability of the paragraph X exemption to the tributaries upstream of Pathfinder is acknowledged expressly in paragraph IX, which excuses Colorado and Wyoming from record-keeping duties respecting municipal uses in those upstream reaches. There is nothing in paragraph X's text that supports an argument for different treatment of municipal uses on tributaries depending on whether they enter the mainstem upstream or downstream of Pathfinder. Thus, paragraph X means exactly what it says in its statement that the Decree does not affect or restrict municipal uses or diversions of water "from the North Platte River and its tributaries."

That is not to say, of course, that municipal uses can in no circumstances be scrutinized. Paragraph XIII(f) of the Decree contains a catch-all reopener provision authorizing further relief if there should be "any change in conditions making modification of the decree or the granting of further relief necessary or appropriate." Should threatened municipal uses turn out to pose risks of significant impacts on natural flows, paragraph XIII(f) can be invoked. Neither Nebraska nor the United States, however, has sought at this stage to have the municipal exemption itself examined under paragraph XIII(f).

ulation by the Decree. The evidence indicated that tributary run-off essentially was exhausted before any shortages occurred in the mainstem and that, accordingly, the regulation of the tributaries would not be of material benefit. Doherty Report at 145.

The United States expressed concern that some tributary regulation between Pathfinder and Guernsey was essential, fearing that additional storage capacity on those tributaries could reduce the mainstem flows for storage in Guernsey and the Inland Lake Reservoirs of the North Platte Project. The Court agreed with the Special Master on the absence of a present threat but allowed that "if such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction," 325 U.S. at 625, and included the language in paragraph XIII's reopener provision, quoted above, retaining jurisdiction for that purpose.

Wyoming candidly admits that the operation of the project will deplete mainstem natural flows but insists that Nebraska has not proffered any showing that those depletions will injure Nebraska's apportionment under the Decree. June 1991 Transcript at 21-22. Wyoming maintains that, under this Court's recent rulings, Nebraska cannot resist summary judgment because she has not made the threshold showing of facts that would support such a finding of injury by a jury.

While Wyoming's statement of the standard is correct, her assessment of Nebraska's evidence is not. I have determined that the Second Affidavit of H. Lee Becker submitted by Nebraska is itself sufficient to require denial of summary judgment for Wyoming.[100] Mr. Becker, a former state hydrologist for the Nebraska Department of Water Resources, reported the results of his examination of two models designed to show the impacts of operating

---

[100] Affidavit of H. Lee Becker (Apr. 25, 1991) ("Second Becker Affidavit"), attached to Nebraska Response.

the proposed Deer Creek Project. One model, the North Platte River Simulation Model ("NPRSM"), was developed for the Wyoming Water Development Commission for use in connection with the environmental permitting of the project. That model, according to Mr. Becker, reflects project operations in a manner designed to minimize the impacts of the Deer Creek Project on the flows below the Tri-State Dam where critical wildlife habitat might be affected. Mr. Becker reconfirmed his testimony in a previous affidavit that operations in accordance with the NPRSM:

> [P]redicted that reductions in the average end of year carryover storage of both the Pathfinder and Kendrick ownerships could be as high as 25,000 acre feet, and 58,000 acre feet, respectively. Such reductions in carryover storage could limit diversions in the Whalen Dam to Tri-State reach in a series of dry years.

Second Becker Affidavit ¶ 2.

If, on the other hand, the Deer Creek Project were to be operated in accordance with another model developed by Mr. Becker incorporating "reservoir operations, natural flow and ownership accounting, and the operation of the Deer Creek reservoir," he concluded that the result would:

> [S]how that the major impacts of the Deer Creek Project are on flows below the Tri-State Dam with lesser impacts on reservoir ownerships. With greater impacts on flows below the Tri-State Dam there would be a greater likelihood that the Deer Creek Project would jeopardize the habitat of the endangered and threatened species in Nebraska.

Id. ¶ 3.

Mr. Becker reported that the two different models showed that the alternative operational plans could either minimize the impacts below Tri-State Dam or minimize impacts on the upstream reservoirs. His final conclusion,

however, was that "the impacts can be transferred from one location to another, but they cannot be obliterated." *Id.* at 10.

Wyoming has not satisfactorily countered Mr. Becker's analysis. At the hearing in June, 1991, counsel for Wyoming attempted to interpret an earlier Becker affidavit as supporting the proposition that Mr. Becker had found that historic canal diversions in the Whalen to Tri-State reach "can be met with Deer Creek, or Deer Creek and Inland Lakes, or Deer Creek and Laramie, or all of the various combinations." June 1991 Transcript at 19. Wyoming counsel did not explain away, however, the prospect that operations under the NPRSM, which may well be required by the federal environmental laws, could result in reducing carryover storage and limiting the Whalen to Tri-State diversions in a series of dry years.

I therefore recommend that the Court deny Wyoming's motion. "[T]he facts specifically averred by [Nebraska] contradict facts specifically averred by [Wyoming]." *Lujan*, 110 S. Ct. at 3188. We shall therefore proceed to trial on the Deer Creek Project's effects on "the delicate balance of the river," 325 U.S. at 625, *unless* Wyoming can establish that the Deer Creek Project fits within the Decree's paragraph X municipal exemption.

B. The Municipal Exemption

As indicated previously, Wyoming characterizes Deer Creek as a municipal project designed to furnish water for Casper and other Wyoming communities and, therefore, claims that it is exempt from the constraints of the Decree by paragraph X, which provides:

> This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

Although Deer Creek enters the North Platte mainstem downstream of Casper, the State of Wyoming takes the

position that the project's primary function will be to furnish Casper and other Wyoming communities with municipal water supplies by exchange. The proposed exchange is designed to offset upstream municipal diversions from the North Platte mainstem by supplying water to downstream Wyoming appropriators having rights senior to those of Casper and the other communities. This claimed municipal function of the project was invoked by Wyoming in her first motion for summary judgment. My decision to deny Wyoming's motion at that time was grounded in part on the need for evidence to determine the extent to which the Deer Creek project will be entitled to the municipal exemption. I therefore turn first to a further examination of the nature and scope of the paragraph X municipal exemption and then to a consideration of whether or to what extent the Deer Creek project fits within that exemption.

1. *The Nature and Scope of the Exemption*

There is little to be found in the Record of the original proceedings on the origin or nature and scope of the paragraph X municipal exemption. Apparently, the basic concept was agreed upon by the parties near the end as consideration was being given to the form of the Decree. The Special Master, responding to suggestions proffered by the States, recommended to the Court an exemption for ordinary and usual domestic and municipal uses served by diversions from the North Platte River in Colorado and Wyoming. Doherty Report at 180. Subsequently, the Court, at the behest of Wyoming, broadened the exemption to encompass diversions from the tributaries as well as from the North Platte mainstem and to exempt stock watering uses as well as domestic and municipal uses. 325 U.S. at 656. The Record in the original proceedings, however, contains little that is helpful in interpreting and applying the sparse text of paragraph X and affords no basis for taking away from its plain meaning that the

ordinary and usual water uses within its scope were neither to be affected nor restricted by the Decree.[101]

Indeed, paragraph X poses some mysteries, as the United States has shown. During the original proceedings, the parties strenuously battled over small quantities of water, such as the 2,000 acre feet of inflows from Spring Creek. *See* Decree ¶ 5. Yet, all of the parties agreed to paragraph X. Counsel for the United States commented on this at the June, 1991 hearing as follows:

> MS. WEISS: You might wonder, in a lawsuit that was so hotly contested for water, why that provision was agreed to. This was a case involving a vastly overappropriated river.
>
> I think the figures, and the Opinion, of the Supreme Court show that during those years of drought, roughly 48 percent of the requirements of the diverters on the river were met. Everybody was fighting over every drop. . . .
>
> Colorado sought to irrigate an extra 10,000 acres of land . . . And that was denied by the Court. . . . What's interesting about [paragraph] 10 is that . . . [t]here was no controversy about it. It's not plausible to believe that they were contemplating a 60,000 acre foot storage project when they agreed to [paragraph] 10.

June 1991 Transcript at 43.[102]

---

[101] *See* Wyoming Brief at 102 n.32 ("Wyoming has searched the record, pleadings and briefs . . . for the source of the reported agreement of the parties regarding municipal use. . . . No clear expression of the agreement was found in the record.").

[102] From Wyoming's perspective, not surprisingly, the scale of the Deer Creek Project is seen in a quite different light. At the March, 1992 hearing, Wyoming commented:

> MR. COOK: Nebraska's problems are many and we have heard in our arguments in June that the Trust and Audubon agree with Nebraska to one extent, they wanted to get the water downhill into Nebraska and then they will fight over it. . . .
>
> But let me suggest to you also that with all of those interests and all of their past sins down in Nebraska over the use of

During the course of the present proceedings, Nebraska has taken a number of different positions on the meaning of paragraph X. Initially, she contended that the only exempt uses were those municipal uses in existence at the time of the Decree and that subsequent municipal projects were simply outside its scope. That contention, however, finds no support in the language of paragraph X which provides no basis for differential treatment of municipal projects constructed before and after the Decree. Ultimately, Nebraska ceased to press that argument.

Both Nebraska and the United States have at various times taken the position that future municipal projects are entitled to the exemption only if the resulting municipal uses are non-consumptive. *E.g.*, *id.* at 254. That position, however, runs afoul of the express language of paragraph X and common sense as well. Paragraph X by its very terms applies to "ordinary and usual domestic, municipal and stock watering purposes and *consumption*" (emphasis added). A municipal project, therefore, does not fall outside paragraph X's scope merely because it consumes some amount of water. Further, while there can be significant return flows from municipal water uses, such uses always consume some water, and Colorado and Wyoming cannot be expected to engineer their future municipal projects to make them entirely non-consumptive.

At the hearing in Salt Lake City in June, 1991, the United States for the first time argued that the Deer

---

> water, that now they are looking to Wyoming and Colorado . . . to solve those problems at the expense of little projects. . . . 10,000 acre feet in this river that has 2 million, 2½ [million] acre feet storage in Wyoming, another 2 million in Nebraska, is just maddening to me. It boggles my mind. . . .
>
> I think about [Nebraska and its misallocation problems] a little bit like their view is somewhat . . . [like] what Lady Macbeth said after she had just planted the murder weapons on the King's servants, she said, "Retire we to our chambers. A little water cleans us of this deed."

March 1992 Transcript at 131-32.

Creek Project cannot qualify under paragraph X because it is designed to *store* water for subsequent releases. The United States contended that the exemption by its terms applies only to the "*use or diversion*" of water and makes no reference to *storage* of water for municipal uses. Nebraska does not join the United States in this argument and concedes that an otherwise qualifying municipal project properly might have a storage feature. June 1991 Transcript at 34-35.

I agree with Wyoming and Nebraska that the mere existence of a storage feature does not by itself disqualify what would otherwise be an ordinary and usual municipal project. The common and sometimes essential use of reservoirs to store water prior to use renders unreasonable the suggestion that a municipal project cannot have a storage feature because storage is not expressly authorized by the words of the Decree.

Finally, on March 9, 1992, at the hearing held in Pasadena to receive comments on a draft of this report, Nebraska announced the discovery of a newly-found plain meaning of paragraph X that precludes its application to Wyoming's Deer Creek project. Nebraska's current position is that all involved have been wrong in thinking of paragraph X as providing a *municipal* exemption because this will predispose one incorrectly "to examine a given project to determine whether by some reasonable standard it fits the exemption." March 1992 Transcript at 22. What one should do instead, Nebraska now insists, is focus on the language stating that the Decree "shall not affect or restrict" uses of water for municipal uses. Viewing the Decree in that light is said to yield a "very different analytic proclivity," which is to focus on the Decree's provisions that could affect or restrict municipal uses. "If none of the provisions resulted in such a restriction, no exemption in our view can arise." *Id.* at 22-24.

In arguing for her newly discovered plain meaning Nebraska contends that only those provisions of the De-

cree that are "decretal," *i.e.* those that impose express restrictions, fit within paragraph X's "affect or restrict" terminology. Thus, the various injunctions specifically set forth in the Decree would qualify for the application of paragraph X, but the paragraph V provision that merely divides natural flows 75/25 between Nebraska and Wyoming in the Whalen to Tri-State reach would not. It follows that if Nebraska claims (as she does in this case) that a proposed upstream project in Colorado or in Wyoming would merely diminish natural flows available in the pivotal reach, paragraph X does not apply as there is in that circumstance no injunction for paragraph X to sweep away. It would seemingly also follow that paragraph X could not be invoked in the case of any other municipal use in either Colorado or Wyoming, however appropriate and compelling that municipal use may be, except when paragraph X can negate specific injunctions.

Nebraska supports her new argument by referring to Wyoming's proposed text in her 1945 exceptions to the Court which, if adopted, would have provided:

> [T]hat the injunctions herein contained shall not comprise any restriction upon the diversion from the North Platte River and its tributaries in Colorado and Wyoming of water for ordinary and usual domestic, municipal and stock watering purposes.

March 1992 Transcript at 23. This argument, of course, stumbles over the fact that Wyoming's proposed formulation was not adopted and that the Court instead wrote language into paragraph X that made no mention of the injunctions.

More important, however, Nebraska's asserted plain meaning is not a common sense meaning one would readily read into language stating that municipal uses are neither to be affected nor restricted by the Decree.[103] Rather, the common sense reading of the words is that the speci-

---

[103] That it is not a plain meaning is illustrated by the United States' immediate response to Nebraska's interpretation at the re-

fied uses set forth in paragraph X are simply to be allowed under the Decree and that the equitable apportionment pursuant to the Decree's remaining provisions act only upon the water remaining after "ordinary and usual" domestic, municipal and stock watering uses and consumption in Colorado and Wyoming.

Whether the proposed Deer Creek Project uses fit within the paragraph X exemption is a separate inquiry to which I now turn.

2. *The Application of Paragraph X to the Deer Creek Project*

a. *The Uses to be Served and the Need for Additional Supplies*

The evidence adduced thus far shows that Deer Creek was planned and designed initialy to serve several uses other than purely domestic and municipal uses. The Deer Creek FEIS prepared in connection with the application for a Section 404 permit discloses that Deer Creek uses also were to include irrigation, industrial, fish and wildlife, recreation, flood control, and possibly hydropower production. In addition, Wyoming's authorizing legislation and the project's state water permit allow the project yield to be devoted to non-municipal uses until the full yield is required for municipal uses. These facts present the issue of the application of the paragraph X exemption

---

cent hearing. Although the United States and Nebraska are in the same camp on the Deer Creek project, Ms. P. Weiss, speaking for the United States, conceded that she did not yet completely understand the new position announced by Mr. Simms, representing Nebraska. March 1992 Transcript at 81. Mr. Simms counselled patience and conceded the difficulty in communicating the interpretation orally. Mr. Simms stated "The argument, however, or the explanation, is very complicated, and it's very difficult to explain in oral argument. On paper I think it will become much more readily understandable." *Id.* at 120. Reading Nebraska's new position on paper, however, fails to convince that it captures the plain meaning of paragraph X.

to water projects not designed solely to serve domestic and municipal uses. Nebraska and the United States have urged that these multiple purposes disqualify Deer Creek from the exemption.

It has also been argued that Casper does not need and would in no meaningful sense make use of project water yields. Nebraska posits that Casper has ample municipal water supplies, that the communities involved appear to be declining in size, and that, in any event, there are more cost-effective alternatives than Deer Creek to gain such additional supplies as might be needed.

The contemplated non-municipal uses of the Deer Creek Project raise factual questions for trial on the extent of the non-municipal uses to be served by the project and their potential impact on the delicate balance of the river. Because such uses do not qualify for the paragraph X exemption, if they cause significant depletions they should not escape scrutiny under the paragraph XIII(c) re-opener provision dealing with the construction of new storage capacity on the tributaries between Pathfinder and Guernsey Reservoirs. The same analysis might apply both to any early non-municipal uses preceding the need for municipal uses and any continuing non-municipal uses after municipal uses begin. While Wyoming might ultimately make the case for allowing *de minimis* early or incremental depletions from non-municipal uses, that case cannot be made in the absence of evidence showing the magnitude of the non-municipal depletions and their impacts on water supplies available to serve the Decree's apportionment.

Wyoming attempts to solve this problem by advising that she would proceed with Deer Creek even if the project were permitted to serve only municipal uses, but at this juncture Wyoming's offer does not dispose of the need for evidence to identify the various uses that such a reformulated project would actually serve and then

to determine how those uses would bear on the applicability of paragraph X.

On the subject of Wyoming's alleged need for additional municipal supplies, Nebraska has presented evidence that Casper and the other Wyoming municipalities to be served by Deer Creek are not growing as previously forecast and that there have actually been population decreases in some communities. Nebraska has further presented an expert's affidavit tending to show that even if more municipal water supplies are needed there is a range of better—that is, more cost-effective—ways to supply that water than Deer Creek. That expert testified, for example, that the cost of Deer Creek water would range from $235.42 to $353.12 per acre foot, in comparison to the least expensive alternative of $31.94 per acre foot to purchase rights from the Bureau of Reclamation's Kendrick Project. Affidavit of Raymond J. Supalla (Apr. 25, 1991), in Nebraska Response.

It will not be enough, however, for Nebraska simply to demonstrate that she disagrees on municipal needs or that Wyoming may not have chosen what Nebraska believes to be the optimal means to satisfy municipal needs. I have concluded that the Court in 1945 did not intend Colorado and Wyoming to be able to invoke the paragraph X municipal exemption only by meeting a standard to be devised by the Supreme Court. Paragraph X of the Decree surely leaves the initial decisionmaking on supplying municipal water needs to Colorado and Wyoming. On the other hand, neither Colorado's nor Wyoming's sole decisions on these matters can escape scrutiny or the Decree's apportionment would be subject to being subverted under the banner of the municipal exemption.

b. ***Project Operation and Water Rights Administration***

The United States has expressed concern that Wyoming not be empowered by any decision in these proceedings to

operate the Deer Creek Project in a manner that would be inequitable to downstream senior water users in Nebraska.[104] While I have previously concluded that paragraph X exempts consumption for domestic, municipal and stock watering purposes and thereby countenances some reductions in water supplies, it does not follow that equitable concerns of the sort raised by the United States cannot or should not be addressed. Therefore, one of the inquiries in the trial of the Deer Creek issues will be whether Wyoming's proposed operations and its contemplated water rights administration in connection with the proposed project will be fair and equitable to affected water users in Nebraska.

For example, there may be inequitable treatment of holders of senior Nebraska appropriative rights. Now that all parties are agreed that Wyoming will administer municipal water rights in priority, a circumstance might arise making it necessary for Wyoming to acquire senior water rights for a proposed municipal water project. The United States raises the specter of Wyoming invoking eminent domain powers that are available under Wyoming law to condemn only the water rights of impacted senior Wyoming water users, while adopting the rationale that paragraph X authorizes the reductions in supplies so far as Nebraska's senior users are concerned. Thus while both the Wyoming and Nebraska senior rights would be taken or impaired, there would be payment of just com-

---

[104] As indicated previously, I am recommending summary judgment in favor of Nebraska and the United States that the Inland Lakes have a December 6, 1904 priority. As with all activities and developments on the North Platte River, I cannot ignore the interrelationship between that ruling and the paragraph X exemption. If municipal developments automatically override interstate priorities (either that of the Interstate Canal or Inland Lakes), my recommended ruling on the Inland Lakes might become ineffective. These types of questions make it important that we proceed to trial on the Deer Creek question to explore the status of the project under the Decree and the equitable allocation of its impacts in light of the paragraph X exemption.

pensation only to the Wyoming water users. *See* March 1992 Transcript at 83-88.[105]

Although judgment must necessarily be reserved until the precise effects of specific operational and water administration plans are carefully examined, it is appropriate at this juncture to note that concerns of the sort raised by the United States should be given appropriate consideration. Again, however, the recognition of the exempt status of municipal uses and consumption does not translate into a license for Wyoming to treat Nebraska's water users in ways that are not consonant with the equitable principles that apply in equitable apportionment proceedings.[106]

---

[105] Complex issues could arise concerning Wyoming's acquisition of senior water rights in both states.

[106] At the hearing on March 9, 1992, the United States argued that the administration of municipal water projects should be subject to the imposition of appropriate constraints to prevent inequitable treatment of the sort discussed. March 1992 Transcript at 85-91. Another way to approach the matter is to analyze the issue as a question of characterization and to disqualify from municipal classification in the first instance any projects that will not be administered in a manner that precludes the inequitable outcomes feared by the United States. At this point it is not necessary to determine which of these two approaches is better; it is enough for now simply to note that paragraph X should not become a license for Wyoming to achieve an inequitable outcome.

The United States proposed, at the March 9, 1992 hearing, that the municipal exemption be read so as to authorize Deer Creek storage only of "excess flows" after Nebraska's senior rights are satisfied. At that point, according to the United States, the municipal exemption can be invoked to bar Nebraska from challenging Wyoming's storage of "these excess flows that otherwise would flow into Nebraska." March 1992 Transcript at 83-84. The flaw in that approach is that it would strip paragraph X of any meaning except when supplies are plentiful, despite the Court's intention that the Decree "be based, as the Special Master recognized, on the dependable flow." 325 U.S. at 620. Further, the Court specifically contemplated that the Decree's constraints might be loosened if the then-prevailing drought conditions were to end. This leaves no room for

3. *Conclusion*

I recommend that the Court deny Wyoming's motion for summary judgment on Deer Creek and that we proceed to trial on Deer Creek issues. To determine whether Deer Creek qualifies under paragraph X of the Decree I will need to consider evidence on a range of factors.

First, I will examine the mix of uses to be supplied—residential, commercial, industrial, and so forth—and then determine whether that mix can reasonably be characterized as "municipal" under Colorado, Wyoming, and Nebraska water laws.

Second, I will take evidence on the need for additional supplies to meet municipal uses, taking account of existing supplies and demands and forecasts. In this regard, I will pay appropriate heed to efficiencies mandated by water law and practice in the three states.

Third, I will examine and evaluate the Deer Creek Project itself to determine whether it is appropriately conceived and designed to be administered so as to meet the municipal needs that ostensibly justify the project, including whether it represents a reasonably efficient use of water toward that end. If uses other than municipal will consume any substantial part of Deer Creek's annual yield, I will examine the magnitude of those depletions to determine whether they affect the delicate balance of the river and should alter the characterization and treatment of the project. In that connection, I will consider whether early or incremental non-municipal depletions should be subject to scrutiny under paragraph XIII(c) dealing with new tributary storage capacity between Pathfinder and Guernsey reservoirs.

Finally, I will examine operational plans and proposed water rights administration to determine whether the project could result in inequitable treatment of water

---

the argument that the exemption should apply only when supplies can satisfy all water rights.

users in Nebraska relative to similarly situated water users in Wyoming.

V. DOWNSTREAM OF TRI-STATE

A. Background

The downstream of Tri-State issues arise from the design and operation of the two large United States Bureau of Reclamation projects on the North Platte River and their downstream effects. By far the more important is the North Platte Project, which includes the Pathfinder and Guernsey Reservoirs in southeastern Wyoming and downstream diversion canals in the pivotal Whalen Dam to Tri-State Dam reach of the river. The project canals and also private canals in that reach divert both project storage water from the up-river federal reservoirs and natural flows for delivery to numerous farms in southeastern Wyoming and far into western Nebraska.

By the time the original proceedings began in 1934, North Platte Project operations had brought enormous changes to the southeastern Wyoming and western Nebraska landscapes. Among those changes was a dramatic increase in irrigation return flows, bringing substantial benefits to Nebraska lands down-gradient of the lands directly served by canal deliveries. In the original proceedings Special Master Doherty found that return flows in the two-state area had increased from a negligible quantity in 1911 to 700,000 acre feet in 1927. Doherty Report at 33. Those return flows figured prominently in the original proceedings and affected the apportionment that Nebraska ultimately received in the Decree.[107]

Nebraska initially claimed that any equitable distribution of the North Platte's flows should extend to all irri-

---

[107] The return flows brought downstream environmental and wildlife benefits as well as irrigation benefits and are, therefore, of concern to the environmental *amici* as well as to the United States and Nebraska.

gated lands in Nebraska as far east on the Platte River as Grand Island in central Nebraska. By the end of the case, Nebraska had agreed that lands east of Bridgeport, Nebraska, some sixty miles east of the Wyoming-Nebraska line, reasonably could be satisfied from local supplies including upstream irrigation return flows. 325 U.S. at 607. In the end, both Special Master Doherty and the Court determined that local seasonal supplies were adequate to fill the needs of all Nebraska canals diverting from the North Platte mainstem downstream of the Tri-State Dam, one mile east of the state line. Accordingly, no river sections east of the Tri-State Dam were included in the equitable apportionment. *Id.* at 654-55.

In view of Special Master Doherty's conclusion that the equitable apportionment would not permit Nebraska to demand direct flow water from above Whalen for uses below the Tri-State Dam, the United States contended that the Decree should limit Nebraska's share "to that which was in fact being diverted and used by the canals between Whalen and the Tri-State Dam within the specified limitations in acre feet and second-feet." *Id.* at 628. The United States worried that in the future, as in the past, Nebraska might intentionally permit water to pass the Tri-State Dam for downstream uses. The Court concluded, however, that if the Decree were ever to be administered "as the United States fears . . . so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree." *Id.* at 628-29.

In the present proceedings the concerns of Wyoming mirror the concerns articulated by the United States in the original proceedings. Wyoming also worries that Nebraska will attempt to call for upstream flows in excess of her apportionment with the intent to route those flows in some manner downstream of Tri-State Dam. Once such flows have made their way downstream, Wyoming apparently also fears future Nebraska claims that Wyoming's proposed upstream water projects might be en-

joined because combined natural flows and storage water releases might be insufficient to satisfy the lands served by the Decree's apportionment.

Although Nebraska did not receive an apportionment of downstream of Tri-State natural flows, there has been heated debate in the present proceedings over exactly what rights Nebraska does have in the downstream return flows contributing to those local supplies that the Court found adequate to meet her needs in 1945. Nebraska has labelled those local supplies the "predicate" for the Court's decision and argues that the resulting local supplies east of Tri-State Dam serve important equities, including both wildlife and irrigation interests. Nebraska insists that those return flows are part of the "regimen of the river" contemplated by the Decree in which she has enforceable rights.[108]

---

[108] On occasion Nebraska has even taken her argument a step further, urging that the preservation of the "regimen of the river" must entail taking whatever upstream measures may be required to assure the continuation of "historic flows." The deposition testimony of J. Michael Jess, the Director of the Nebraska Department of Water Resources, suggests just such a claim. Mr. Jess was asked whether it is Nebraska's position "that the return flows should remain unabated coming from the federal project in the State of Wyoming into Nebraska." He answered "I believe so, it is." Deposition of J. Michael Jess, Vol. IV at 164. Further, Nebraska has contended that "Nebraska's collective equities have a right to continued supplies equaling historical averages or the Decree will be undermined." Nebraska Response to 52-53. Nebraska's historic flow thesis is unsound to the extent Nebraska means to suggest that the Decree imposes upstream obligations on Wyoming to immunize return flows from impacts caused by natural annual fluctuations in supply. The underlying theory of the 75/25 division of natural flows in the Whalen to Tri-State reach is that the parties will share the supplies that are available, in the stated proportions, both in good years and in dry years.

Colorado expresses justifiable concern over Nebraska's suggestion of claims respecting "collective equities equaling historical averages." Sustaining that position would, indeed, cause anxiety in Colorado over potential prejudice for not having fully used the share allocated to her in paragraph I of the Decree. As she argued on

By contrast, Wyoming and Colorado take the position that Nebraska has no rights under the Decree downstream of Tri-State independent of her right to protect the upstream apportionment for those lands that are directly served by the canals diverting at and above the Tri-State Dam. In their view, Nebraska's entitlement to relief for diminished return flows downstream can exist, therefore, only after a finding is made first of a violation of her upstream of Tri-State apportionment. If such an upstream violation is, in fact, established, the two upstream states concede that any resulting Nebraska injuries downstream of Tri-State would be compensable.

On the opposing motions for summary judgment concerning the cluster of issues grouped under the downstream of Tri-State heading, I find myself largely in agreement with the United States that they:

> [A]re too theoretical and not sufficiently anchored to concrete pleadings or an adequately developed factual Record, a particular concern in litigation between states and in equitable proceedings.

United States Post-Argument Comments at 6. Neither motion has crystallized the issues such that they are presently postured—*i.e.*, ripe—for resolution. Although the summary adjudication sought is therefore premature, there is nonetheless one subsidiary question that can be answered now: I recommend that the Court rule that the Decree does not impose absolute ceilings for Nebraska's diversions in the Whalen to Tri-State section on a canal-by-canal basis.

B. Wyoming and Colorado Motions

In her counterclaim, Wyoming asserts that Nebraska has intentionally circumvented and violated the Decree:

---

summary judgment, Colorado "should not be placed in a 'use it or lose it' situation with regard to her apportionment." June 1991 Transcript at 156-57.

> (a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;
>
> (b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree.

Wyoming Answer and Counterclaim at 8-9. Wyoming has not moved for summary adjudication on her counterclaim as such. Rather, she seeks a partial summary judgment that would prevent Nebraska from developing and using certain evidence in these proceedings. She asks for a ruling to "confirm that evidence of instream uses and uses supplied by diversions below Tri-State Dam is immaterial to proof of violation of Nebraska's apportionment under the Decree." Wyoming Brief at 5. Wyoming takes the position that such evidence can be offered for the purpose of establishing injury only "if Nebraska first proves a violation of her [upstream of Tri-State] apportionment" under the Decree. *Id.*

Colorado adopts much of Wyoming's motion. Colorado asks that evidence of uses below Tri-State be excluded from these proceedings as immaterial, until Nebraska proves a violation of her upstream apportionment. Colorado Motion for Partial Summary Judgment (Feb. 25, 1991) at 4. In addition, Colorado seeks judgment in her favor on any Nebraska claims that Colorado is violating or threatening to violate the Decree by allegedly reducing direct flows passing Tri-State or certain return flows. *Id.* at 3-4. Colorado argues even more stridently than Wyoming that Nebraska, in seeking to protect water rights below Tri-State, is attempting to shroud what is actually a petition to modify the Decree. If water supplies below Tri-State decrease primarily because of decreased return flows, Colorado asserts that Nebraska

should in a straightforward manner file a petition for a new proceeding under paragraph XIII(f) of the Decree, which explicitly contemplates future modifications for "any change in conditions making modification of the decree or the granting of further relief necessary or appropriate." For Nebraska to attempt to address her concerns via claims about the "predicate of the apportionment" or "regimen of the river" is, in Colorado's view, to make arguments based on "sophistry and semantic smoke screens." June 1991 Transcript at 153-65.

The specific issue to be addressed at this point is the appropriateness of ruling on whether Nebraska's as yet unseen evidence of injury or threatened injury to her interests downstream of Tri-State will be material to whether Wyoming or Colorado has violated Nebraska's decreed apportionment. At this stage, however, it is premature to enter an order advising Nebraska on how she may develop her case and the propositions for which her evidence will be deemed material. To rule on such questions now would be to issue an advisory opinion that Wyoming and Colorado cannot unlawfully injure Nebraska's downstream of Tri-State interests except by actions that will violate the Decree with respect to her upstream of Tri-State apportionment. Even though it might seem difficult to conceive of another manner in which the upstream states might wrongfully impede the return flows contributing to downstream local supplies, there is no wisdom in ruling on that question in the abstract.

Nebraska makes an important point in labelling the downstream return flows a "predicate" to the 1945 Decree. The Court did use evidence of the reliability of those flows even in dry years as the basis for deciding that Nebraska did not require an apportionment downstream of the Tri-State Dam. There is, therefore, reason to proceed cautiously until Nebraska has developed her factual case. As the United States has pointed out, there has been "no factual development concerning either

the quantities of water involved or the uses or non-uses of that water." United States Response at 18.

In the course of the briefing and argument respecting summary adjudication, however, one contention emerged that can and should be resolved now. Wyoming has asked for a summary ruling declaring that the beneficial use requirements that were determined in the original proceedings for the several canals diverting between Whalen and the Tri-State Dam are absolute ceilings for Nebraska's diversions on a canal-by-canal basis. The uncontradicted facts do not establish Wyoming's claim; instead, they lead to the opposite conclusion, requiring a ruling in favor of Nebraska on this question.

While it is true that Special Master Doherty took comprehensive evidence on the irrigation of Nebraska lands served by the canals diverting at and above Tri-State Dam and he calculated the beneficial use requirements of those lands, the Record makes clear that he did so in order to construct a basis for determining the proper shares of the natural flow to be apportioned to the two states in the pivotal Whalen to Tri-State reach. The 1945 Record also demonstrates that the Decree left to Nebraska and to Wyoming the administration of their respective 75 percent and 25 percent shares of the natural flow. Special Master Doherty's recommendation in his Report is unequivocal on that issue, and neither the Court's opinion nor the final Decree afford any basis for concluding that his recommendation was rejected by the Court.

Indeed, the Doherty Report addressed this matter with particular care when explaining that a distribution of natural flow on a percentage of daily flow basis would avoid the problems of the interstate priority allocation urged by Nebraska and the mass allocation urged by Wyoming:

> The quantities would vary from day to day, but the proportions would remain constant. Under this

method each State would participate proportionately and immediately in all variations in supply. *The share of each State, determined by the established ratio, would be subject to administration by that State in any manner it saw fit or the rights of its appropriators might require.*

. . . .

. . . In arriving at the equitable share of each State I have first determined for that purpose the requirements of the various canals or districts. Is this to be taken as a determination of the limits of beneficial use for the purpose of intra-state administration? If so, those limits would apply to both storage and natural flow water.

Wyoming feels that such a limitation should be placed on the Nebraska State Line Canals . . . I doubt the jurisdiction of this Court to fix such limitations upon individual canals. The suit is between States and jurisdiction is invoked to determine the equitable rights of the States, that is, to determine the proper apportionment of water between them. The requirements of individual appropriators in each State being one of the elements in the ascertainment of the State's equitable share, they are incidentally a proper matter for investigation and determination for their bearing on the ultimate issue. But it would be quite a different matter to undertake to define the rights of individual appropriators between each other or between them and their State, or to determine what portion of the State's share must be allocated to any appropriator or group of appropriators, or to place a limit upon the participation of any appropriator or group in such allocation. That, in the absence of the appropriators as parties, would, I apprehend, as to them amount to a denial of due process of law. *Consequently, the findings herein as to requirements cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree.*

Doherty Report at 150, 160-61 (emphasis added).[109]

Thus, it is undeniable that the Special Master's painstaking analysis of the relative priorities and beneficial use requirements was key to his proposed 75/25 division of the natural flow in the Whalen to Tri-State reach. In adopting the Special Master's recommended division and ordering the apportionment, however, the Court did not differ with Mr. Doherty's conclusion that the administration of the shares so apportioned should be left as an intrastate matter. The Court stated:

> We may assume that the rights of the appropriators *inter se* may not be adjudicated in their absence. But any allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two States. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible. *The determination of those priorities for the limited purposes of this interstate apportionment is accordingly justified.*

325 U.S. at 627 (emphasis added).

As to four canals with headgates in Wyoming that serve Nebraska lands, Nebraska was given the express right in paragraph V of the Decree "to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals." That provision was deemed necessary because Wyoming could not be counted on to respond to Nebraska's instructions unless ordered to do so. June 1991 Transcript at 131-32. The provision makes no mention of canal ceilings and implies no more than an overall ceiling by its reference to designations from Nebraska's "share." Thus, it is

---

[109] It is noteworthy that in the course of the original proceedings Wyoming argued "no allocation can be made to individual appropriators in any of the States because they are not parties and cannot be bound in their absence." 325 U.S. at 626.

reasonable to conclude that Nebraska cannot designate more than its apportioned share, but that within that share Nebraska may make designations for deliveries to the canals as her own internal water laws and policies may dictate.

Wyoming makes much of the provisions contained in the Decree establishing interstate priorities between the canals diverting in the Whalen to Tri-State reach on the one hand and the upstream federal reservoirs in Wyoming on the other. It is true that, as recommended by Special Master Doherty, the Court enjoined Wyoming "from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs . . . otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals," Decree ¶ IV, all of which canals were adjudged to be senior to the four named federal reservoirs. It does not follow, however, that the specified diversion limitations set forth in the Decree were established as absolute ceilings or that further diversions into those canals were necessarily forbidden by the Decree. The Decree contains no express injunction to that effect, and there is no basis on which to imply one.

Wyoming insists that the very establishment of the priorities between the canals and the reservoirs dictates recognition of ceilings under general principles of western prior appropriation law. That, however, is so only to the extent that the junior reservoir rights necessarily come into priority when the senior canal appropriations have been satisfied. Should the junior reservoirs already be filled or for any other reason fail to store, there is nothing in the Decree that requires the downstream canals to refrain from diverting water merely because the senior rights have already been satisfied. Further, there is nothing in the Decree that can be read to forbid shifting

deliveries among the senior canals so long as the junior storage rights of the reservoirs are not harmed thereby.[110]

Wyoming cannot sustain her burden for partial summary judgment on this issue. The language of the Doherty Report, the Court's Opinion and the Decree is clear on this. The beneficial use requirements for the canals determined by Special Master Doherty in the original proceedings do not constitute decreed ceilings for diversions for each of those canals. Thus, I recommend that the Court rule for Nebraska on that point.

That the deliveries on a canal-by-canal basis are not limited, however, does not leave Wyoming helpless should Nebraska's total up-river calls for diversions into the canals be found to exceed Nebraska's rights under her apportionment. If, as Wyoming fears, there should be any such abuse by Nebraska, Wyoming may petition the Court for relief. That, of course, is precisely the recourse the Court contemplated would be available to the United States were Nebraska improperly to divert water from above Tri-State for the use of lands below Tri-State. *See* 325 U.S. at 628-29.

C. Nebraska's Motion for Partial Summary Judgment

What is said above about Wyoming's motion also applies to Nebraska's motion for partial summary judgment. With respect to the downstream of Tri-State issues Nebraska asks for determinations that:

---

[110] In the course of weighing the "requirements" of the various canals in order to determine an equitable apportionment, the Court commented on Special Master Doherty's finding that there were historic canal diversions greater than the determined requirements in seven years during the 1931 to 1940 drought period. Among those canals that had excess diversions were nine canals serving only Wyoming lands. Despite full awareness of this pattern, no injunction was recommended by Special Master Doherty or issued by the Court to prevent such excess diversions from occurring in the future. 325 U.S. at 604-06.

> Nebraska has an equitably cognizable interest under the North Platte Decree to return flows from North Platte waters resulting from the equitable apportionment of North Platte waters diverted at or above Tri-State Dam. The return flows and other local supplies in the North Platte River below Tri-State Dam were expressly counted in the determination of the equitable apportionment between Nebraska and Wyoming, and the Special Master and the Court recognized that the apportionment would be undermined if return flows were decreased. Unavoidable operational "water" flowing past Tri-State Dam is not a violation of the Decree. Storage water was not apportioned by the Court. Nebraska can administer its equitable apportionment intrastate according to Nebraska law, and the Court did not restrict diversions or irrigated acreages of Nebraska appropriators.

Nebraska Brief at 7-8.

On all but its last sentence, Nebraska's motion also suffers from being "too theoretical and not sufficiently anchored to concrete pleadings or an adequately developed factual Record." United States Post-Argument Comments at 6. Nebraska, like Wyoming, seeks answers to abstract questions about the nature of her "rights" with respect to downstream of Tri-State return flows and other local supplies, but thus far has not pointed to evidence of specific harms or specific actions by Wyoming that are alleged to have caused or that threaten such harms. For the same reasons that I decline to give the abstract advice sought by Wyoming's motion, I decline to give such advice in response to Nebraska's motion.

The exception to the foregoing, as indicated above, is Nebraska's request for a ruling that her 1945 equitable apportionment did not restrict diversions or irrigated acreages of Nebraska appropriators on a canal-by-canal basis. That recommended ruling is encompassed within the recommended ruling on Wyoming's motion for summary adjudication respecting her counterclaim.

VI. THE RENEWED MOTIONS FOR INTERVENTION

A. Background

The June, 1989, First Interim Report explained my reasons for denying petitions to intervene filed by five separate petitioners. At that time, however, I did grant *amicus curiae* status to each of the petitioners and most of the *amici* have since participated to some degree in the current proceedings.

At oral argument on the summary judgment motions in June, 1991 I solicited comments from those *amici* present on the extent to which they had succeeded in the ensuing two years in presenting their concerns in these proceedings. After listening to their comments, I stated that I would consider renewed applications to intervene from any *amicus* believing it should now be granted party status. June 1991 Transcript at 293.

New motions to intervene were subsequently filed by The Platte River Trust, Audubon, and Central. By letter dated July 24, 1991, Basin advised that it was no longer pursuing its then-pending request to intervene but asked that its motion "be granted in the event that one or more of the current motions to intervene of the other *amici* are granted." [111] I recommend that the court deny the renewed motions to intervene.

In reviewing the renewed intervention petitions, I have applied the same standards that I followed in April, 1988 in denying the *amici's* initial motions to intervene. Original actions are clothed in a mantle of flexible procedure. *See, e.g., Grayson v. Virginia*, 3 U.S. 320 (3 Dall. 320) (1796); *California v. Southern Pacific Co.*, 157 U.S. 229, 249 (1895). Resolution of disputes in this context traditionally has not been held hostage to procedural technicalities. While S. Ct. R. 17.2 provides that, insofar as

---

[111] Basin Electric Power Cooperative's Memorandum In Opposition To Motions Of *Amici* To Intervene (Aug. 23, 1991) ("Basin Intervention Opposition") at 1 n.1.

appropriate, the Federal Rules of Civil Procedure shall govern procedure in original actions, Fed. R. Civ. P. 24 does not necessarily apply to motions for intervention in an original case. *See, e.g., Utah v. United States*, 394 U.S. 89, 95 (1969) (*per curiam*). Thus, while Fed. R. Civ. P. 24 lends structure to the intervention analysis here, the applicable standards are found in other original actions.

A private party ordinarily has no right to intervene in an original action, but may be permitted to intervene if he can satisfy the "burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953); *see also Colegrove v. Green*, 328 U.S. 549 (1946); *Kentucky v. Indiana*, 281 U.S. 163 (1930). Further, the case at hand must, in fact, adjudicate rights belonging to the intervenor, *see Texas v. New Jersey*, 379 U.S. 674, 677 n.6 (1965), and have a *stare decisis* effect with respect to those interests.

Policy considerations favoring intervention include fairness to non-parties, protection of interests that will be affected by principles of *stare decisis*, collateral estoppel and *res judicata*, full exposition of the issues, and promotion of judicial economy. These considerations must be balanced against the need to prevent unnecessary expansion of the scope of the action and to avoid confusion, delay and inefficient administration of justice. Further, the parties to an action must be protected against the prejudice and additional litigation obligations (*e.g.*, discovery, experts and evidence-gathering) that might be caused by adding intervenors. *See* Fed. R. Civ. P. 24(b); 3B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 24.10[4] (2d Ed. 1987); *see also* J.H. Friedenthal, *Increased Participation by Non-Parties: The Need for Limitations and Conditions*, 13 U.C. Davis L. Rev.

259, 263 (1980). All of these considerations are cloaked, further, in the strong policy that original jurisdiction "should be invoked sparingly." *Utah v. United States*, 394 U.S. at 95.

In finding that none of the three would-be intervenors has met those standards, I note that it remains the case that their interests will either be represented by a party to these proceedings or will not be adjudicated in these proceedings. In the cases of Audubon and the Platte River Trust, their central Nebraska wildlife interests can largely be safeguarded in more suitable forums, sanctioned, if necessary, by appropriate language in the decree in this case. To the extent these interests enter into these proceedings, I rely upon the United States to develop and represent them. As for Central, the interests it espouses must also be dealt with in other forums, including Nebraska's intrastate water proceedings.

Ultimately, no *amicus* has made the case for changed circumstances since June, 1989 that warrant a different outcome. As in 1989, I again invite the *amici* to continue their participation in the case and urge appropriate collaboration between the *amici* and those parties with whom their interests are aligned. The *amici* may move for enhanced participation upon a showing of good cause if they find themselves unable to work through the channels I have established to have their interests heard. *See* March 1992 Tanscript at 109-11.

B. The Platte River Trust and Audubon Intervention Motions

The arguments for intervention invoked by the Platte River Trust and by Audubon largely echo their 1989 arguments. Both express concern over the need for river flows in the critical wildlife habitat areas in the Platte River's Big Bend Reach in central Nebraska downstream of the Tri-State Dam, and both urge relief in these proceedings to protect that habitat and the wildlife that is dependent

on it. Both also express disappointment over the failure of the United States so far to develop a factual record on the current plight of the habitat and on the potential threat of further harms from unconstrained water developments in Wyoming.

The Platte River Trust's motion differs from that of Audubon in that the Trust first asks to be granted "a more active litigation role in the case" but expresses a willingness to become a party should I determine that representation of environmental and wildlife interests below Tri-State Dam require that it become a full party. There is only a sketchy description of what its more active role might entail, but mention is made of affording the Trust greater opportunities to participate in developing expert studies and reports for the evidentiary record, participating in presenting testimony and cross-examining experts, and collaborating in "drafting study protocols as necessary to close gaps in the Record." [112]

There is in my judgment no merit in granting the motion insofar as it seeks a "more active litigation role," because that would add little to the status the Trust already enjoys as an *amicus*. I have granted all *amici* the privilege to present affidavits, file briefs, and, "upon a showing of good cause," participate more fully respecting key matters in the proceedings. That flexible status seems preferable to the attempt to define a more novel role of the sort the Trust envisions. I have always seen the *amici* as potential sources of expertise and will continue to do so.[113]

---

[112] Motion Of Platte River Trust For A More Active Litigation Role Or Reconsideration Of The Issue Of Its Intervention (Aug. 9, 1991) at 10.

[113] The Trust's motion also asks that, as Special Master, I independently retain experts for the purpose of developing the record on wildlife and environmental concerns in a non-adversary setting. Platte River Trust Motion at 11-14. That suggestion is not meritorious in view of the commitment of the United States to address

Turning to the question of party status, I have determined again that the Court should deny full party status to the Platte River Trust and Audubon for two separate reasons. First, neither has shown that the United States has defaulted in its express commitment to meet its responsibilities to represent environmental and wildlife values, nor demonstrated that they will be denied opportunities to work with the United States (and Nebraska as well) in developing aspects of the case that implicate those values. Second, this Court ultimately will in most instances prove a less suitable forum for safeguarding environmental values than other forums, and those other forums need not be constrained from functioning effectively by a decree in the present proceedings.

With respect to its responsibilities on environmental and wildlife concerns, the United States has made the cogent point that it is too early to brand it neglectful of its duties. At this summary judgment stage, the United States certainly is not barred from continuing the development of the case and discharging the commitment it has made to represent both federal reclamation and fish and wildlife interests. The United States, in its opposition to the intervention motions, has called attention to extensive efforts under way both in connection with these proceedings and outside of these proceedings to gather information and seek solutions to the downstream of Tri-State wildlife habitat concerns.[114] Obviously, the United States has not satisfied the Trust and Audubon in this regard, but no case has been made that the United States has defaulted or will default in this important responsibility or that it will fail to work cooperatively with the *amici*.

On the second reason for denial, the history of the North Platte teaches that other forums for environmental claims have been available and that they are more suit-

---

those concerns and the latitude already given to the *amici* to contribute to addressing them.

[114] *See* United States Response To The Intervention Motions Of The Platte River Trust, The Audubon Society And The Central Nebraska Public Power And Irrigation District (Sept. 3, 1991).

able than this Court acting in an original jurisdiction case. The instant case had its genesis in long-standing disputes about the allocation of an interstate stream among Colorado, Wyoming and Nebraska dominantly for agricultural uses. The environmental claims to the stream flows that have arisen before the current proceedings have in fact been addressed in other forums. Immediate examples include the 1970's litigation over the possible wildlife impacts of Basin's now-operating Grayrocks Project on the Laramie River in Wyoming, and the pending litigation over Wyoming's proposed Deer Creek Project upstream of Whalen, Wyoming. *See* Basin Intervention Opposition at 7-9.

Both the Platte River Trust and Audubon have expressed serious concerns that other forums may be constrained from effective action by the outcome in these proceedings. The Trust contends that the Court's decision on the quantity of water to which Nebraska is entitled "will delimit the outcome of any case addressing the management of that quantity within Nebraska." Platte River Trust Motion at 7. While that is not a wholly groundless fear, there are effective ways to address it short of this Court sweeping into these proceedings the implementation and enforcement of all federal environmental laws.

In a similar vein to the Trust, Audubon expresses the fear that the Decree could make it awkward for Audubon to enforce the Endangered Species Act "because, as a practical matter, a lower court would be unlikely to require Nebraska or the United States to disregard the Court's decision in this case, even if necessary to protect the river's endangered species." [115] If at the conclusion of this case such a fear seems justified, it will be a simple matter to include appropriate language in the final decree explicitly stating that the decree is not intended to circumscribe in any way the application of federal environ-

---

[115] Petition Of The National Audubon Society For Reconsideration Of Motion For Leave To Intervene And Brief In Support Of Petition For Reconsideration (Aug. 2, 1991) at 9-10.

mental laws. The message can surely be delivered that an equitable apportionment does not immunize from such laws the shares of the river apportioned to the opposing states. *See New Jersey v. New York*, 283 U.S. 336, 344, 348 (1931).

As underscored by Basin, the existence of the 1945 Decree has not in fact proven a barrier to litigating any environmental claims arising out of proposed water projects. As Basin notes, "[s]imply because, as between two states, the waters of a stream are apportioned in a certain way, does not mean that a project in one of them operated, licensed or permitted by the federal government to utilize water within that state's apportionment is exempted in any way from compliance with these laws." Basin Intervention Opposition at 5-6 (footnote omitted).[116]

---

[116] In the National Environmental Policy Act ("NEPA") of 1969, Congress authorized and directed that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act." NEPA § 102, 42 U.S.C. § 4322. It is no stretch, therefore, for this Court to conclude that it, too, should be mindful of NEPA's environmental policies when fashioning equitable apportionment decrees. Thus, the Court might in some circumstances qualify a state's apportionment with a proviso that the granting of the apportionment does not remove the need to comply with federal environmental laws, or cautioning that the state's apportioned share might have to remain in the stream to the extent instream flows are needed to safeguard environmental values protected by these laws.

To qualify a state's equitable apportionment in the manner suggested would be comparable to qualifying an appropriative water right with a proviso that it cannot not be exercised in a manner that violates state environmental policies. Just such a step was taken by the California Supreme Court in *National Audubon Society v. Superior Court*, 658 P.2d 709, 33 Cal. 3d 419 (1983). That court held that California appropriative water rights of the City of Los Angeles were subject to being curtailed by the state's public trust doctrine. The city's long-standing water rights in eastern Sierra Nevada streams flowing into Mono Lake were, therefore, found to be subject to being cut back to safeguard the Mono Lake environment. The court explained that the public trust "prevents any party

Accordingly, I recommend that the Court deny the intervention motions of the Trust and Audubon and that *amici* look to other potential forums for vindicating federal environmental laws. By recommending denial I do not suggest that there is no meaningful role for the United States to play as a party in this proceeding respecting environmental and wildlife concerns. To the contrary, I reaffirm what I have previously stated concerning my expectations of the United States in that regard.

C. The Basin Intervention Motion

For the reasons set forth above in addressing the motions of the Trust and Audubon, it is also appropriate to dispose finally of Basin's pending motion to intervene. On March 29, 1989, when Basin was displeased with its *parens patriae*, Wyoming, it renewed its motion to intervene. Now that Basin has taken the position that it seeks intervention only if party status is granted to the other *amici* petitioners, it is appropriate to close this chapter for Basin also. Accordingly, I recommend that the Court deny Basin's pending motion to intervene.

D. The Central Intervention Motion

The sole ground urged by Central for intervention is the existence of competing demands on the water supply within Nebraska.[117] That there are competing claimants

---

from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." 33 Cal. 3d at 445. *See also United States v. Glenn-Colusa Irrigation District*, 1992 WL 41634, at *7 (E.D. Cal. Jan. 9, 1992) (the Endangered Species Act "provides no exemption from compliance to persons possessing state water rights, and thus the District's state water rights do not provide it with a special privilege to ignore the Endangered Species Act. Moreover, enforcement of the Act does not affect the District's water rights but only the manner in which it exercises those rights.").

[117] Motion Of The Central Nebraska Public Power And Irrigation District For Leave To Intervene As Plaintiff, Complaint In Intervention And Memorandum In Support Of Motion For Leave To Intervene As Plaintiff (Aug. 2, 1991) at 3, 7.

for water in arid regions is self-evident, but that has never been regarded as disabling a state from acting *in parens patriae* for all its water claimants. Those competing demands should be worked out within the state and should not be preempted by an original jurisdiction decree that both apportions water to the state and then intrudes further to dictate the allocation within the state of that state's apportioned share. In the 1945 case, as previously noted, the Special Master and the Court took pains to interfere as little as possible with the intrastate administration of the apportionments under the Decree. *See supra* at 95-97. Thus, I recommend that the Court deny Central's motion to intervene.

VII. CONCLUSION: PROPOSED FORM OF ORDER

In accordance with the above, I recommend that the Court enter the following form of Order:

This case having been submitted on the report of the Special Master dated April 9, 1992 [and the exceptions of the parties thereto],

IT IS ORDERED that Nebraska's motion for summary judgment that the Inland Lakes in Nebraska have a priority right of December 6, 1904, to store at least 46,000 acre feet of water during the months of October, November, and April is hereby GRANTED; and

IT IS FURTHER ORDERED that the United States' motion for summary judgment that the Interstate Canal in Wyoming has a priority right of December 6, 1904, to divert natural flow from the North Platte River for storage in the Inland Lakes, and that the Guernsey and Glendo reservoirs have the right to store water temporarily before transfer to the Inland Lakes, is hereby GRANTED; and

IT IS FURTHER ORDERED that Nebraska's motion for partial summary judgment that the Decree does not restrict diversions or irrigated acreages of Nebraska's appropriators on a canal-by-canal basis is hereby GRANTED; and

IT IS FURTHER ORDERED that all other motions for summary judgment or partial summary judgment are DENIED; and

IT IS FURTHER ORDERED that all motions for intervention are DENIED; and

IT IS FURTHER ORDERED that the decree of October 8, 1945, 325 U.S. 665, as modified in 1953, 345 U.S. 981, is hereby supplemented as set forth below:

1. A new paragraph is added to the decree, as follows:

> XVIII. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from interfering with the December 6, 1904, priority right of the Inland Lakes in Nebraska to store no less than 46,000 acre feet of natural flow water during the months of October, November, and April, the December 6, 1904 rights of the Interstate Canal to divert natural flow waters in Wyoming for storage in the Inland Lakes, and the right of the Guernsey and Glendo Reservoirs to store that flow temporarily during the winter months for the ownership account of the Inland Lakes.

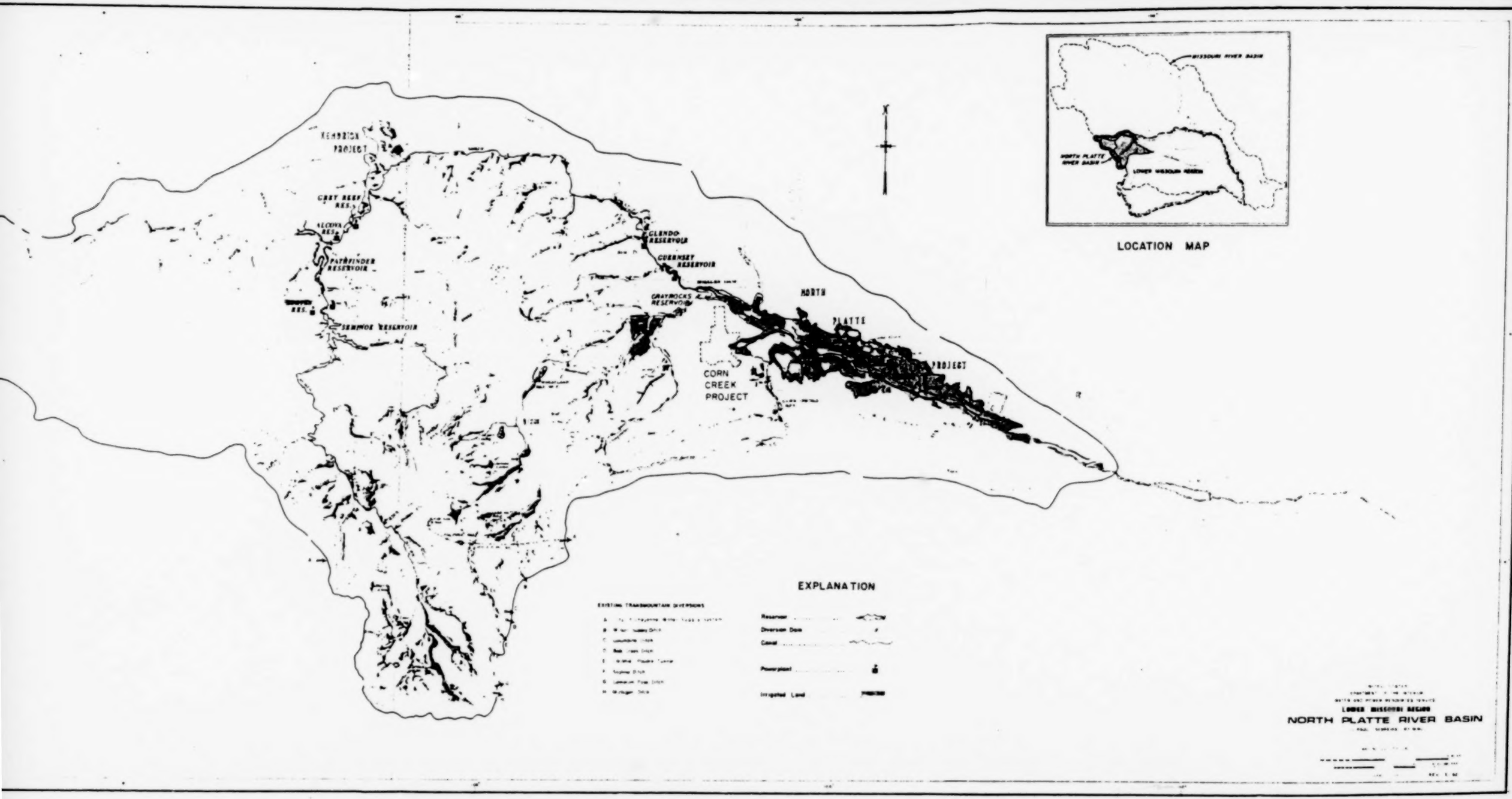
2. Paragraph XIII of the decree is amended to add new subsection (g), as follows:

> (g) The question of the effect upon the rights of Nebraska or the United States of future water rights administration by Wyoming of the Laramie River that interferes with or threatens to interfere with the flow releases and other obligations of the parties to that certain Agreement of Settlement and Compromise dated December 4, 1978, in *Nebraska v. Basin Electric Cooperative*, No. 78-1775 (D. Neb. 1978).

Respectfully submitted,

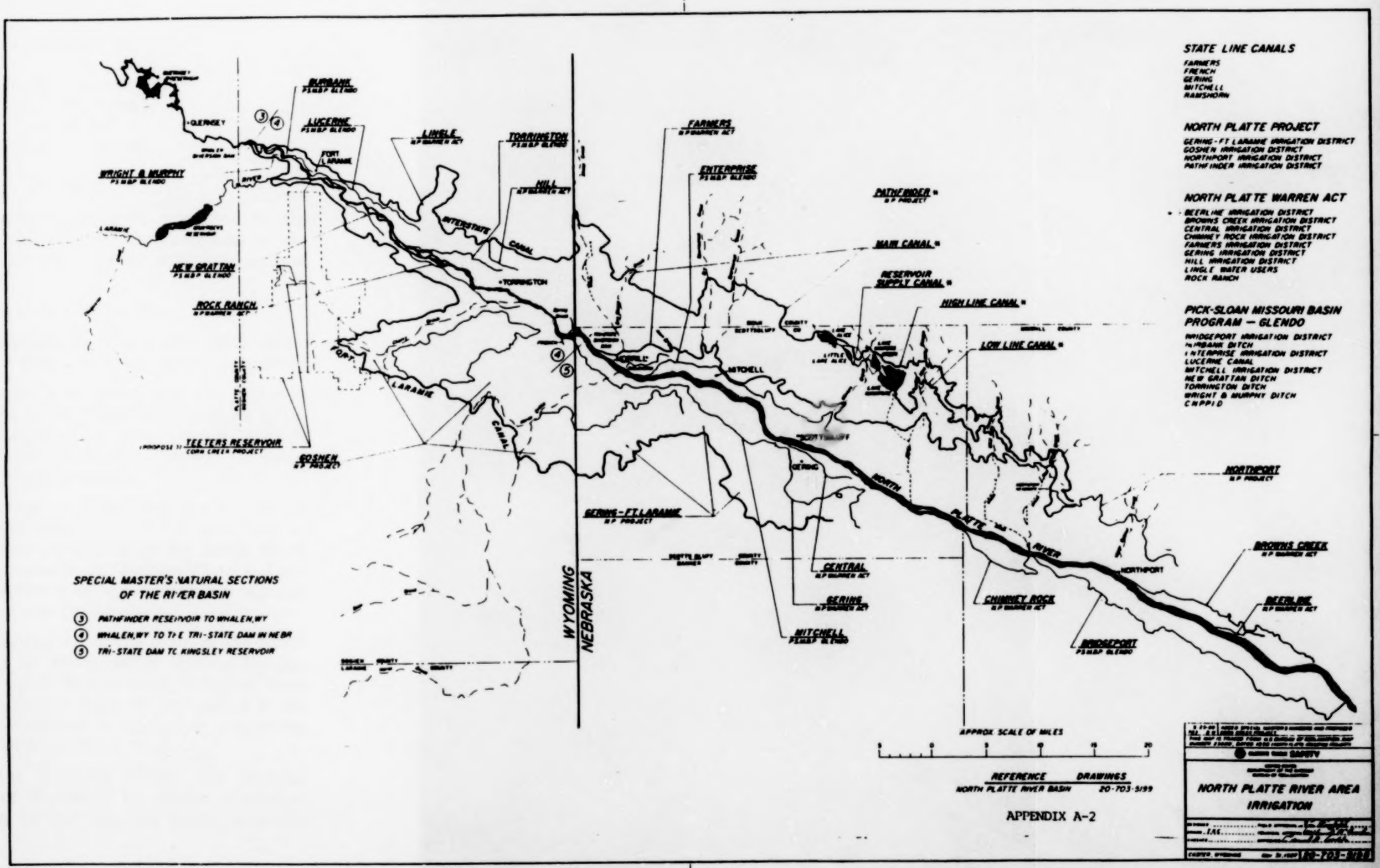
OWEN OLPIN
Special Master

APPENDICES



APPENDIX A-1

BEST AVAILABLE COPY



APPENDIX A-2

BEST AVAILABLE COPY

APPENDIX B

The North Platte Decree
325 U.S. 665 (1945),
as modified
345 U.S. 981 (1953).

DECREE.

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 145,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals. Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water

in Pathfinder, Guernsey, Seminoe, Alcova, and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascer-

tainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthy evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for

the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be

required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities[;]

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies[;]

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953 the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming[;]

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming, and Nebraska, copies of this decree fully authenticated under the seal of this Court.

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice

to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When the Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado or Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limita-

tion on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(38)

Supreme Court, U.S.
FILED
JUN 30 1992
OFFICE OF THE CLERK

No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
FIRST AND SECOND INTERIM REPORTS
OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF WYOMING TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT

JOSEPH B. MEYER
Attorney General of Wyoming
DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

July 2, 1992

BEST AVAILABLE COPY

147 pp

No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
FIRST AND SECOND INTERIM REPORTS
OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF WYOMING TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

---

1. The State of Wyoming excepts to the Special Master's recommended denial of the Motion of the State of Wyoming for Summary Judgment dated September 11, 1987 and the Wyoming Second Motion for Summary Judgment dated February 22, 1991. First Interim Report at 16; March 2, 1989 Order at 3 (Docket No. 119); Second Interim Report at 110. Specifically, Wyoming excepts to the Special Master's failure to recommend summary judgment

   a) that the measure and the limit of Nebraska's apportionment under the Decree are the water

requirements of the Nebraska canals in the Guernsey Dam to Tri-State Dam section of the North Platte River;

b) that Nebraska's claims of violation of the Decree should be denied to the extent such claims are based on allegations of injury to uses diverting below Tri-State Dam;

c) that Nebraska has failed to produce sufficient facts to warrant a trial on her claims that construction and operation of Deer Creek Reservoir would violate the Decree or require the imposition of new injunctions;

d) that municipal use of Deer Creek Reservoir is exempt from restriction under the Decree;

e) that the Inland Lakes have no priority for storage of natural flow under state law or the Decree;

f) that the Laramie River was excluded from Nebraska's apportionment in the Decree and that, therefore, Nebraska's allegations that Grayrocks Reservoir or the proposed Corn Creek Project would violate the Decree should be denied as a matter of law.

2. The State of Wyoming excepts to the Special Master's recommendation that the Court grant "Nebraska's motion for summary judgment that the Inland Lakes in Nebraska have a priority right of December 6, 1904, to store at least 46,000 acre feet of water during the months of October, November, and April..." Second Interim Report at 109.

3. The State of Wyoming excepts to the Special Master's recommendation that the Court grant "[t]he United States' motion for summary judgment that the Interstate Canal in Wyoming has a priority right of December 6, 1904, to divert natural flow in the North Platte River for storage in the Inland Lakes, and that the Guernsey and Glendo Reservoirs have the right to store water temporarily before transfer to the Inland Lakes . . ." Second Interim Report at 109.

4. The State of Wyoming excepts to the Special Master's recommendation that the Court amend the Decree to add a new paragraph XVIII imposing an injunction on the State of Wyoming to effectuate the summary judgment recommended by the Special Master with respect to the Inland Lakes. Second Interim Report at 110.

5. The State of Wyoming excepts to the Special Master's denial of Wyoming's September 19, 1988 Motion to Strike Affidavits (First Interim Report at 17 n.35; March 2, 1989 Order at 2-3 (Docket No. 119)) to the extent that the Special Master then relied on affidavits challenged by that motion in recommending final resolution of the Inland Lakes issue without a trial.

6. The State of Wyoming excepts to the Special Master's recommendation that the Court grant Nebraska's partial summary judgment motion "that the Decree does not restrict diversions or irrigated acreages of Nebraska's appropriators on a canal-by-canal basis . . ." Second Interim Report at 109.

7. The State of Wyoming excepts to the Special Master's recommendation that the Court amend paragraph

XIII of the Decree to add a new subsection (g) that would authorize an action by Nebraska in the original jurisdiction of the Supreme Court in order to enforce an agreement between Nebraska and Basin Electric Power Cooperative. Second Interim Report at 110.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming



DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

QUESTIONS PRESENTED 1

JURISDICTION 2

STATEMENT OF THE CASE 3

I. *NATURE OF THE CASE* 3

II. *COURSE OF PROCEEDINGS* 4

A. *The Original Proceeding and the 1945 Decree* 4

B. *The Present Proceeding* 9

C. *Disposition by the Special Master* 11

1. *Extent of Nebraska's Apportionment (Downstream of Tri-State Dam Issues)* 11

2. *Deer Creek Reservoir* 14

3. *Inland Lakes* 15

4. *Laramie River* 17

SUMMARY OF ARGUMENT 19

ARGUMENT 24

I. *THE COURT SHOULD DETERMINE FROM AN INDEPENDENT REVIEW OF THE RECORD WHETHER THERE ARE DISPUTED ISSUES OF FACT THAT REQUIRE A TRIAL* 24

II. *THE SPECIAL MASTER'S ANALYSIS RESTS ON A FUNDAMENTAL MISCONCEPTION OF THE DECREE AND THE NATURE OF THIS LAWSUIT* .. 26

A. *This is an Action to Interpret and Enforce the Decree* 26

B. *The Decree is Not the Source of Wyoming's Authority to Use Water Within Her Borders, But Only a Limit on the Exercise of That Authority* 28

C. *The Special Master Failed to Afford Finality to Matters That Were Fully Litigated and Determined in the Original Proceeding* 29

III. *NEBRASKA'S APPORTIONMENT OF NATURAL FLOW IN THE WHALEN TO TRI-STATE DAM SECTION OF THE RIVER WAS INTENDED TO PROVIDE A SUPPLY FOR THE DETERMINED WATER REQUIREMENTS OF THE NEBRASKA LANDS SUPPLIED BY CANALS DIVERTING AT AND ABOVE TRI-STATE DAM* 31

A. *Wyoming is Entitled to Summary Judgment Denying the Nebraska Claims That are Based on Either an Alleged Reduction of Direct Flow Passing Tri-State Dam or an Alleged Reduction of Return Flow From Diversions in Excess of the Water Requirements of the Nebraska Canals Determined in the Original Proceedings* 33

B. *The Special Master Failed to Give Effect to the Diversion Limitations and Seasonal Limitations on Nebraska Canals Fixed in Paragraph IV of the Decree* 35

IV. *NEBRASKA HAS NOT PRESENTED SUFFICIENT EVIDENCE TO WARRANT A TRIAL ON THE ISSUE OF WHETHER DEER CREEK RESERVOIR WILL VIOLATE NEBRASKA'S APPORTIONMENT UNDER THE DECREE* 38

V. *WYOMING IS ENTITLED TO SUMMARY JUDGMENT CONFIRMING THAT MUNICIPAL USES OF DEER CREEK RESERVOIR ARE EXEMPT FROM RESTRICTION UNDER THE DECREE* ... 43

VI. *NEBRASKA AND THE UNITED STATES ARE NOT ENTITLED TO SUMMARY JUDGMENT CONFIRMING A PRIORITY WATER STORAGE RIGHT FOR THE INLAND LAKES* 50

A. *It is Undisputed That the Inland Lakes Have No Water Storage Right Under State Law* 51

B. *The Decree Did Not Establish a Priority for Storage of Natural Flow in the Inland Lakes* 54

C. *Any "Equitable Considerations" with Respect to the Inland Lakes are Questions of Fact That Cannot be Determined on Summary Judgment in This Case* 56

D. *There is No Basis for the Conclusion That Nebraska's Apportionment Includes the Right to Store Inland Lakes Water in Guernsey and Glendo Reservoirs* 62

VII. *WYOMING IS ENTITLED TO SUMMARY JUDGMENT DENYING NEBRASKA'S CLAIMS THAT GRAYROCKS RESERVOIR AND THE PROPOSED CORN CREEK PROJECT VIOLATE THE DECREE* 64

A. *The North Platte Decree Excludes the Laramie River* 65

B. *The Special Master's Recommendation With Respect to Grayrocks Reservoir Would Improperly Convert a Private Agreement into an Equitable Apportionment* 70

C. *The Corn Creek Project Cannot Violate the Decree* 73

CONCLUSION 74

TABLE OF AUTHORITIES

CASES Pages

Anderson v. Liberty Lobby,
477 U.S. 242 (1986) 24, 26, 42, 58

Arizona v. California,
376 U.S. 340 (1964) 37

Arizona v. California,
460 U.S. 605 (1983) 8, 28, 30, 40, 69

California v. Nevada,
447 U.S. 125 (1980) 72, 74

California v. United States,
438 U.S. 645 (1978) 51, 54

Celotex Corporation v. Catrett,
477 U.S. 317 (1986) 24, 42

City & County of Denver v. Sheriff,
105 Colo. 193, 96 P.2d 836 (1939) 44

Colorado v. Kansas,
320 U.S. 383 (1943) 29, 38

Colorado v. New Mexico,
467 U.S. 310 (1984) 24

Combs v. Agricultural Ditch Co.,
17 Colo. 146, 28 P. 966 (1892) 37

Connecticut v. Massachusetts,
282 U.S. 660 (1931) 39, 49

Federal Crop Ins. Corp. v. Merrill,
332 U.S. 380 (1947) 63

Gunn v. University Committee to End the War in Vietnam,
399 U.S. 383 (1970) 69

Heckler v. Community Health Services,
467 U.S. 51 (1984) 63

Hinderlider v. La Plata and Cherry Creek Ditch Co.,
304 U.S. 92 (1938) 36, 54

Holt v. City of Cheyenne,
22 Wyo. 212, 137 P. 876 (1914) 44

Idaho v. Oregon,
462 U.S. 1017 (1983) 29, 39

Lewis v. State Board of Control,
699 P.2d 822 (Wyo. 1985) 53, 63

Lujan v. National Wildlife Federation,
110 S.Ct. 3177 (1990) 24, 26, 42, 43

Maryland v. Louisiana,
451 U.S. 725 (1981) 25

Missouri v. Illinois,
200 U.S. 496 (1906) 29

Nebraska v. Basin Electric Power Cooperative,
No. 78-1975 (8th Cir., Order of Remand
February 27, 1979) 70

Nebraska v. Rural Electrification Administration,
No. 78-1778 (8th Cir., Order of Remand
February 27, 1979) 70

Nebraska v. Wyoming,
295 U.S. 40 (1935) 6, 51, 54

Nebraska v. Wyoming,
325 U.S. 589 (1945) ..... *passim*

Nebraska v. Wyoming,
345 U.S. 981 (1953) 1, 3, 8

Nebraska v. Wyoming,
479 U.S. 1051 (1987) 9

Nebraska v. Wyoming,
481 U.S. 1011 (1987) 9

Nebraska v. Wyoming,
483 U.S. 1002 (1987) 5, 9

Nebraska v. Wyoming,
485 U.S. 931 (1988) 3, 10

Nebraska v. Wyoming,
492 U.S. 903 (1989) 10

Nebraska v. Wyoming,
112 S.Ct. 1930 (1992) 3, 11

Nevada v. United States,
463 U.S. 110 (1983) 28

New York v. New Jersey,
256 U.S. 296 (1921) 29

Oklahoma v. New Mexico,
111 S.Ct. 2281 (1991) 69

Schauffler v. Local 1291,
292 F.2d 182 (3d Cir. 1961) 39

Schmidt v. Lessard,
414 U.S. 473 (1974) 69

United States v. California,
332 U.S. 19 (1947) 34

United States v. Maine,
475 U.S. 89 (1986) 24

United States v. Texas,
339 U.S. 707 (1950) 25

Washington-Baltimore Newspaper v. Washington Post,
626 F.2d 1029 (D.C. Cir. 1980) 39

Wyoming v. Colorado,
259 U.S. 419, *amended*,
260 U.S. 1 (1922) 17, 23, 65, 66

Wyoming v. Colorado,
286 U.S. 494 (1932) 29

Wyoming v. Colorado,
298 U.S. 573 (1936) 66

Wyoming v. Colorado,
353 U.S. 953 (1957) 23, 67

Wyoming v. Oklahoma,
112 S.Ct. 789 (1992) 25, 43

Wyoming ex rel. Christopulos v. United States,
No. C86-0370-B
(D. Wyo. filed October 3, 1986) 15

Wyoming Hereford Ranch
v. Hammond Packing Co.,
33 Wyo. 14, 236 P. 764 (1925) 53

CONSTITUTIONS

U.S. Const., Article III, §2, Clause 2 2

Colo. Const., Article XVI, §6 37

STATUTES AND COURT RULES

Clean Water Act, 33 U.S.C. §1344 (1990) 47

Endangered Species Act,
16 U.S.C. §1537 (1990) 47

Judiciary Act, 28 U.S.C. §1251(a) (1990) 2

National Environmental Policy Act,
42 U.S.C. §§4321-4361 (1990) 47, 72

Reclamation Act of 1902,
43 U.S.C. §372 (1990) 37, 51, 54

Colo. Rev. Stat. §§37-92-301
to 37-92-306 (1990) 55

Neb. Rev. Stat. §46-231 (1988 Reissue) 37

Neb. Rev. Stat. §46-233 (1988 Reissue) 55

Neb. Rev. Stat. §§46-2,107
to 46-2,119 (1988 Reissue) 73

Wyo. Stat. §41-3-101 (1977) 37

Wyo. Stat. §41-4-310 (1977) 55

1895 Neb. Laws ch. 69, §56, *as amended by*
1903 Neb. Laws ch. 120, §2,
as further amended by
1911 Neb. Laws ch. 153, §32 53

1903 Wyo. Sess. Laws ch. 69, *as amended by*
1907 Wyo. Sess. Laws ch. 86, §16 53

Supreme Court Rule 17.2 24

Fed.R.Civ.P. 56 ..... 24, 57

Fed.R.Civ.P. 56(e) 26, 46, 61, 74

MISCELLANEOUS

A. D. Tarlock, *Law of Water Rights and Resources*,
§9.06[4][c], Clark Boardman Co., Ltd. (1989) ... 72

Fed.R.Civ.P. 56, Advisory Committee Notes
Accompanying the 1946 Amendment 34

No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE FIRST
AND SECOND INTERIM REPORTS
OF THE SPECIAL MASTER

WYOMING BRIEF IN SUPPORT OF EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

QUESTIONS PRESENTED

This matter is before the Court on exceptions to two reports of the Special Master recommending disposition of motions for summary judgment which raise the following issues:

A. Whether the measure and limit of Nebraska's apportionment under the Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981

(1953), are the water requirements previously determined by the Court for Nebraska's irrigation canals diverting at and upstream of Tri-State Dam.

B. Whether Nebraska's apportionment under the Decree extends to uses supplied by diversions below Tri-State Dam.

C. Whether Nebraska is entitled to a trial on her claim that the construction and operation of the proposed Deer Creek Reservoir in Wyoming would violate the Decree or require the imposition of new injunctions.

D. Whether Paragraph X of the Decree exempts municipal uses of Deer Creek Reservoir from restriction under the Decree.

E. Whether the Inland Lakes have a priority for storage under state law or the Decree.

F. Whether the 1945 Decree excluded the Laramie River and, if so, whether Nebraska's claims that the existing Grayrocks Reservoir and the proposed Corn Creek Project violate Nebraska's apportionment under the Decree should be denied as a matter of law.

JURISDICTION

The State of Nebraska invoked the retained jurisdiction of this Court to enforce the October 8, 1945 Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665, 671-72 (1945). The Decree, which apportioned the waters of the North Platte River among the States of Nebraska, Wyoming and Colorado, was entered in a proceeding under Article III, §2, Clause 2 of the U.S. Constitution and the Judiciary Act, 28 U.S.C. §1251(a) (1990).

STATEMENT OF THE CASE

I. *NATURE OF THE CASE*

The State of Nebraska brought this action against the State of Wyoming to enjoin alleged violations of the interstate apportionment of the North Platte River under the Decree in *Nebraska v. Wyoming*, 325 U.S. 589 (1945).[1] The Nebraska petition accepted for filing in the present case does not seek to modify, enlarge or otherwise change the apportionment effected by the Decree.[2]

Nebraska's petition accuses Wyoming of violating or threatening to violate Nebraska's apportionment established in the Decree by the following actions:

> (a) Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> (b) Depleting the flows of the North Platte River by the proposed construction of additional

1. As used in this brief, "the Decree" or "North Platte Decree" refers to the decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *as modified*, 345 U.S. 981 (1953). The litigation that resulted in that opinion and decree will sometimes be referred to as *"Nebraska v. Wyoming (I)"* or "the original proceeding". The Decree is reproduced as Appendix A-2 to A-10 of this brief and for convenience will be cited by reference to the paragraph number of the Decree.
2. In 1988 the Court denied Nebraska leave to amend her petition to seek a modification of the apportionment. *Nebraska v. Wyoming*, 485 U.S. 931 (1988). Nebraska recently filed a second motion to amend her petition to pray for an apportionment of non-irrigation season flows which Nebraska argues were not apportioned in the original proceeding. The Court has deferred consideration of that motion pending exceptions to the two Special Master's Reports. *Nebraska v. Wyoming*, 112 S.Ct. 1930 (1992).

river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers;

(c) Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

(d) Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

Petition for an Order Enforcing Decree and for Injunctive Relief at 2, ¶3 (Docket No. 1). The petition is reproduced in the Appendix to this brief at A-19 to A-21.[3]

In her answer, Wyoming admitted taking the actions alleged in Nebraska's petition, but denied that those actions violate the decreed apportionment, thereby presenting pure questions of law. Wyoming also filed a counterclaim alleging that Nebraska has circumvented and violated the Decree. The Wyoming Answer and Counterclaim (Docket No. 5) is reproduced at Appendix A-22 to A-30.

3. The appendices to this brief will be cited simply as "Appendix at . . ." Documents in the record certified by the Special Master have been numbered in chronological order on a Docket which accompanies and serves as an index to the record. Documents in the record are therefore cited by title as well as by the docket number.

Nebraska's claims are now before the Court on cross-motions for partial summary judgment. While resolution of some of the issues raised in the summary judgment motions would narrow the issues for trial on Wyoming's counterclaim, the counterclaim is not before the Court on the summary judgment motions. The Court has before it the entire record that was before the Special Master.[4]

II. *COURSE OF PROCEEDINGS*

A. *The Original Proceeding and the 1945 Decree*

In the original proceeding that resulted in the 1945 Decree of equitable apportionment, Nebraska requested the Court to impose an interstate priority system. Under Nebraska's proposal, water users in Nebraska with earlier appropriations would be assured a full supply before later appropriators upstream in Wyoming or Colorado could divert any water. *Nebraska v. Wyoming,* 325 U.S. at 599-600, 619-20; Report of Special Master Michael J. Doherty at 100 (1944), *Nebraska v. Wyoming,* 325 U.S. 589 (1945) (hereinafter cited as "Doherty Report"). Wyoming opposed an interstate priority system and asserted that, if the Court were to apportion the North Platte River, such apportionment should be by means of a "mass allocation" whereby Wyoming would have a fixed delivery obligation at the state line. *Nebraska v. Wyoming,* 325 U.S. at 620, 642. Colorado, an impleaded defendant, argued strenuously for dismissal

4. As used in this brief, "Special Master" or "Master" refer to Special Master Owen Olpin who was appointed by the Court on June 22, 1987. *Nebraska v. Wyoming,* 483 U.S. 1002 (1987). Special Master Michael J. Doherty, who served in the proceeding that resulted in the 1945 Decree, will be referred to in this brief as "Special Master Doherty".

of Nebraska's complaint on the ground that Nebraska had failed to show injury to any of the uses she sought to protect. *Id.* at 607-11. Initially, the United States was not a party but instead was held to be a Wyoming appropriator. *Nebraska v. Wyoming*, 295 U.S. 40 (1935). The United States subsequently intervened in the original proceeding to assert that pursuant to land withdrawals for reclamation projects the United States had acquired title to all the water of the North Platte River that was unappropriated at the time of the withdrawals. The Court rejected that argument. *Nebraska v. Wyoming*, 325 U.S. at 611-16.

Special Master Doherty thought it a close question whether Nebraska had made a sufficient showing of injury to move the Court to exercise its power to enjoin the activities of the upstream states. Doherty Report at 102-05. A divided court ultimately rejected both the priority system proposed by Nebraska and the mass allocation proposed by Wyoming and adopted Special Master Doherty's recommendation for a "decree effecting a water distribution by means of the imposition of a minimum of restriction . . . ." Doherty Report at 122; *Nebraska v. Wyoming (I)*. The Decree adopted by the Court contained: (1) a limitation on the amount of irrigated acreage and the amount of storage in Colorado and Wyoming above Guernsey Dam on the main stem and above Pathfinder Reservoir on the main stem and tributaries, (2) a limited interstate priority system under which certain Nebraska canals were declared to be senior to the storage operations of specific federal reservoirs and the direct flow diversions of the government's Casper Canal in Wyoming and (3) a 75%/25% division of the natural flow present in the Guernsey Dam to Tri-State Dam reach of the North Platte River. Decree, ¶¶ I, II, III, IV and V. The Decree,

in accordance with Special Master Doherty's recommendations, included the specific restrictions on the respective states that the Court deemed necessary to protect particular equities — the requirements of certain lands irrigated by diversions between Guernsey Dam and Tri-State Dam.[5]

Nebraska had originally sought protection for senior uses downstream on the Platte River to Grand Island, Nebraska. However, at the close of evidence before Special Master Doherty, Nebraska conceded that lands east of Bridgeport, Nebraska could make no claim on water from Wyoming. *Nebraska v. Wyoming*, 325 U.S. at 607, 654-55. Special Master Doherty and the Court went further and concluded that Nebraska lands irrigated by diversions between Tri-State Dam and Bridgeport were adequately supplied by local sources and return flows and therefore would be excluded from the apportionment. The Court said, "[E]quitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628.

The Decree included some provisions which operate year around (for example, the relative priorities of the specified federal storage reservoirs in Paragraph III). However, the bulk of the Decree's provisions operate only during the May 1 to September 30 irrigation season to protect the irrigation supply to specific canals in the Guernsey to Tri-State section of the river.

5. Tri-State Dam is located in Nebraska less than a mile downstream of the Wyoming-Nebraska state line and is the point of diversion for the Tri-State Canal serving the Farmers Irrigation District and the Northport Irrigation District. Guernsey Dam is in Wyoming about 50 miles above the state line.

The Decree also included a provision for petitioning the Court to enforce the Decree or to consider changed conditions that may warrant modification of the Decree. Decree, ¶XIII. The Court's purpose in retaining jurisdiction can be gleaned from Special Master Doherty's Report. *Arizona v. California,* 460 U.S. 605, 624 n. 17 (1983). The changed condition particularly envisioned by Special Master Doherty in recommending Paragraph XIII was the "possibility of the passing of the present drouth cycle ... which might justify a release of some or all of the restrictions ..." on Wyoming and Colorado. Doherty Report at 10-11.[6]

In 1953, the Decree was modified by stipulation among the parties to allow for construction and operation of Glendo Reservoir on the main stem of the North Platte River in Wyoming. *Nebraska v. Wyoming,* 345 U.S. 981 (1953). The stipulation raised the limit on Colorado's

6. Since entry of the Decree in 1945, Nebraska's diversions in the Guernsey Dam to Tri-State Dam section have far exceeded the water requirement found by Special Master Doherty for those canals. Affidavit of Bern S. Hinckley at 5-7, ¶¶ 8-10, Wyoming Second Motion for Summary Judgment (Docket No. 294); Affidavit of Ann S. Bleed, ¶3 and Table 1, Nebraska's Motion for Partial Summary Judgment at 28, 31 (Docket No. 296). Likewise, supplies to canals below Tri-State Dam to Bridgeport have been greater than determined to be required by Special Master Doherty. Second Affidavit of Bern S. Hinckley, Figure 1, Wyoming Brief in Opposition to Nebraska's Motion to Recommend an Apportionment of Non-Irrigation Season Flows at 38 (Docket No. 316). Natural flow supplies in the river have on the average been greater than the flows that occurred in the 1931-1940 period reviewed by Special Master Doherty. Affidavit of John W. Shields, Wyoming Second Motion for Summary Judgment (Docket No. 294). Finally, Wyoming has never irrigated more than 25,000 acres nor diverted more than 90,000 acre-feet in one year under the Kendrick Project even though Special Master Doherty had determined a water requirement of 168,000 acre-feet per year for 60,000 acres. Affidavit of Bern S. Hinckley at 8, ¶¶ 11-14, Wyoming Second Motion for Summary Judgment (Docket No. 294).

irrigated acreage, added Glendo Reservoir to the list of federal reservoirs described in the Decree and provided for Wyoming and Nebraska's use of storage water in Glendo Reservoir for irrigation in specific areas of the North Platte River basin. Decree, ¶¶ I, III, IV, V and XVII.

B. *The Present Proceeding*

Nebraska sought leave to file her petition to enforce the Decree in this case in October, 1986. The Court granted leave to file over Wyoming's objection and on Nebraska's assurance that "Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2 (Docket No. 4). *Nebraska v. Wyoming,* 479 U.S. 1051 (1987). Wyoming was permitted to file an answer and counterclaim (Docket No. 5). *Nebraska v. Wyoming,* 481 U.S. 1011 (1987). Appendix at A-22 to A-30. Motions for intervention were filed by the Platte River Whooping Crane Critical Habitat Maintenance Trust, the National Audubon Society, the Central Nebraska Public Power and Irrigation District, the Nebraska Public Power District and Basin Electric Power Cooperative. The Court then appointed the Special Master. *Nebraska v. Wyoming,* 483 U.S. 1002 (1987).

Wyoming's first motion for summary judgment was addressed to the Court and filed with the Special Master in September, 1987. Appendix at A-31 to A-35. While that motion was pending, Nebraska filed with the Court her first motion to amend the petition to seek a new or modified apportionment for instream wildlife uses. The

Court denied Nebraska's motion to amend on March 7, 1988 *(Nebraska v. Wyoming,* 485 U.S. 931) and the Special Master denied the intervention motions on April 1, 1988 (Seventh Memorandum of the Special Master (Docket No. 60)). However, the Special Master later allowed the intervention movants a very active role as "litigating amici" in which they have briefed, argued and supplied affidavits on the pending summary judgment motions.[7]

The Special Master did not make a recommendation to the Court on Wyoming's first summary judgment motion. He instead reported to the Court that he had denied the motion but left open the possibility of a later summary adjudication following additional development of the facts. Tenth Memorandum of the Special Master (Docket No. 119); First Interim Report at 17-18. The Court accepted the First Interim Report for filing without inviting exceptions. *Nebraska v. Wyoming,* 492 U.S. 903 (1989).

Following a period of extensive discovery, all four of the parties filed motions for summary judgment variously addressing Nebraska's claims. Those motions are reproduced in the Appendix. While the summary judgment motions were pending before the Special Master, Nebraska filed a "Motion to Recommend an Apportionment of Non-Irrigation Season Flows" with the Special

7. Wyoming objects to the granting of a non-traditional litigating amicus status in this case if in practice it permits amici to participate in a trial on issues that remain after the Court's decision on the motions for summary judgment. Wyoming urges the Court to limit amicus participation to a more traditional role for the same reasons the amici were denied intervention. This is an action involving sovereign state interests in which the states appear as *parens patriae* for the individual interests within each state.

Master in which she asked the Special Master to recommend to the Court that it undertake to apportion North Platte River flows in the non-irrigation season, which Nebraska contends were left unapportioned in the original proceeding (Docket No. 301). At the time Nebraska had not yet filed her second motion to amend petition. After briefing and argument, the Special Master denied that motion. Order of June 17, 1991 (Docket No. 361). Nebraska then filed her second motion to amend petition which is presently pending before the Court. Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows (Docket No. 407). That motion to amend is opposed by all of the other parties.

The Special Master has recommended a disposition of the pending cross-motions for summary judgment. Second Interim Report at 109-10. The Court has now invited exceptions to both the First and Second Interim Reports. *Nebraska v. Wyoming,* 112 S.Ct. 1930 (1992).

C. *Disposition by the Special Master*

The proceedings before the Special Master resulting in his two interim reports and these exceptions are more easily described when arranged by the four major issues raised by Nebraska's petition: (1) extent of Nebraska's apportionment (the downstream of Tri-State Dam issues), (2) Deer Creek Reservoir, (3) the Inland Lakes and (4) the Laramie River.

1. *Extent of Nebraska's Apportionment (Downstream of Tri-State Dam Issues)*

Wyoming's first motion for summary judgment sought to simplify the case and narrow the issues for trial

by confirmation that Nebraska's apportionment under the Decree is "limited to the water supplies for Nebraska lands irrigated by the canals identified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal)." [First] Motion of the State of Wyoming for Summary Judgment at 5. Appendix at A-35. The Special Master acknowledged, as did Nebraska, "that the section of the North Platte River below Tri-State Dam was not included in the 1945 apportionment" and "that the apportionment itself does not extend below Tri-State Dam." First Interim Report at 33. However, the Special Master denied Wyoming's requested summary judgment because he believed it "necessary to take evidence on Nebraska's injury claims [to uses below Tri-State Dam] in order to determine whether those claims are cognizable under the Decree." *Id.* at 37.

Following the Special Master's denial of Wyoming's first motion for summary judgment, without conceding her original position, Wyoming tried through discovery to determine the nature and extent of Nebraska's claims of injury below Tri-State Dam. It became apparent that Nebraska was claiming under her present petition that the Decree entitles her to the continuation of historical return flows and historical direct flow past Tri-State Dam even though it is undisputed that those flows were surplus to the requirements of the canals in the Guernsey to Tri-State section.[8] Nebraska presented no evidence of specific injury to specific uses below Tri-State Dam, but

8. Under the Decree the natural flow in the Guernsey to Tri-State section can be exhausted in meeting the water requirements of the canals in that reach. Administration of the Decree has been designed to minimize the flow passing Tri-State Dam. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 65-66 and record cites therein (Docket No. 294).

responded to various discovery requests by alleging generally that all Nebraska water rights in the Platte River basin would be injured by any interference with the "regimen of the river." Nebraska's Answers to Colorado's First Set of Requests for Admission, Request No. 1 (Docket No. 162); Nebraska's Answers to Wyoming's Third Set of Requests for Admissions, Interrogatories and Request for Production at 3-4, 14-15, Interrogatory No. 7, Request for Admission No. 3 (Docket No. 186); Deposition of J. Michael Jess, Vol. I at 47, 110-11, 120-21, 137-42, Vol. III at 164-66, 171-72; Vol. IV at 115-16, 128-31 (Docket No. 192).

Wyoming then sought summary judgment on Nebraska's claims that Wyoming is violating or threatening to violate the Decree "to the extent they are based on (1) alleged reduction of direct flow passing Tri-State Dam or (2) alleged reduction of return flow from diversions in excess of the water requirements of the North Platte Project canals and the Nebraska State Line Canals." Wyoming Second Motion for Summary Judgment at 4-5. Appendix at A-39. Wyoming again relied on the Court's conclusion that equity did not permit Nebraska to demand water from Wyoming for use below Tri-State to argue that evidence of Nebraska's diversions below Tri-State is immaterial to whether Nebraska's apportionment is being violated. *Nebraska v. Wyoming*, 325 U.S. at 628. The Special Master again declined to recommend a summary judgment excluding uses below Tri-State Dam because there has been "no factual development concerning either the quantities of water involved or the uses or non-uses of that water." Second Interim Report at 94-95. The Special Master views Wyoming's motion in this regard as a request for an advisory opinion.

Wyoming takes exception to the Special Master's refusal to give effect to the Court's decision in *Nebraska v. Wyoming (I)* and to recommend summary judgment denying Nebraska's claims of violation of the Decree to the extent such claims are based on allegations of injury to uses diverting below Tri-State Dam.

2. *Deer Creek Reservoir*

Wyoming's first summary judgment motion sought a simple determination that the Decree presently contains no restriction on Wyoming's use of the tributaries between Pathfinder and Guernsey Reservoirs and therefore that Deer Creek Reservoir would not violate the Decree as alleged in Nebraska's petition. Wyoming [First] Summary Judgment Motion at 4-5. Appendix at A-34. Wyoming also sought a confirmation that, as a source of municipal water, Deer Creek Reservoir would be within the domestic/municipal use exemption of Decree Paragraph X. *Id.* at 5. The Special Master, while acknowledging that the Decree contains no present injunction against Wyoming's use of the tributaries, held that Nebraska's petition should be interpreted broadly to invoke the Court's retained jurisdiction pursuant to Paragraph XIII(c) to consider whether new restrictions on the tributaries were necessary to protect Nebraska's apportionment. First Interim Report at 29-30.

Following extensive discovery aimed at determining the injury Nebraska asserted as grounds to impose a new injunction against construction of Deer Creek Reservoir, Wyoming filed her second motion for summary judgment. The motion challenged the sufficiency of Nebraska's evidence to meet her burden of proving that new restrictions in the Decree were warranted and also sought to confirm

that municipal use of the proposed Deer Creek Reservoir is exempt from any restriction or scrutiny under the Decree. While agreeing with Wyoming that municipal use of Deer Creek Reservoir is exempt from the Decree, the Special Master nevertheless recommends holding a trial on (1) the question of whether Deer Creek will be so administered in the future as to bring its use within the municipal exemption of Paragraph X and (2) the question of whether any non-municipal uses of Deer Creek Reservoir would cause such injury to Nebraska's apportionment as to warrant the imposition of additional restrictions pursuant to Paragraph XIII(c) of the Decree. Second Interim Report at 88-89.

Wyoming takes exception to the Special Master's recommendation for a trial on Deer Creek Reservoir and excepts to the Special Master's refusal to recommend a summary judgment that municipal use of Deer Creek Reservoir is exempt from restriction under the Decree.

3. *Inland Lakes*

Wyoming's first motion for summary judgment sought a simple determination that it was no violation of the Decree for Wyoming to seek a declaration in state or federal court of any water storage rights for the Inland Lakes. Appendix at A-35. Wyoming had pending at that time an action in the federal district court to determine whether the Inland Lakes had a water right under state law.[9] The Special Master denied Wyoming's summary

9. *Wyoming ex rel Christopulos v. United States*, No. C86-0370-B (D. Wyo. filed October 3, 1986) (Order Staying Proceedings March 27, 1987, Order of Dismissal without prejudice August 31, 1990). The dismissal order noted that related issues were pending in the Supreme Court and that the case could be "refiled when and if there becomes a need to do so."

judgment motion and indicated his belief that the Supreme Court intended him to proceed with trial on the issue of "whether the Inland Lakes enjoy a water priority date under Wyoming law of December 6, 1904 and certain water rights for their historical administration under the Decree, . . ." First Interim Report at 19.

Further research and discovery concerning the United States' Inland Lakes water rights claims followed the Special Master's First Interim Report. The United States and Nebraska then filed motions for summary judgment in which they sought a ruling that the Inland Lakes enjoy a 1904 priority under the Decree for storage of 46,000 acre-feet of water during the months of October, November and April. Their focus had shifted from claims that the Inland Lakes enjoy a water right under state law to claims that the Decree is the basis of the right. Wyoming's response requested a summary judgment confirming that the Inland Lakes possess no water right under state law or the Decree and recognizing that the question of whether any interference with historical deliveries to the Inland Lakes would injure Nebraska's apportionment under the Decree is a factual issue on which Nebraska has the burden of proof. Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 104-05. (Docket No. 334, excerpt reproduced in Appendix at A-49 to A-50.) The United States' motion also claimed a right to store water for the Inland Lakes in Guernsey and Glendo Reservoirs under a 1904 priority, a claim not made by Nebraska. Appendix at A-40.

The Special Master has recommended granting the motions for summary judgment of Nebraska and the United States and has also recommended that the Decree

be modified to expressly enjoin Wyoming from interfering with storage of "no less than" 46,000 acre-feet per year in the Inland Lakes. Without explanation, the Special Master also recommends summary judgment finding that the United States' existing water storage rights for Guernsey Reservoir (1923 priority) and Glendo Reservoir (1951 priority) include a right to store water for the Inland Lakes under a 1904 priority.

Wyoming takes exceptions to these recommendations and urges the Court instead to enter partial summary judgment that the Inland Lakes have no priority for storage under state law or the Decree.

4. *Laramie River*

Nebraska's petition paragraphs 3(a) and 3(b) allege that the existing Grayrocks Reservoir and the proposed Corn Creek Project on the Laramie River violate Nebraska's apportionment under the Decree. Appendix at A-19 to A-20. Wyoming's first summary judgment motion sought, among other rulings, a simple ruling as a matter of law that "[t]he Decree does not restrict Wyoming's use of water from the Laramie River." Motion of the State of Wyoming for Summary Judgment at 4. Appendix at A-33. Wyoming's argument was grounded on the recognition in *Nebraska v. Wyoming,* 325 U.S. at 592 n.1, that the Laramie River had been previously apportioned in *Wyoming v. Colorado,* 259 U.S. 419, *amended,* 260 U.S. 1 (1922), and on Special Master Doherty's exclusion of the Laramie River from the recommended apportionment. Doherty Report at 177. The Special Master "acknowledged that these references could, if accepted uncritically at face value, be interpreted to apportion all Laramie River flows between Colorado and

Wyoming, leaving no room for any claims to Laramie flows beyond its confluence with the North Platte." First Interim Report at 23. However, he "found sufficient material factual issues to foreclose such an uncritical interpretation at this juncture and to require the taking of evidence on the Laramie." *Id.*

The parties then undertook an extensive review of the record in the original proceeding to determine if the Court meant something other than the plain exclusion of the Laramie River from the apportionment. That research revealed that Nebraska had litigated her claim to an apportionment of the Laramie River in the original proceeding. Nebraska and Wyoming agreed that there were no genuine issues of material fact but urged opposite conclusions about whether the Decree apportioned any Laramie River water to Nebraska. Wyoming Second Motion for Summary Judgment at 2, ¶3, Appendix at A-36 to A-37; Nebraska's Motion for Partial Summary Judgment at 2, 4-5, ¶¶ 2, 4, Appendix at A-42 to A-45. The Special Master agreed that "the underlying facts are not in dispute" and he rejected Nebraska's legal theory that she was apportioned a specific share of the Laramie. However, he refused to recommend summary judgment for Wyoming that the Decree excluded water in the Laramie River. Second Interim Report at 40-41.

Wyoming takes exception to the Special Master's failure to conclude that the Laramie River was excluded from Nebraska's apportionment and his consequent failure to recommend summary denial of Nebraska's claims that Grayrocks Reservoir or the proposed Corn Creek Project violate Nebraska's apportionment under the Decree.

SUMMARY OF ARGUMENT

The Decree to be interpreted and enforced in this case is not ambiguous. It contains specific injunctions that define in clear and unambiguous terms what each of the states is called upon to do or refrain from doing. The Court imposed only such injunctions in the Decree as it deemed necessary to protect North Platte flows for specific irrigation uses on Wyoming and Nebraska lands served by diversions between Guernsey and Tri-State Dams.

Three fundamental principles are key to resolution of the summary judgment motions now before the Court:

1. Nebraska's petition seeks only to enforce Nebraska's apportionment under the Decree, not to expand or enlarge that apportionment;

2. The Decree is not the source of, but only a limitation on, Wyoming's authority to use and permit the use of water of the North Platte River or its tributaries;

3. Plain and unambiguous language in the Court's opinions and decrees should be given effect and matters that were determined in prior actions may not be relitigated in this action to enforce the Decree.

The Special Master's failure to recognize and apply these principles affected his entire analysis and led him to recommend the wrong result.

The most important matter presented for resolution in the summary judgment motions is the dispute over

the extent of Nebraska's apportionment under the Decree. The core of Nebraska's petition is the claim that certain Wyoming actions violate Nebraska's apportionment under the Decree. Unless the extent of that apportionment is defined, there is no way to measure Nebraska's evidence to determine if she is entitled to proceed to trial or ultimately to determine if she is entitled to the relief sought in the petition. In the original proceeding, the water requirements of the specific irrigation canals diverting in the Guernsey Dam to Tri-State Dam section of the river were litigated and determined as the measure and the limit of Nebraska's right to demand water from Wyoming. That previous determination may not be relitigated in this action to enforce the Decree. As a matter of law, no matter what evidence Nebraska might offer with respect to uses below Tri-State Dam, she may not premise a violation of the Decree on injury to such uses. A ruling to that effect would narrow the issues for trial.

A ruling defining the extent of Nebraska's apportionment under the Decree is also critical to a determination of Nebraska's claim under Paragraph XIII(c) of the Decree that new restrictions on Wyoming's use of the tributaries such as Deer Creek are necessary to protect Nebraska's apportionment. Nebraska would be entitled to a trial on her claim that Deer Creek Reservoir will violate the apportionment only if Nebraska could show by clear and convincing evidence a serious and imminent threat to her decreed apportionment, i.e., to the supply for the beneficial use requirements of the canals in the Guernsey Dam to Tri-State Dam section of the river. Because Nebraska's affidavits and other evidence fall short of meeting this burden, summary judgment should be entered for Wyoming dismissing Nebraska's claim

that Deer Creek Reservoir would violate the decreed apportionment.

Even if Nebraska's evidence were deemed sufficient to warrant a trial with respect to the impact of Deer Creek Reservoir on Nebraska's apportionment, under Paragraph X of the Decree, Wyoming is entitled to build and operate Deer Creek Reservoir for municipal purposes. The Special Master correctly confirmed that ordinary and usual municipal uses of Deer Creek Reservoir are exempt from any restriction or scrutiny under the Decree. However, he incorrectly determined a need to hold a trial on the wisdom of Wyoming's decision to build Deer Creek Reservoir and whether state officials in the future would administer Deer Creek Reservoir according to state law. Affidavits supplied by both Nebraska and Wyoming establish that the municipal uses to be supplied by Deer Creek Reservoir are similar in amount and character to uses commonly served by municipalities throughout the North Platte basin. No trial is needed to determine that the municipal uses to be supplied by Deer Creek Reservoir are ordinary and usual within the plain meaning of Decree Paragraph X because there is no evidence to the contrary. The other issues of fact identified by the Special Master, such as the economic feasibility of Deer Creek Reservoir, the efficiency of Deer Creek Reservoir and policy decisions about alternatives to Deer Creek Reservoir are immaterial to whether Deer Creek Reservoir is within the Paragraph X exemption. Furthermore such issues are inappropriate for judicial resolution in the original jurisdiction of the Supreme Court.

The United States never obtained a water storage right under state law for the Inland Lakes in Nebraska. Nor was a specific water storage right determined for the

Inland Lakes in the original proceeding. The Decree is silent as to the Inland Lakes because the Court was never asked to determine a water right for those lakes. Rather than simply ruling as a matter of law that the Inland Lakes were awarded no water storage priority in the Decree, the Special Master without a trial found on the basis of "equitable concerns" alone that the Inland Lakes should "have a priority right of December 6, 1904, to store at least 46,000 acre-feet of water during the months of October, November, and April." Second Interim Report at 109. The Special Master based this finding on affidavits and other evidence that were specifically disputed. He misapplied the summary judgment standards announced by the Court in recent cases by disbelieving or ignoring sworn affidavits and other documents disputing the facts he found with respect to the Inland Lakes. Further, the Special Master's conclusion at this stage of the proceeding that Wyoming's action with respect to the Inland Lakes would adversely affect Nebraska's apportionment is without foundation because he refused to define the extent of Nebraska's apportionment.

The Special Master's conclusion that the United States has a right to store Inland Lakes water in Guernsey or Glendo Reservoir under a 1904 priority is created from whole cloth. It ignores overwhelming evidence, including the admission of the United States' own expert witness, that such use of Glendo and Guernsey Reservoirs in the past was only by mutual consent of the states and the United States on a year-to-year basis. Moreover, it ignores the state law water rights, the congressional authorizations and the government's contractual obligations for the uses of Guernsey and Glendo Reservoirs.

The Special Master refused to give effect to the plain language of the Court's opinion and decree excluding the Laramie River from the apportionment of the North Platte in the original proceeding. Nebraska's claim for an apportionment of the Laramie River was litigated in the original proceeding. Special Master Doherty and the Court found no restriction on Wyoming's use of the Laramie River to be necessary to the equitable apportionment. Therefore the Court excluded the Laramie River from the apportionment. *Nebraska v. Wyoming*, 325 U.S. at 592 n.1. Twelve years later in *Wyoming v. Colorado*, 353 U.S. 953 (1957), the Court adopted an amended decree apportioning the Laramie River between Colorado and Wyoming that increased Colorado's share of the Laramie River and confirmed Wyoming's "right to divert and use all water flowing and remaining in the Laramie River" after the use apportioned to Colorado under that decree. The Court cannot adopt the Special Master's recommendations on the Laramie River without overruling its previous decrees and opinions in this case and in *Wyoming v. Colorado*.

This is an action to enforce the existing apportionment under the Decree, not to determine whether an apportionment or reapportionment of the Laramie River is warranted as a matter of equity. Consequently, the Court should reject the Special Master's recommendation for further proceedings concerning Grayrocks Reservoir or the proposed Corn Creek Project. Wyoming is entitled as a matter of law to summary judgment dismissing Nebraska's claims that those uses of the Laramie River would violate the Decree.

ARGUMENT

I. *THE COURT SHOULD DETERMINE FROM AN INDEPENDENT REVIEW OF THE RECORD WHETHER THERE ARE DISPUTED ISSUES OF FACT THAT REQUIRE A TRIAL*

The Court is not functioning in its usual appellate role in this original action. Although the Court has appointed a Special Master to recommend a ruling, the Court is ultimately responsible for deciding the case. *See generally United States v. Maine,* 475 U.S. 89, 97 (1986); *Colorado v. New Mexico,* 467 U.S. 310, 317 (1984).

The Special Master held no trial and took no evidence. The documentary record that was before the Special Master is now before the Court. Even if this were an appellate case in the same posture, the Court would review the record independently and decide the issues of law. *See Lujan v. National Wildlife Federation,* 110 S.Ct. 3177, 3186 (1990) ("[B]ecause this case comes to us on petitioners' motion for summary judgment, we must assess the record under the standards set forth in Rule 56 of the Federal Rules of Civil Procedure").

Supreme Court Rule 17.2 provides that the Federal Rules of Civil Procedure may be taken as a guide in original actions where their application is appropriate. The Court in a series of cases in recent years has instructed the lower federal courts on the use of Fed.R.Civ.P. 56 to resolve cases which do not require a factual trial. *See Celotex Corporation v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby,* 477 U.S. 242 (1986); *Lujan v. National Wildlife Federation,* 110 S.Ct. 3177 (1990). Contrary to the Special Master's belief that application of

those decisions should be tempered in an original action (Second Interim Report at 10), the fact that this is a suit between states does not mean that use of the Federal Rules of Civil Procedure would be inappropriate. States have the same interest in efficiently resolving litigation and the same right to avoid an unnecessary trial as any other litigant. While the Court has recognized the importance of allowing a full development of the facts in original actions (*e.g., United States v. Texas,* 339 U.S. 707, 715 (1950)), there has been ample opportunity here through discovery and pretrial proceedings for the parties to develop the material facts required to support their claims.

The Special Master has inferred that, when the Court granted Nebraska leave to file her petition over Wyoming's objection and appointed a special master, it "reviewed the factual adequacy of Nebraska's case" and "preliminarily determined that there are factual issues in dispute." Second Interim Report at 10. See also First Interim Report at 5, 18, where the Special Master thought that in granting leave to file the petition "the Court had already reviewed and considered the arguments later made by Wyoming in her summary judgment motion." Such inferences read too much into the granting of leave to file the case. The issue then was not the "factual adequacy of Nebraska's case", but rather the sufficiency of Nebraska's initial pleadings to invoke the Court's jurisdiction to consider alleged violations of the Decree. Moreover, the Court's appointment of a special master did not mean that the Court had identified factual issues that would preclude summary judgment. *See Maryland v. Louisiana,* 451 U.S. 725 (1981) (where even though the special master recommended that a trial be held, the Court resolved the case on a motion for judgment on the pleadings); *Wyoming v. Oklahoma,* 112 S.Ct. 789 (1992).

The posture of the case now is quite different than when the Court granted leave to file and appointed the Special Master. At this summary judgment stage, Nebraska may not rely on mere allegations in her pleadings but must come forward with "specific facts showing that there is a genuine issue for trial" on the violation of the Decree alleged in her petition. *Lujan v. National Wildlife Federation*, 110 S.Ct. at 3186; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242; Fed.R.Civ.P. 56(e).

II. *THE SPECIAL MASTER'S ANALYSIS RESTS ON A FUNDAMENTAL MISCONCEPTION OF THE DECREE AND THE NATURE OF THIS LAWSUIT*

A. This is an Action to Interpret and Enforce the Decree

The Special Master reached the wrong result in his two reports because he failed to recognize this lawsuit as one to enforce and protect the existing apportionment, not to enlarge, expand or modify the apportionment. In her answer and in her first summary judgment motion, Wyoming admitted taking the actions alleged in Nebraska's petition but denied as a matter of law that those actions violate the Decree. Nebraska then sought to amend her petition to seek a modification of the Decree. Since Nebraska's motion to amend her petition was denied, Nebraska has tried to characterize her original petition as requesting enlargement of her apportionment.

When asked to admit that her petition does not request the Court to expand or modify the Decree to protect "flows in excess of the requirements for uses above Tri-State Dam", Nebraska responded,

> Denied. "The Petition requests an order construing or clarifying the Decree, modifying it if necessary, and enforcing the Decree by enjoining Wyoming from increasing current depletions of the 'natural flow' of the North Platte River..." ... Special Master Olpin has confirmed that the Decree can be modified or expanded in this proceeding.

Nebraska's Answers to Colorado's First Set of Requests for Admission at 5, Request No. 10 (Docket No. 162). Nebraska's response flatly contradicts the representation she made to the Court when seeking leave to file the petition: "Nebraska does not seek to modify the Decree in any respect...." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2 (Docket No. 4).

The power of the Court to reconsider the Decree and to modify the equitable apportionment in an action properly brought and accepted for that purpose is not questioned. But the Court has not accepted such an action. In view of Wyoming's admissions regarding the actions alleged in Nebraska's petition, the case referred to the Special Master presents legal issues of interpretation of the Decree and particularly the extent of Nebraska's apportionment under the Decree. Instead of focusing on those disputes, which are questions of law, the Special Master has accepted Nebraska's changed characterization of her petition as one to modify or enlarge her apportionment and has recommended a trial to equitably apportion water among competing equities in the first instance.

When the dispute over interpretation of the Decree has been decided, any party not satisfied with the answer

may ask the Court to reopen the Decree or to modify the apportionment. However, before entertaining such a suit the Court would require a sufficient showing at the threshold not only to demonstrate a serious threat of imminent harm but also to overcome the principles of finality and certainty that militate against upsetting the existing decreed apportionment. *Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. United States*, 463 U.S. 110 (1983). The Special Master's recommendation would allow Nebraska to avoid that threshold showing and would deprive the Court of the ability to decide in the first instance whether to exercise jurisdiction over such an action to modify the Decree.

B. *The Decree is Not the Source of Wyoming's Authority to Use Water Within Her Borders, But Only a Limit on the Exercise of That Authority*

The second fundamental error that tainted much of the Special Master's analysis was his misconception of the Decree as a *grant* of authority to Wyoming to divert and use the water of the North Platte River and its tributaries. For example, because the Special Master does not find in the Decree a specific grant of authority to Wyoming to use Laramie River water, he infers that such use was intended to be precluded or at least subject to challenge by Nebraska in an action to enforce the apportionment. *See, e.g.*, Second Interim Report at 39 ("I therefore have determined that the Decree does not grant the right to Wyoming . . . to dewater the Laramie . . . ."). Contrary to the Special Master's view, the Decree is not the source of Wyoming's authority to use water or to permit the use of water within her borders. Rather, that authority is inherent in Wyoming's sovereignty and the Decree provides only the specific limitations on the

exercise of that authority that the Court deemed necessary to protect specific uses in Nebraska.

The Court does not interfere with the sovereign authority of a state at the instance of a sister state unless the alleged injury is shown by clear and convincing evidence to be both imminent and of serious magnitude. *Missouri v. Illinois,* 200 U.S. 496, 520-22 (1906); *New York v. New Jersey,* 256 U.S. 296, 309 (1921); *Idaho v. Oregon,* 462 U.S. 1017 (1983). The Decree was intended to protect specific uses or equities that Nebraska was able to prove in need of such protection. In accord with the principle that the Court would interfere as little as possible, and only where absolutely necessary, with the sovereignty of the states, Special Master Doherty recommended and the Court adopted a decree containing the "minimum of restriction" found necessary to protect those specific equities. Doherty Report at 122. See also Decree, ¶XII(a); *Nebraska v. Wyoming,* 325 U.S. at 608 (citing *Missouri v. Illinois,* 200 U.S. 496, 521 (1906); *Colorado v. Kansas,* 320 U.S. 383, 393-94 (1943)). Therefore, Wyoming law controls the use of water from the North Platte in Wyoming except where the Decree imposes specific injunctions.

C. *The Special Master Failed to Afford Finality to Matters That Were Fully Litigated and Determined in the Original Proceeding*

Matters that were litigated and determined in the original proceeding are not subject to relitigation in this action to enforce the apportionment. *Wyoming v. Colorado,* 286 U.S. 494, 507 (1932). Even if this were an action under the Court's retained jurisdiction to reopen or modify the Decree, strong principles of finality and

certainty militate against relitigating matters that were previously determined. *Arizona v. California,* 460 U.S. 605, 619-20 (1983). The Special Master's failure to recognize and apply the principle of finality, as well as his failure to give effect to the plain language of the Court's opinions and decrees, led him to unduly complicate this case.

For example, in the original proceeding Nebraska sought a ruling that, as a matter of equitable apportionment, Nebraska water users on the Platte River downstream to Grand Island, Nebraska should have a right to call for water from Wyoming. *Nebraska v. Wyoming,* 325 U.S. at 607. After 11 years of litigation, the Court determined that only those rights diverting at or upstream of Tri-State Dam could in equity demand natural flow water from Wyoming. *See* Second Interim Report at 18, 90-91. The fact that these matters were litigated and determined could not have been explained more clearly by the Court:

> It is said that Nebraska can permit, as it has heretofore, water to pass the Tri-State Dam for uses below that point even though her equitable share is calculated only on the basis of the needs of appropriators at or above Tri-State. And it is pointed out that the lands served by diversions below Tri-State have no equitable claim on water originating in Wyoming or Colorado, their needs being reasonably met by local supplies. We think, as we will develop later, that the record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State.

Nebraska v. Wyoming, 325 U.S. at 628. *See also id.* at 654-55.

In short, the requirements of Nebraska's canals in the Guernsey to Tri-State section were litigated and determined as the measure of Nebraska's apportionment. Because he did not recognize the finality of that determination, the Special Master thought his task was to determine in the first instance what protections *should be afforded* as a matter of equity to uses below Tri-State Dam rather than to determine what protections *were afforded* as a matter of right in the 1945 Decree.

Similarly, the Special Master failed to acknowledge that Nebraska's claim to restrict Wyoming's use of the Laramie River was litigated and denied in the original proceeding. Consequently, instead of giving effect to the plain language of the Court's Decree and opinion excluding the Laramie from the apportionment, he recommends further proceedings in which Nebraska could relitigate her claims to restrict Wyoming's use of the Laramie River.

III. *NEBRASKA'S APPORTIONMENT OF NATURAL FLOW IN THE WHALEN TO TRI-STATE DAM SECTION OF THE RIVER WAS INTENDED TO PROVIDE A SUPPLY FOR THE DETERMINED WATER REQUIREMENTS OF THE NEBRASKA LANDS SUPPLIED BY CANALS DIVERTING AT AND ABOVE TRI-STATE DAM*

Nebraska's petition asserts that proposed uses of water in Wyoming will violate "Nebraska's apportionment established in the Decree." Petition for an Order Enforcing Decree and for Injunctive Relief at 2, Appendix at A-19. Unless the extent of Nebraska's apportionment established in the Decree is defined, there is no standard against which to measure Nebraska's evidence

to determine whether Nebraska should have the relief she seeks, or even whether she has come forward with sufficient evidence to avoid summary judgment and to proceed to trial.

For example, while Nebraska must acknowledge that nothing in the Decree expressly restricts Wyoming's development on tributaries such as Deer Creek, or expressly determines a 1904 priority for storage in the Inland Lakes, she nonetheless asserts that an injunction against construction of Deer Creek Reservoir and determination of a 1904 priority for the Inland Lakes are necessary to prevent a violation of her apportionment under the Decree. Nebraska must show more than just some effect on the historical flows or on "equities" below Tri-State Dam in order to establish a violation of her apportionment under the Decree. She must establish a serious and imminent threat to Nebraska uses that formed the basis of that apportionment — uses diverting at and above Tri-State.

Wyoming requests only that the Court treat Nebraska's claims of injury in this proceeding in the same manner as Special Master Doherty did when originally defining Nebraska's right to demand water from Wyoming. In analyzing Nebraska's injury claims, Special Master Doherty excluded uses below Tri-State Dam and instructed Nebraska to rework her analysis of injury to the Guernsey to Tri-State canals by limiting the demands of those canals to the level of requirements he ultimately adopted. Doherty Report at 103. *See also id.* at 67-82 (where Special Master Doherty also discounted evidence of historical diversions beyond the determined requirements in his overall analysis of the sufficiency of North Platte River supplies).

The Court decided unequivocally in the original proceeding that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628. *See also id.* at 654-55. That determination may not be relitigated here but should be given effect and should control the course of the proceedings in this case.

A. *Wyoming is Entitled to Summary Judgment Denying the Nebraska Claims That are Based on Either an Alleged Reduction of Direct Flow Passing Tri-State Dam or an Alleged Reduction of Return Flow from Diversions in Excess of the Water Requirements of the Nebraska Canals Determined in the Original Proceedings*

Wyoming's first summary judgment motion sought a partial summary judgment defining the limits of Nebraska's apportionment under the Decree as a matter of law to control the remaining course of proceedings. Appendix at A-33, A-35. The Special Master denied that motion stating that "it is difficult to rule on the question on which Wyoming seeks a summary judgment until Nebraska's injury claims are fully articulated." First Interim Report at 35. Nebraska took advantage of that cart-before-the-horse approach and devised a claim that she is entitled under the Decree to the maintenance of the historical "regimen of the river." That claim extends both to surplus natural flow that historically passed Tri-State Dam and to historical return flows below Tri-State Dam resulting from diversions in excess of the water requirements determined by the Court in the original proceeding. Nebraska's Answers to Wyoming's Third Set of Requests for Admissions, Interrogatories and Request

for Production at 3-4, 14-15, Request for Admission No. 3, Interrogatory Nos. 7, 8 and 9 (Docket No. 186); Nebraska's Answers to Colorado's First Set of Requests for Admission at 1, Request No. 1 (Docket No. 162); Deposition of J. Michael Jess Vol. I at 47, 110-11, 114-15, 131, 137-42; Vol. III at 164-66, 171-72; Vol. iV at 115-16, 128-31 (Docket No. 192). Wyoming's second motion for summary judgment requests summary denial of those claims for the simple reason that Nebraska's apportionment does not extend to uses below Tri-State Dam. Appendix at A-39.

The Special Master's Second Interim Report does not address the issue posed by Wyoming's second motion for summary judgment: whether under any set of facts that might be shown by Nebraska respecting uses below Tri-State Dam, Nebraska may establish a violation of her decreed apportionment on injury to such uses. The Special Master finds that to answer that question would be to give an advisory opinion. He recommends that the Court direct him first to take evidence on Nebraska's uses below Tri-State Dam and only thereafter to determine if such evidence could establish a violation of the Decree.

There is nothing abstract about the question Wyoming poses. Rather, to define the extent of Nebraska's apportionment at this stage would dispose of those specific claims. *See United States v. California,* 332 U.S. 19, 26 (1947) (where a pre-trial determination of the basic legal issue of ownership of the three-mile marginal ocean belt served to narrow the remaining issues for trial); Advisory Committee Notes Accompanying the 1946 Amendment to Fed.R.Civ.P. 56. There would be no need for the parties to spend the enormous amount of time and money that a trial on the uses below Tri-State Dam would

consume if the Court would confirm (1) that the requirements of Nebraska's canals in the Whalen to Tri-State Dam section are the measure and limit of Nebraska's existing apportionment and (2) that this case is only an action to enforce that apportionment.[10] In short, even if Nebraska had made out a clear case of injury to uses below Tri-State Dam, or to the equities which she says have come to rely on surplus direct flow or excess return flows below Tri-State Dam, she would not be entitled to relief in this action to enforce the existing apportionment.[11]

B. *The Special Master Failed to Give Effect to the Diversion Limitations and Seasonal Limitations on Nebraska Canals Fixed in Paragraph IV of the Decree*

The Special Master recommends that summary judgment be granted on one aspect of Nebraska's motion: "that the Decree does not restrict diversions or irrigated acreages of Nebraska's appropriators on a canal-by-canal basis." Second Interim Report at 109. Wyoming recognizes that the Decree contains no injunction prohibiting Nebraska from allocating her share of the available natural flow as she sees fit or from allowing diversions by canals in the Whalen to Tri-State Dam section in excess of the determined water requirements when there is surplus water available for such diversion. However, there

10. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 77-80 (Docket No. 294) for a discussion of the expanded scope of trial that would be required to litigate all the issues below Tri-State Dam.

11. Wyoming has described the speculative nature of Nebraska's claims of threatened injury to uses below Tri-State in the Wyoming Brief in Opposition to Nebraska's Motion for Leave to File Amended Petition (Docket No. 419).

are consequences under the Decree if Nebraska allows such excess diversions.

Paragraph IV of the Decree affords certain Nebraska canals a limited, interstate priority call against the storage of natural flow in the upstream federal reservoirs in Wyoming. The extent of the right of each of those canals to curtail storage in the federal reservoirs is expressly fixed in Paragraph IV in terms of both an instantaneous flow rate and a seasonal volume of water. A determination of the limits of the senior, calling priority is fundamental to the practical implementation of a system of prior appropriation. The Court recognized that in 1945 when it noted that "[u]nless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible." *Nebraska v. Wyoming,* 325 U.S. at 627. The Court's definition of storage water also recognized that the limit of Nebraska's right to call natural flow through the federal reservoirs was "the requirements of any canal as recognized in the decree." *Id.* at 631. Any summary judgment in this regard therefore must clarify that the federal reservoirs are not required to bypass natural flow to a senior Nebraska canal under Paragraph IV when that canal is exceeding the diversion limits or seasonal limits fixed in Paragraph IV.

While the Decree does not limit or prescribe the allocation of natural flow among the Nebraska canals *inter se,* without question it determined each canal's right to demand water from Wyoming. And the Decree may thereby have an "indirect effect" on individual rights within the state. *Id.* at 627 (citing *Hinderlider v. La Plata and Cherry Creek Ditch Co.,* 304 U.S. 92 (1938)).

A basic principle at the heart of all three states' water laws and the Reclamation Act of 1902 is that beneficial use is "the basis, the measure and the limit of the right to use water." Wyo. Stat. §41-3-101 (1977); Neb. Rev. Stat. §46-231 (1988 Reissue); Colo. Const. Art. XVI, §6; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 28 P. 966 (1892); Reclamation Act of 1902, 43 U.S.C. §372 (1990). *See also Arizona v. California*, 376 U.S. 340 (1964) (defining a "perfected water right" as a right that has been acquired in accordance with state law and exercised by use of a specific quantity of water on a defined area of land).

The purpose of the Decree's restrictions on Wyoming and Colorado was not to allow Nebraska to divert an unlimited amount of water through her canals. Rather, the restrictions in the Decree were to protect the use on specified lands in Nebraska. While Nebraska may be free to divert excess flows in any one canal as against other Nebraska canals, she has no right to such excess diversions enforceable under the Decree against upstream states.[12]

12. Affidavits submitted by both Nebraska and Wyoming establish the undisputed fact that the Nebraska canals in the Whalen to Tri-State section have frequently diverted far in excess of the requirements determined in the original proceedings. Affidavit of Bern S. Hinckley at 5-7, ¶¶ 8-10, and related figures and tables, Wyoming Second Motion for Summary Judgment (Docket No. 294); Affidavit of Ann S. Bleed, ¶3 and Table 1, Nebraska's Motion for Partial Summary Judgment at 28, 31 (Docket No. 296).

IV. *NEBRASKA HAS NOT PRESENTED SUFFICIENT EVIDENCE TO WARRANT A TRIAL ON THE ISSUE OF WHETHER DEER CREEK RESERVOIR WILL VIOLATE NEBRASKA'S APPORTIONMENT UNDER THE DECREE*

The Special Master recognized that the Decree does not presently restrict development on the tributaries between Pathfinder and Guernsey Dam. First Interim Report at 29 n.60. But he rejected Wyoming's argument that Nebraska's petition requires no further analysis to determine whether the Deer Creek Reservoir will violate Nebraska's apportionment. Instead, the Special Master treated Nebraska's petition as a request under Paragraph XIII(c) of the Decree to consider the need for new restrictions on Wyoming's use of the tributaries between Pathfinder and Guernsey to prevent injury to Nebraska's apportionment. First Interim Report at 29-31; Second Interim Report at 71-72.

The Special Master then rejected Wyoming's assertion that, in order to proceed to trial under Paragraph XIII(c), Nebraska must establish by clear and convincing evidence a serious and imminent threat to her apportionment determined in the original proceeding. The Special Master concluded:

> The Court requires states to bear a heavier burden than the usual civil litigant only where interference with another state's actions is requested in the first instance. *Colorado v. Kansas,* 320 U.S. 383, 399 (1943). Here, the interference has already occurred by entry of the Decree.

Second Interim Report at 13.[13] That conclusion is incorrect for the simple reasons that the Decree contains no injunction against Wyoming's use of the tributaries and that the Special Master treats Nebraska's petition as a request for a new injunction under Paragraph XIII(c).

The Court in 1945 rejected the United States' request for restrictions on the tributaries between Pathfinder Reservoir and Guernsey Reservoir based on Special Master Doherty's finding that "the runoff of the tributaries becomes so far exhausted before any shortage of water occurs in the main river that any regulation of the tributary diversions would be of no material benefit." *Nebraska v. Wyoming*, 325 U.S. at 624. The Court also noted that the Nebraska and United States evidence demonstrated no "present threat to the water supply from this source." *Id.* at 624-25. Equitable relief is granted against a state in the original jurisdiction only if imminent harm of serious magnitude is shown by clear and convincing evidence. *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *Idaho v. Oregon*, 462 U.S. 1017 (1983). Having failed to prove the need for any restriction on the tributaries in the earlier litigation, Nebraska certainly should face the same burden of proof when she now seeks such restriction under Paragraph XIII(c) of the Decree. In light of the Court's reluctance to relitigate matters that were once determined, Nebraska should face an even greater burden to revisit the Court's finding in the original proceeding that the tributary supply is so far exhausted by local water rights as to be of little use to

13. Wyoming notes that in an ordinary civil contempt proceeding an allegation of violation of a court decree must be proved by clear and convincing evidence. *Washington-Baltimore Newspaper v. Washington Post*, 626 F.2d 1029, 1031 (D.C. Cir. 1980); *Schauffler v. Local 1291*, 292 F.2d 182, 190 (3d Cir. 1961).

the canals in the Guernsey to Tri-State section in times of shortage. *Arizona v. California,* 460 U.S. 605, 624-25 (1983).

The question of whether Deer Creek Reservoir would violate Nebraska's apportionment under the Decree turns on a clear definition of that apportionment. Since "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State", Nebraska may proceed to trial on Deer Creek Reservoir only if her evidence is sufficient to show by clear and convincing evidence a serious and imminent threat to Nebraska's apportionment for uses diverting at or above Tri-State Dam. *Nebraska v. Wyoming,* 325 U.S. at 628. *See* Argument, part III above.

In support of her second motion for summary judgment, Wyoming pointed out that none of the affidavits by Nebraska's and the United States' experts had demonstrated any material injury by Deer Creek Reservoir to Nebraska's apportionment under the Decree — to the supply to Nebraska lands irrigated by diversions between Whalen and Tri-State Dam.[14] Wyoming Brief in Support of Second Motion for Summary Judgment at 93-101 (Docket No. 294). The affidavits submitted by Nebraska in support of her motion for partial summary judgment demonstrated further that Nebraska had no evidence to show that Deer Creek Reservoir would adversely affect her apportionment for uses diverting between Guernsey and Tri-State. In fact, the March 1, 1991 affidavit of

14. In fact, it is undisputed that Deer Creek Reservoir will store water only in times of surplus flows. Deposition of David G. Wilde, Vol. II at 397-400 (Docket No. 158); Affidavit of David G. Wilde at 38, United States Response to Wyoming [First] Motion for Summary Judgment (Docket No. 83).

Nebraska's expert H. Lee Becker concluded that, based on a computer simulation study developed by Mr. Becker, "[h]istoric diversions from Whalen [Guernsey Dam] to Tri-State can be met" even if Deer Creek Reservoir is built, the Inland Lakes are administered without a priority and the flows of the Laramie are fully depleted in Wyoming. March 1, 1991 Affidavit of H. Lee Becker, ¶¶ 9-10, Nebraska's Motion for Partial Summary Judgment at 45-46 (Docket No. 296).

In her subsequent response to Wyoming's second summary judgment motion, Nebraska submitted a further affidavit by Mr. Becker. There he concluded that Deer Creek Reservoir, if operated under the assumptions contained in a computer simulation model used by the Army Corps of Engineers in preparing the Deer Creek Environmental Impact Statement, would reduce carryover storage in the federal reservoirs and "*could* limit diversions in the Whalen to Tri-State reach in a series of dry years." April 25, 1991 Affidavit of H. Lee Becker, ¶2, Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment at 9 (Docket No. 335) (emphasis added).[15] The Special Master discounted Mr.

15. Although the United States has not filed any claims against Wyoming in this action to protect its projects, the Special Master based his decision to deny Wyoming's first summary judgment motion in part on statements by the government's witness David G. Wilde that Deer Creek Reservoir may affect the federal reclamation projects. First Interim Report at 30-31. The United States Army Corps of Engineers reached the opposite conclusion when considering whether issuance of a permit to construct Deer Creek Reservoir was in the public interest. The Corps concluded that Deer Creek Reservoir will not significantly affect the federal projects. May 5, 1988 Record of Decision Deer Creek Dam and Reservoir at 16-22 (Docket No. 84a); April, 1988 Supplemental Information Document to the Final Environmental Impact Statement for Regulatory Permits Deer Creek Dam and Reservoir Wyoming at 16 (Docket No. 84a).

Becker's earlier affidavit and relied on the later statement alone in finding a sufficient factual dispute to avoid summary judgment. Second Interim Report at 75-76. He recommends denial of Wyoming's summary judgment because "Wyoming has not satisfactorily countered Mr. Becker's analysis." *Id.* at 77.

The issue is not whether Wyoming has countered Mr. Becker's statements, but rather whether Mr. Becker's statements themselves would be sufficient to meet Nebraska's burden of proof. The analysis prescribed in the Court's recent summary judgment cases calls for summary dismissal of Nebraska's claims. First, it is proper and necessary to consider the heightened standard of proof applicable to actions between states in evaluating whether Nebraska could prove her case on Deer Creek Reservoir. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242. If it appears that Nebraska's proof on even one of the essential elements of her claim is insufficient to meet that standard, summary judgment is warranted. *Celotex Corporation v. Catrett,* 477 U.S. 317. Finally, plaintiff's affidavits in response to a summary judgment challenge must contain more than a "general allegation of injury" to make out a case for trial. *Lujan v. National Wildlife Federation,* 110 S.Ct. at 3186, 3188-89.

The statement of Mr. Becker that the Special Master relied on is even less than a "general allegation of injury"; it is a mere speculation of some possible impact on the diversions in the Guernsey to Tri-State section. The Becker affidavit does not quantify the alleged impact. Nor does it tie the alleged impact to the water requirements that were determined as the basis of Nebraska's apportionment. Rather, it only suggests the possibility that Deer Creek Reservoir could affect historical diver-

sion amounts which have greatly exceeded those determined requirements. *See Wyoming v. Oklahoma,* 112 S.Ct. 789, 807 n.1 (1992) (J. Scalia, dissenting) ("just as the requirements for summary judgment are not met when a court makes unsubstantiated inferences about a third party's behavior, *see, e.g., Lujan v. National Wildlife Federation* . . ., they are not met when the plaintiff hires an outside expert to do the same").

In summary, Nebraska has not presented evidence which, if proved, would establish a violation of the existing Decree or would move the Court to impose new restrictions on Wyoming's use of the tributaries between Pathfinder and Whalen in an action for that purpose under Paragraph XIII(c). Therefore, no trial is warranted with respect to Deer Creek Reservoir.

V. *WYOMING IS ENTITLED TO SUMMARY JUDGMENT CONFIRMING THAT MUNICIPAL USES OF DEER CREEK RESERVOIR ARE EXEMPT FROM RESTRICTION UNDER THE DECREE*

The Special Master correctly concluded that ordinary and usual municipal use in Wyoming and Colorado is exempt from any present restriction under the Decree as well as from any scrutiny in an action brought under Paragraph XIII(c). Thus, even if Nebraska were allowed to proceed to trial on her claim against Deer Creek Reservoir, that claim could not extend to ordinary and usual municipal uses of the reservoir.[16] Paragraph X of the Decree provides:

16. Deer Creek Reservoir was planned to provide a municipal supply for present as well as future municipal needs. Responsible municipal water supply planning requires municipal projects to have excess

> This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

"This decree" plainly means the whole Decree, including Paragraph XIII(c). Therefore, an action under the retained jurisdiction of Paragraph XIII(c) to consider the effect of the construction of storage capacity on tributaries between Pathfinder and Guernsey Reservoirs cannot affect or restrict municipal uses. See Second Interim Report at 74 n.99.

The question presented in Wyoming's second motion for summary judgment is whether the uses of Deer Creek Reservoir to supply the City of Casper and other municipalities directly and by exchange, as described in the Final Environmental Impact Statement for Deer Creek Reservoir (Docket No. 84a), are exempt under Paragraph X of the Decree. Nebraska concedes that ordinary and usual municipal use is within Wyoming's apportionment under the Decree. Nebraska's Post-Hearing Brief on Nebraska's, Wyoming's, Colorado's, and the United States' Motions for Summary Judgment at 6-7 (Docket

---

capacity over present needs if the municipality is to be able to provide for future growth as it occurs. *See Holt v. City of Cheyenne*, 22 Wyo. 212, 137 P. 876 (1914); *City & County of Denver v. Sheriff*, 105 Colo. 193, 96 P.2d 836 (1939). The original plans for Deer Creek Reservoir allowed leasing some of the storage water for non-municipal uses temporarily until the full municipal demand for the reservoir developed. Affidavit of Michael K. Purcell, ¶4, [First] Motion of the State of Wyoming for Summary Judgment at 27 (Docket No. 23). The Special Master found the question of whether such interim use would violate Nebraska's apportionment under the Decree to be a disputed issue for trial. First Interim Report at 31-32.

No. 375). However, she has raised various challenges to the economic feasibility and relative efficiency of Deer Creek Reservoir, questions about Wyoming's motives in pursuing Deer Creek Reservoir and speculation about the future administration and operation of Deer Creek Reservoir. The Special Master recommends that the Court authorize him to hold a trial on such issues.

To adopt the Special Master's recommendation would involve the Court in matters of planning, policy and water administration that are better left to the individual states and municipalities within those states. Moreover, the issues that Nebraska raises are immaterial to the correct interpretation and application of Paragraph X. The plain intent of Paragraph X can be carried out simply by asking whether the proposed municipal use is ordinary and usual in comparison to uses commonly supplied by other municipalities in the North Platte basin in Nebraska, Wyoming and Colorado. Such an approach would provide an objective standard for giving effect to Paragraph X in an action to enforce the Decree.

The Special Master articulated a similar approach as only the first of various issues he would explore at trial.

> First, I will examine the mix of uses to be supplied — residential, commercial, industrial, and so forth — and then determine whether that mix can reasonably be characterized as "municipal" under Colorado, Wyoming and Nebraska water laws.

Second Interim Report at 88. A trial is not necessary to apply the ordinary and usual municipal use standard. No genuine dispute of material fact has been raised in this regard. Neither the United States nor Nebraska even

alleged that the mix of uses made by Casper and the other municipalities to be served by Deer Creek Reservoir are out of the ordinary in any way. The only affidavits addressing the subject are in complete agreement. *See* Affidavit of Bern S. Hinckley, Wyoming Second Motion for Summary Judgment (Docket No. 294); Affidavit of Ann S. Bleed, Nebraska's Motion for Partial Summary Judgment (Docket No. 296).

The following facts are undisputed concerning Wyoming's proposal to build Deer Creek Reservoir:

(1) The proposed Deer Creek Reservoir will supply water to the City of Casper, Wyoming and other smaller municipalities along the North Platte River in Wyoming.[17] Affidavit of Michael K. Purcell at ¶4, [First] Motion of the State of Wyoming for Summary Judgment at 27 (Docket No. 23).

---

17. Because Deer Creek enters the North Platte downstream of the City of Casper and some of the other municipalities to be served by the reservoir, water will be delivered by exchange. For example, Deer Creek Reservoir will deliver water to the North Platte River via Deer Creek in exchange for equivalent depletions by the City of Casper upstream. Second Affidavit of Gordon W. Fassett at 3, ¶7, Wyoming Second Motion for Summary Judgment (Docket No. 294). Nebraska raised the argument in briefs and in oral argument that such an exchange results in the delivery of water from Deer Creek Reservoir to irrigators downstream on the North Platte thereby raising a factual issue as to whether such use is "municipal use". Such arguments of counsel cannot create material issues of fact for the purpose of avoiding summary judgment. *See*, Fed.R.Civ.P. 56(e). The only sworn statement in the record on the matter is the affidavit of the Wyoming State Engineer which establishes that such exchanges are commonly practiced in Wyoming and throughout the West and merely constitute an efficient means of delivering water without the need to construct pipelines or other conveyance facilities. Second Affidavit of Gordon W. Fassett at 3, ¶7, Wyoming Second Motion for Summary Judgment (Docket No. 294).

(2) The types of uses supplied by Casper and the other Wyoming municipalities to be served by Deer Creek Reservoir are like those supplied by Nebraska municipalities in the North Platte basin. Affidavit of Bern S. Hinckley at 2-4, ¶¶ 2-7, Wyoming Second Motion for Summary Judgment (Docket No. 294); Affidavit of Ann S. Bleed, Nebraska's Motion for Partial Summary Judgment at 3 (Docket No. 296).

Those undisputed facts establish that the proposed municipal uses of Deer Creek Reservoir are ordinary and usual uses within the plain meaning of Paragraph X and no trial is necessary. However, the Special Master recommends the taking of evidence on a number of other issues that are both immaterial and inappropriate for the Supreme Court. For example, he would "take evidence on the need for additional supplies to meet municipal uses" and would examine whether the Deer Creek Project "represents a reasonably efficient use of water." Second Interim Report at 88.

The Wyoming Water Development Commission has spent many years and millions of dollars studying Deer Creek Reservoir as the preferred alternative to supply the municipal needs in Wyoming's North Platte basir reasonably into the future. Second Affidavit of Michael K. Purcell at 3, ¶7, Wyoming Second Motion for Summary Judgment (Docket No. 294). The Deer Creek Project has undergone intensive study by the United States Army Corps of Engineers. After completing an Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. §§4321-4361 (1990), consultation with the U.S. Fish and Wildlife Service under §7 of the Endangered Species Act, 16 U.S.C. §1537 (1990), and public interest review under §404 of the Clean Water

Act, 33 U.S.C. §1344 (1990), the Army Corps of Engineers issued Wyoming a permit to build Deer Creek Reservoir (Docket No. 84a). The Supreme Court should not assume the policy, planning and administrative functions of state and local governments and the federal agencies in the name of enforcing the municipal exemption in the Decree. Applying Paragraph X does not require the Court to decide whether Wyoming made a wise choice in the selection of Deer Creek Reservoir as the preferred solution to her municipal water supply needs.

The Special Master also recommends various inquiries to determine "whether Wyoming's proposed operations and its contemplated water rights administration in connection with the proposed project will be fair and equitable to affected water users in Nebraska." Second Interim Report at 86; *see also id.* at 88-89. If the Special Master's recommendation were accepted, Paragraph X would serve no purpose because the Court would engage in a new weighing of the equities to determine the proper equitable apportionment each time Wyoming or Colorado proposes a new municipal use. Nebraska's claim for an interstate priority system to protect senior appropriative rights in Nebraska was litigated in the original proceeding. The Court adopted Special Master Doherty's recommended Decree including Paragraph X and denied Nebraska's claim for an interstate priority system. To now hold a trial on the question of whether the enforcement of Paragraph X by its terms would result in "inequitable treatment of holders of senior Nebraska appropriative rights" (*Id.* at 86) would be to relitigate matters that were decided in the original proceeding.

Nebraska and the United States raise the spectre that Wyoming might operate Deer Creek Reservoir in the

future in some manner that is inconsistent with the Decree or inequitable to Nebraska. The Court should not assume that Wyoming will operate Deer Creek Reservoir under the guise of a municipal use to circumvent the decreed apportionment.[18] If Wyoming should do so, Nebraska will have recourse under the Court's retained jurisdiction, including, if necessary, an action under Paragraph XIII(f) of the Decree to modify or reconsider the application of Paragraph X. The Court in this case is called upon not to reconsider Paragraph X, but to interpret and apply it by its terms. *See* Transcript of Hearing March 9, 1992 at 27-28 (Docket No. 435) (where counsel for Nebraska confirmed that the petition presently before the Court does not seek reconsideration of the Decree under Paragraph XIII(f)); Second Interim Report at 74 n.99.

Wyoming has indicated that, even if interim, non-municipal uses of Deer Creek Reservoir were ultimately disallowed and use of the reservoir were strictly limited to a supply for the usual municipal needs of the City of Casper and other municipalities, she would build and operate the reservoir under such limits. Second Affidavit of Michael K. Purcell, Wyoming Second Motion for Summary Judgment (Docket No. 294). The Court's ruling at this juncture should give Wyoming that option.[19] Further

---

18. When the United States raised similar concerns about Nebraska's future administration of water rights under the Decree, the Court said:

> We cannot assume that Nebraska will undertake to circumvent the decree . . . . If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

Nebraska v. Wyoming, 325 U.S. at 628-29.

19. The Court long ago recognized the importance of supplying water for domestic and municipal uses. *Connecticut v. Massachusetts*, 282 U.S. 660, 673 (1931).

delay is extremely prejudicial to Wyoming as construction costs escalate and the municipalities that would use Deer Creek Reservoir are forced to look for alternative supplies at additional expense. Second Affidavit of Michael K. Purcell, *id.* Even if the Court decides that there is a triable issue of fact with respect to non-municipal uses, it should confirm Wyoming's right under Paragraph X to build and operate the reservoir for municipal uses.

VI. *NEBRASKA AND THE UNITED STATES ARE NOT ENTITLED TO SUMMARY JUDGMENT CONFIRMING A PRIORITY WATER STORAGE RIGHT FOR THE INLAND LAKES*

The Special Master was unclear about the basis on which he found a December 6, 1904 priority for storage of natural flow in the Inland Lakes. When he denied Wyoming's first motion for summary judgment, he characterized the Inland Lakes issue as:

> Whether the Inland Lakes enjoy a water priority date under Wyoming law of December 6, 1904, and certain water rights for their historical administration under the Decree, . . .

First Interim Report at 19. These simple questions of law are presented for decision in the second round of summary judgment motions.[20] The Special Master did not find

---

20. The only issue raised in the pleadings accepted by the Court is whether the actions of Wyoming in seeking a determination of any Inland Lakes water right violates the Decree. That issue of course turns on whether the Inland Lakes have a water right *under the Decree.* However, the parties followed the Special Master's formulation of the issues and also submitted their documentary evidence on the issue of whether the Inland Lakes have a priority under state law.

a priority under state law or under the Decree. However, instead of recommending an answer to the legal questions presented, he recommends that the Decree be modified to include an Inland Lakes priority based on "equitable considerations." Second Interim Report at 34-35.

The Special Master also recognizes that the only issue decided in the original proceeding with respect to the Inland Lakes was that historical storage in the lakes should be taken into account in determining the water requirements of the Interstate Canal. Second Interim Report at 27 n.40. However, that fact has significance to the apportionment only if, as Wyoming asserts, the determined water requirements of the Interstate Canal and the other Guernsey Dam to Tri-State Dam canals are the measure and the limit of Nebraska's apportionment. If the Court decides to go beyond the simple legal question of the existence of a priority under state law or the Decree and to consider in this proceeding whether to modify the Decree to create an Inland Lakes water right, Nebraska's burden would be to prove that the lack of a water right under the Decree will result in shortages to the water requirements that are the basis of Nebraska's apportionment. Nebraska has not met that burden.

A. *It is Undisputed That the Inland Lakes Have No Water Storage Right under State Law*

Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 372 (1990), which authorized the North Platte Project, unequivocally requires the United States to follow state law in acquiring water rights for its reclamation projects. *Nebraska v. Wyoming,* 295 U.S. 40, 43 (1935); *Nebraska v. Wyoming,* 325 U.S. at 612-15, 629; *California v. United*

States, 438 U.S. 645 (1978). Wyoming presented extensive documentary evidence before the Special Master showing that the United States never acquired a water storage right under state law for the Inland Lakes. Wyoming's evidence also showed without dispute that the United States officials were at all times aware of, and acknowledged, the fact that the Inland Lakes possessed no water right under state law.[21]

---

21. The Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States (Docket No. 334) at 47-87 contains a detailed review of the historical, documentary evidence concerning the Inland Lakes. Copies of most of the relevant documents are included in the appendix to that brief. Those documents show that both before and after the litigation in the original proceedings, government officials acknowledged that the Inland Lakes had no water storage right under state law. Correspondence between United States officials and the Wyoming State Engineer in 1913 acknowledged that "no application for a permit to build these reservoirs has been filed in this state." Appendix to Wyoming Brief in Response . . . at C-29 to C-32, C-38 to C-58 (Docket No. 334), also Appendix to Nebraska's Brief in Support of Motion for Partial Summary Judgment at A-33 (Docket No. 296). In 1925, government officials acknowledged the lack of a state water right permit but concluded it did not matter because the United States owned all unappropriated water in the river, a theory the United States later tried and lost in *Nebraska v. Wyoming*, 325 U.S. at 611-16. Counsel for the United States acknowledged at the time of the original proceeding that "The Bureau has not complied with State laws respecting Lake Alice and Lake Minatare." Appendix to Wyoming Brief in Response . . . at C-172 (Docket No. 334). The decision to intervene in the original proceedings in order to argue that the United States owned all the unappropriated water in the river was intended in part to solve the Inland Lakes dilemma:

> The only answer is an allotment to the United States for its reservoirs separate from the allotment to the states. But more sad is the picture of Lake Alice and Lake Minatare in Nebraska. The United States has no Nebraska or Wyoming filing for these reservoirs.

April 10, 1938 Letter to Chief Counsel Cheadle from District Counsel W. J. Burke, Appendix to Wyoming Brief in Response . . . at C-166 (Docket No. 334).

The Special Master recognizes that the Inland Lakes were never awarded a separate water storage permit under Wyoming law, but he says that fact is "immaterial to whether the Inland Lakes ultimately enjoy a 1904 priority right." Second Interim Report at 32. Referring to the United States' argument that the Inland Lakes possess a priority under state law, he notes:

> The United States acknowledges that the Inland Lakes priority may not have been obtained by the "traditional route" but stresses that the interstate nature of the Inland Lakes operation and their functional significance to the overall North Platte Project made such routes unsuitable.

Second Interim Report at 30 n.45.

The problem with the United States' argument is that application for a permit from the State Engineer is the *only* route to obtain a priority under Wyoming law. *Wyoming Hereford Ranch v. Hammond Packing Co.*, 33 Wyo. 14, 236 P. 764 (1925); *Lewis v. State Board of Control*, 699 P.2d 822 (Wyo. 1985). Apparently the United States argues that a 1904 storage right exists because the Inland Lakes were originally built as part of the Interstate Canal. However, since before 1904 both Wyoming and Nebraska law have distinguished between direct flow water rights under which water can be taken directly from the stream and applied to immediate beneficial use and storage rights under which water can be diverted and stored for later beneficial use. 1903 Wyo. Sess. Laws ch. 69, *as amended by* 1907 Wyo. Sess. Laws ch. 86, §16; 1895 Neb. Laws ch. 69, §56, *as amended by* 1903 Neb. Laws ch. 120, §2, *as further amended by* 1911 Neb. Laws ch. 153, §32 (copies reproduced in the appendix to Wyo-

ming Brief in Response ... at C-5 to C-6, C-9, C-16 to C-17 (Docket No. 334)). Therefore, a separate permit was required for a storage right in the Inland Lakes. *Id.* The fact that the United States acquired a direct flow permit for the Interstate Canal has no bearing on the question of whether the United States acquired a priority for storage.

The Court recognized the necessity of a state permit when, in applying §8 of the Reclamation Act, it said that the United States "must obtain *permits and priorities* . . . in the same manner as a private appropriator." *Nebraska v. Wyoming,* 295 U.S. 40, 43 (1935) (emphasis added). The Court should rule as a matter of law that the Inland Lakes have no priority for storage of natural flow under Wyoming law.

B. *The Decree Did Not Establish a Priority for Storage of Natural Flow in the Inland Lakes*

While an interstate equitable apportionment may limit the exercise of individual water rights appropriated under state law, there is no precedent for the Court to create such an individual water right as a matter of interstate apportionment. *See, e.g., Hinderlider v. La Plata and Cherry Creek Ditch Co.,* 304 U.S. 92 (1938). *Cf. California v. United States,* 438 U.S. 645 (1978). Nebraska argued before the Special Master that the 1904 priority she claims for the Inland Lakes was litigated and determined in the original proceeding. Second Interim Report at 29 n.43 and at 33. However, Paragraphs III and IV of the Decree, which set out the relative priorities of the federal storage rights among themselves and as to the Nebraska State Line Canals, do not mention the Inland Lakes. *See* footnote 26, 29, *infra.* When Special Master

Doherty specified the priorities of each of the federal storage reservoirs he did not mention the Inland Lakes. Doherty Report at 136. When the Court totalled the combined storage rights of the federal storage reservoirs it did not include the Inland Lakes. *Nebraska v. Wyoming,* 325 U.S. at 626-27. Such omissions dispel any notion that the Court intended to confirm a storage priority for the Inland Lakes in the original proceeding.

When the Decree was amended in 1953 to add Glendo Reservoir to Paragraph III, again the Court did not mention the Inland Lakes. The Court could not have intended to determine a priority for the Inland Lakes and yet not once, but twice, neglect to include that important provision in the Decree.

While declining to apply the principle of *res judicata* directly, the Special Master found that, as a matter of equity, Wyoming should have litigated the issue of an Inland Lakes priority in the original proceeding. Second Interim Report at 34. Such an argument ignores the principle common to western prior appropriation states that it is the duty of the water right claimant or reservoir owner to pursue adjudication of the priority for storage. Wyo. Stat. §41-4-310 (1977). *See also* Neb. Rev. Stat. §46-233 (1988 Reissue); Colo. Rev. Stat. §§37-92-301 to 37-92-306 (1990). The very relief that Nebraska sought in her original bill of complaint was "for a determination . . . of the priorities of *all appropriations* in both States." *Nebraska v. Wyoming,* 325 U.S. at 592 (emphasis added). Yet neither the United States nor Nebraska presented any claim or evidence of a priority for storage of natural flow in the Inland Lakes. The United States had carefully considered the situation of the Inland Lakes and consciously decided to assert ownership of all the

unappropriated water in the river rather than to assert some priority for the Inland Lakes. *See* footnote 21 above and documentary record cited therein.[22]

The only Inland Lakes issue that was decided in the original proceeding was that any storage in the Inland Lakes during the non-irrigation season was to be counted against the requirement of the Interstate Canal for the purpose of determining Nebraska's irrigation season apportionment of natural flow in the Whalen to Tri-State section. *See* Second Interim Report at 27 n.40. Special Master Doherty and the Court decided to reduce the irrigation season requirements of the Interstate Canal by the amount that the Inland Lakes had been able to store in the non-irrigation season. Doherty Report at 60-61; *Nebraska v. Wyoming*, 325 U.S. at 646. The fact that Special Master Doherty thought that the water requirements of the Interstate Canal would need to be adjusted in the future if the Inland Lakes realized a different amount of storage water than he assumed discredits any argument that he found a fixed amount and priority for the Inland Lakes. Doherty Report at 61 n.3.

C. *Any "Equitable Considerations" with Respect to the Inland Lakes are Questions of Fact That Cannot be Determined on Summary Judgment in this Case*

Although the Special Master's finding of an Inland Lakes priority can stand neither on state law nor on the existing Decree, he recommends that, on the ground of

22. A more detailed analysis of the *res judicata* issues with respect to the Inland Lakes and the original proceeding is found in Wyoming Supplemental Brief Regarding Summary Judgment at 1-12 (Docket No. 374).

"equitable concerns" alone, the Decree should be modified to add an injunction restraining Wyoming "from interfering with the December 6, 1904, priority right of the Inland Lakes in Nebraska to store no less than 46,000 acre-feet of natural flow water during the months of October, November, and April...."[23] Second Interim Report at 34, 110. The simple fact that the Court has not exercised its jurisdiction over an action to modify the Decree is grounds alone to reject the Special Master's recommendation.

Wyoming respectfully urges the Court to decide the issue presented in Nebraska's petition: whether Wyoming violated the Decree by seeking a determination that the Inland Lakes have no priority. However, if the Court goes beyond that issue to consider whether in equity the Decree should be modified to create an Inland Lakes storage right, there are genuine issues of material fact that preclude summary judgment. The discussion of the Inland Lakes in the Special Master's Second Interim Report reads as if a trial has already been held. The Special Master weighed the evidence before him, discounted or ignored much of the historical documentation submitted by Wyoming, and made findings of fact on the disputed evidence.[24] In doing so, he in effect held a trial on the affidavits and misapplied Fed.R.Civ.P. 56. Contrary

23. There is no basis in the record or in the law of prior appropriation for the recommendation that the Inland Lakes be afforded an apparently unlimited right to store *"no less than"* 46,000 acre-feet. Every water right must have a fixed amount so that it can be administered in relation to other water rights.

24. The Special Master notes that he "cannot help but consider" that Wyoming's motivation for bringing the Inland Lakes issue to a head in 1985 seemed to be her desire to increase the yield of the proposed Deer Creek Reservoir. Second Interim Report at 29 n.44, 33 n.51. Wyoming acknowledged that the question of an Inland Lakes priority could affect the yield of Deer Creek Reservoir. That is why the

to *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255 ("Evidence of the non-movant party is to be believed, and all justifiable inferences are to be drawn in his favor."), the Special Master either disbelieved or simply ignored the bulk of Wyoming's evidence disputing the key facts on which he bases his recommended ruling.

Among the many facts that the Special Master finds after weighing the evidence, a few can be distilled as forming the basis of his recommended ruling:

> The key material fact is that since 1913 the Inland Lakes have been used for storage of natural flows during the non-irrigation season.
>
> * * *
>
> The Inland Lakes, as the evidence shows, have been treated throughout the century as having a December 6, 1904 priority.
>
> * * *
>
> The initial North Platte Project components continue to depend upon the right of the Inland Lakes to store water and thus upon a priority commensurate with the other components. . . . This fact alone suffices to defeat Wyoming's motion. Furthermore, without priority protection for the Inland Lakes, the entire apportionment scheme for the North Platte Project could be severely disrupted.

Second Interim Report at 32-33.

Deer Creek Reservoir Environmental Impact Statement analyzed two scenarios — one with the Inland Lakes priority asserted by Nebraska and one without it (Docket No. 84a). If the prospect of building Deer Creek Reservoir was the motivation for Wyoming to finally seek resolution of the longstanding Inland Lakes dilemma, that fact could have no possible bearing on the legal question of whether the Inland Lakes possess a storage priority under the Decree.

Only one of these facts is undisputed in the record before the Court. Wyoming acknowledges that the Inland Lakes historically stored natural flow water in the non-irrigation season from available gains accruing to the river below Alcova Dam. The accounting procedure agreed to annually has allowed the Inland Lakes to accrue *up to* 46,000 acre-feet during the months of October, November and April at a rate of 910 cubic feet per second but not to exercise a priority to regulate upstream water rights. Affidavit of David G. Wilde, August 15, 1988, United States Response to Wyoming [First] Motion for Summary Judgment (Docket No. 83); Second Affidavit of George L. Christopulos, Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States (Docket No. 334). That procedure has allowed the government to make use of water that would otherwise flow downstream unused. *See* Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 70-87, 90-94, 100-03 (Docket No. 334). The rest of the "facts" relied upon by the Master are no more than groundless inferences drawn from other evidence which itself is disputed.

The record repeatedly establishes the fact that, although the Inland Lakes were historically allowed to store available gains below Alcova, a priority was never once exercised or administered for the Inland Lakes.[25]

25. Deposition of David G. Wilde at 305-06, 307-08 (Docket No. 158); Deposition of Gordon W. Fassett at 49, 190-91 (Docket No. 311); Deposition of Earl Michael at 229 (Docket No. 204a); Wyoming Response to Nebraska's Second Set of Interrogatories, Nos. 36, 56, 62 and 132 (Docket No. 208); Wyoming Response to United States' First Set of Requests for Admission and Second Set of Interrogatories, Admission No. 2 and Interrogatory No. 86 (Docket No. 214); Wyoming Response to United States' Third Set of Interrogatories, No. 1 (Docket No. 215); Second Affidavit of George L. Christopulos at 3-4 and Fourth Affidavit of Gordon W. Fassett, Wyoming Brief in Response . . . (Docket No. 334).

That fact plainly contradicts the Special Master's finding that the Inland Lakes have been "treated throughout the century as having a December 6, 1904, priority."[26] Second Interim Report at 32. Moreover, none of the sources cited by the Master contains a statement that the Inland Lakes were treated, i.e., operated or administered, with a 1904 priority. The Special Master apparently infers such treatment from the fact that under the annual agreements the filling of Guernsey and Glendo Reservoirs was postponed to allow available gains below Alcova to accrue to the Inland Lakes.

The record further contradicts the Special Master's finding based on the Affidavit of David G. Wilde that Nebraska's apportionment would be disrupted if the Inland Lakes were not given a 1904 priority. Second Interim Report at 33 and n.50. The Wilde affidavit did not analyze the impact on Nebraska's apportionment of denying a priority call to the Inland Lakes. It only analyzed the amount of storage in the federal reservoirs under various assumed operating scenarios including one assigning a present-day priority storage right to the Inland Lakes.[27] Finally, even if an impact on Nebraska's apportionment could be inferred from the Wilde affidavit,

---

26. A priority fixes the right of an appropriator to command the flow of the river relative to other appropriators. To say that a water right has been "treated" with a certain priority necessarily implies the regulation of upstream juniors to satisfy that right. The Inland Lakes have never been accorded such treatment. *See* footnote 25, *supra*. Moreover, such treatment would conflict with the order of priorities for the federal reservoirs in Paragraphs III and IV of the Decree by placing the Inland Lakes on an equal footing with Pathfinder Reservoir and ahead of the other four reservoirs.

27. Indeed Wilde could not have shown an impact on Nebraska's apportionment under the Decree in the face of Nebraska's and Wyoming's undisputed evidence showing that diversions by Nebraska appropriators in the Whalen to Tri-State reach have exceeded Doherty's determined requirements by 40,000 acre-feet on an average annual basis

the statements in that affidavit have been disputed. Wyoming Response to Nebraska's Second Set of Interrogatories, Nos. 18-162 (Docket No. 208); Wyoming Motion to Strike Affidavits, ¶10, filed with Wyoming Reply Brief in Support of [First] Motion for Summary Judgment at 49-51 (Docket No. 87).[28]

---

since 1959. Affidavit of Ann S. Bleed at ¶3 and Table 1, Nebraska's Motion for Partial Summary Judgment at 28, 31 (Docket No. 296). *See also* Affidavit of Bern S. Hinckley at 5-7, ¶¶8-10, and related figures and tables, Wyoming Second Motion for Summary Judgment (Docket No. 294). By comparison, Wilde alleged that giving the Inland Lakes a present day priority would reduce the average annual carryover storage of the federal reservoirs by 18,200 acre-feet. Affidavit of David G. Wilde at 42, Table 12, United States' Response to Wyoming [First] Motion for Summary Judgment (Docket No. 83).

28. Wyoming's Motion to Strike Affidavits challenged the affidavits filed by the United States and Nebraska in response to Wyoming's First Motion for Summary Judgment on the grounds, *inter alia*, that they were immaterial to the Decree interpretation issues presented by Wyoming's motion and that they failed to comply with Fed.R.Civ.P. 56(e) which requires that such affidavits "shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence." Wyoming filed the motion to strike out of caution to preserve her objections to the unsupported statements in the affidavits. The Special Master denied Wyoming's motion as "hypertechnical" and said,

> What is presently before the Special Master is not a jury trial proceeding, but rather a summary judgment motion in a case within the Supreme Court's original jurisdiction where full factual development should not be prematurely derailed by procedural technicalities.
>
> * * *
>
> [W]here, as here, the affidavits are submitted to oppose the grant of summary judgment, opinion evidence is appropriately considered to support the existence of a disputed issue of fact.

Tenth Memorandum of the Special Master at 7-8 (Docket No. 118). The Special Master has now gone far beyond considering the disputed affidavits "to support the existence of a disputed issue of fact" and has rested his recommended resolution of the Inland Lakes issue on the speculations, opinions and legal conclusions in those affidavits. For that reason, Wyoming excepts to the denial of the Motion to Strike. See Wyoming Exception No. 5.

Further, the Special Master's finding of an impact on Nebraska's apportionment is without foundation in light of the Master's refusal to define the extent of Nebraska's apportionment. The Special Master found that the request by Wyoming and Colorado to define the extent of Nebraska's apportionment was too abstract and theoretical to decide at this stage. *See* Argument in Part III.A., *supra;* Second Interim Report at 92, 94. Nevertheless, the Special Master purports to find that material injury to the as yet undefined apportionment would result from Wyoming's desire to have the Inland Lakes water rights determined.

D. *There is No Basis for the Conclusion That Nebraska's Apportionment Includes the Right to Store Inland Lakes Water in Guernsey and Glendo Reservoirs*

The Special Master's recommendation that the Court recognize a 1904 priority to store water in Guernsey and Glendo Reservoirs for later delivery to the Inland Lakes conflicts with Paragraph III of the Decree ordering the priorities of the federal reservoirs. In fact, the storage of Inland Lakes water in Glendo or Guernsey Reservoirs has no basis in the original proceeding. Special Master Doherty's consideration of Inland Lakes winter storage in determining the irrigation season requirement of the Interstate Canal clearly contemplated only the diversion at the Interstate Canal for storage in the Inland Lakes and made no reference to storage in Guernsey or Glendo Reservoirs. Glendo Reservoir did not even exist at the time of the original proceeding.

The United States has not sought to amend the government's water rights for Glendo or Guernsey Reser-

voirs to subordinate those rights to storage for the Inland Lakes. Second Affidavit of George L. Christopulos at 4, ¶10, Wyoming Brief in Support of Second Motion for Summary Judgment (Docket No. 294). Nor does the record reveal any attempt to amend the congressional authorizations of Glendo or Guernsey Reservoirs to allow such subordination.[29]

The United States' own expert, David Wilde, admitted that the states and the United States never acknowledged a right to store Inland Lakes water in Guernsey or Glendo Reservoirs. Rather, such operation was a matter of consent by the states as part of the annual accounting agreements. Deposition of David G. Wilde at 170-73, 178-80 (Docket No. 158). *See also* Second Affidavit of George L. Christopulos at 4, ¶10, Wyoming Brief in Response to Motions for Summary Judgment . . . (Docket No. 334). Even if federal officials had asserted such a right with the acquiescence of state officials, such action beyond the scope of the officials' authority would not bind or estop the respective sovereigns. *See Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947); *Heckler v. Community Health Services,* 467 U.S. 51, 60 (1984); *Lewis v. Board of Control,* 669 P.2d 822, 828 n.4 (Wyo. 1985).

29. The Court refused to consider even the joint operation of the reservoirs listed in Paragraphs III and IV until the government's contractual obligations were amended and water right and other legal issues were resolved. *Nebraska v. Wyoming,* 325 U.S. at 632-33; *see also* ¶XIII(e). A joint operation that would include the Inland Lakes was not raised by the United States or discussed by the Court.

VII. *WYOMING IS ENTITLED TO SUMMARY JUDGMENT DENYING NEBRASKA'S CLAIMS THAT GRAYROCKS RESERVOIR AND THE PROPOSED CORN CREEK PROJECT VIOLATE THE DECREE*

The basic issue concerning the Laramie River is whether the Decree excluded the Laramie River from the apportionment. If the Laramie was excluded, Nebraska's claims that the existing Grayrocks Reservoir and the proposed Corn Creek Project violate the Decree must be denied as a matter of law. Nebraska and Wyoming have agreed that Nebraska's Laramie River claims should be decided on summary judgment, but the Special Master avoided the legal issues presented in the cross-motions.

The Special Master correctly rejected Nebraska's various arguments that the Decree affirmatively apportioned water in the Laramie River to Nebraska. Second Interim Report at 40, 59. Upon concluding that the existing Decree does not apportion water in the Laramie River to Nebraska and finding no restriction in the Decree on Wyoming's use of the Laramie River, the Special Master should have recommended summary judgment denying Nebraska's claim that Wyoming's use of the Laramie River violates Nebraska's apportionment under the Decree. Instead, he has recommended that the Decree be modified to provide Nebraska a forum in the Supreme Court to enforce a 1978 settlement agreement with Basin Electric Power Cooperative (Second Interim Report at 68-69) and that he be authorized to proceed to trial on the question of whether the proposed Corn Creek Project would "disturb the delicate balance of the North Platte River." *Id.* at 71. Both recommendations go far beyond the questions of decree enforcement raised by Nebraska's petition.

A. *The North Platte Decree Excludes the Laramie River*

The Court's opinion mentions the Laramie River only briefly. *Nebraska v. Wyoming,* 325 U.S. 592-93. In plain words, the Court said,

> The waters of the South Platte and the Laramie were previously apportioned — the former between Colorado and Nebraska by compact (44 Stat. 195), the latter between Colorado and Wyoming by decree. *Wyoming v. Colorado,* .... Those apportionments are in no way affected by the decree in this case.

Id. at 592 n.1.

The Decree in turn refers to the Laramie River only once:

> XII. This decree shall not affect:
>
> * * *
>
> (d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado and the waters of the Laramie River, a tributary of the North Platte River . . .

There was no ambiguity in Special Master Doherty's exclusion of the Laramie River from his recommended apportionment. He introduced and qualified his recommendation for a decree with the following language:

> With respect to the water of the North Platte River and its tributaries, *except the Laramie River,* I recommend entry of a decree . . .

Doherty Report at 177 (emphasis added). Moreover, Special Master Doherty said that the 75/25 division of natural flow that he proposed, and that was adopted by the Court, was to apply only to water "*present in* the Whalen to Tri-State Dam section." *Id.* at 179 (emphasis added). *See also* Doherty Report at 124 ("the Laramie River . . . was in effect apportioned between Wyoming and Colorado by the decree of this Court in the case of *Wyoming v. Colorado,* 259 U.S. 419. This apportionment I find equitable so far as it touches the interest of any of the parties to this suit").

The apportionment of the Laramie River referred to by the Court in footnote 1 of the 1945 opinion in *Nebraska v. Wyoming (I)* was originally decreed in 1922. *Wyoming v. Colorado,* 259 U.S. 419 (1922), *amended,* 260 U.S. 1 (1922). In the 1930's, while the North Platte case was pending before Special Master Doherty, the Court considered an action by Wyoming to enforce the 1922 Laramie River decree against Colorado. The Court's opinion in that case defined and enforced the limits in the decree on Colorado's diversions and expressly confirmed "the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries." *Wyoming v. Colorado,* 298 U.S. 573, 578 (1936). Then, in 1957, twelve years after entry of the North Platte Decree, the Court vacated the 1922 Laramie River decree and entered a new decree that increased Colorado's allowable annual diversions by almost 10,000 acre-feet and confirmed that:

> The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remain-

> ing in the Laramie River and its tributaries after such diversion and use in Colorado.

Wyoming v. Colorado, 353 U.S. 953 (1957).

Wyoming argued to the Special Master that these unambiguous declarations of the Court in published opinions and decrees intended to resolve important disputes among sovereign states should not be lightly dismissed. However, the Special Master, not satisfied with a "surficial plain-meaning reading of the Opinion and the Decrees", invited the parties to go "beyond the bounds of the Laramie and North Platte Decrees themselves to interpret and apply them." Second Interim Report at 44. The voluminous briefs in which the parties recounted the record underlying the Laramie and North Platte decrees ultimately afforded no clearer answer to the Special Master:

> I . . . find that a crisp result eludes me on the Laramie.

Id. at 38.

The record establishes that Nebraska sought and was denied an apportionment of Laramie River flows in the original proceeding. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 10-12 (Docket No. 294) and record cites therein. Wyoming will not retrace in this brief the analysis and discussion of the record underlying the Decree because we believe the plain language of the opinion and Decree controls. Should the Court desire to explore that matter further, Wyoming's discussion of the record of the original proceeding is found in the following briefs before the Special Master: Wyo-

ming Brief in Support of Second Motion for Summary Judgment at 6-26, 30-40, 42-47 (Docket No. 294); Wyoming Brief in Response to Motions for Summary Judgment ... at 6-13, 18-21 (Docket No. 334); Wyoming Reply Brief in Support of Second Motion for Summary Judgment at 12-27 (Docket No. 352).

A key fact conceded by Nebraska's own witnesses in the original proceeding was that the contribution of the Laramie was "negligible" in times of shortage when an apportionment was needed. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 12-16 (Docket No. 294) and record cites therein. Even though the Laramie contributed some water on a seasonal or average basis, Special Master Doherty said that the apportionment he proposed would need to operate only in times of shortage. Doherty Report at 161. So there is no contradiction between Special Master Doherty's findings about historical Laramie River contributions and his exclusion of the Laramie from the apportionment. *See* Second Interim Report at 58.

There is no basis for concluding that the Court intended to prohibit new or increased uses of the Laramie in Wyoming. The North Platte Decree imposes no restriction on Wyoming's use of the Laramie River. It requires no measuring or reporting of Laramie River diversions or uses. The Court's discussion of the competing uses and priorities in the critical Whalen to Tri-State reach contains no discussion of the then present or expected future uses of the Laramie River. *Nebraska v. Wyoming,* 325 U.S. at 637-54. Had the Court intended to assure the continued contribution of a certain amount of Laramie River water to the North Platte River, appropriate injunctions would have been included in the Decree. Even if some

continued contribution of the Laramie were assumed in the original proceeding, Nebraska cannot transform such an assumption into an injunction in the Decree. *Cf. Oklahoma v. New Mexico,* 111 S.Ct. 2281 (1991) (where the assumption that flows might pass Conchas Dam to the benefit of downstream users in Texas was held not to change the plain language of the compact which did not restrict New Mexico from enlarging Conchas Dam to hold those flows). Nebraska's position and the Special Master's recommendation rest on the untenable proposition that the Court was incapable of saying what it meant in plain words.

A fundamental principle of equity jurisprudence is that any injunction must be specific and definite so as to inform the parties enjoined as to what they are called upon to do or refrain from doing. *Gunn v. University Committee to End the War in Vietnam,* 399 U.S. 383, 388-89 (1970) ("that requirement is essential in cases where private conduct is . . . enjoined . . . . It is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign state"). *See also Schmidt v. Lessard,* 414 U.S. 473, 476 (1974). To look beyond the plain language of the Court's unambiguous decrees to determine if there is some assumption or other basis upon which to imply additional restrictions not expressly included in the decree would cloud the Court's decrees in uncertainty. Disputes would never be resolved with finality (*cf. Arizona v. California,* 460 U.S. 605 (1983)), and this Court would be embroiled in continuing litigation. The Court should give effect to the plain language of the Decree until a party shows cause to modify the Decree and properly brings an action for that purpose.

B. *The Special Master's Recommendation with Respect to Grayrocks Reservoir Would Improperly Convert a Private Agreement into an Equitable Apportionment*

In 1978, Nebraska and Basin Electric Power Cooperative ("Basin"), among others, agreed to resolve litigation over Basin's compliance with federal environmental laws in the construction of Grayrocks Reservoir and the Laramie River Electric Generating Station.[30] Before the settlement an appeal had been taken to the Eighth Circuit of a federal district court injunction halting construction of the Grayrocks Reservoir and the Laramie River Station and jeopardizing the $1.3 billion investment of Basin and its partners. Under the settlement agreement Nebraska and the other opponents withdrew all objection to construction and operation of Grayrocks Reservoir. Settlement Agreement at ¶13 (Docket No. 23). In return, Basin agreed to limit the exercise of its water rights and, if necessary, to release storage water to maintain certain flows at the mouth of the Laramie River. Wyoming was not a party to the Grayrocks litigation or to the Settlement Agreement.

In the proceedings before the Special Master, Nebraska conceded that "Grayrocks will not harm her if operated in accordance with the 1978 settlement agreement, ..." Second Interim Report at 65-66. The Special Master further found it undisputed that "Wyoming

30. The December 4, 1978 Agreement of Settlement and Compromise (cited in this brief as "Settlement Agreement") and the Stipulations of Dismissal filed in *Nebraska v. Basin Electric Power Cooperative*, No. 78-1975 and *Nebraska v. Rural Electrification Administration*, No. 78-1778 (8th Cir., Order of Remand February 27, 1979) are reproduced in the Appendix to Wyoming Brief in Support of [First] Summary Judgment Motion at A-19 to A-31 (Docket No. 23).

has so far not interfered in the operation pursuant to the 1978 settlement agreement . . . ." *Id.* at 66-67. However, the Special Master expressed the following concern:

> Wyoming has repeatedly declined my several invitations to give assurances that she will in the future support Basin's obligations to maintain flows against would-be Wyoming junior appropriators.

Id. at 67.

The Special Master's concern is with the possibility that a new Wyoming appropriator might seek to divert water from the Laramie River between Grayrocks Reservoir and the mouth of the Laramie at a time when Basin is releasing water from the reservoir for the purpose of complying with the agreement. The Special Master therefore recommends a modification of the Decree to incorporate a reference to the Settlement Agreement flows and to subject Wyoming to a suit in the original jurisdiction in aid of enforcement of that Settlement Agreement.[31]

Certainly, the Settlement Agreement does not supersede Wyoming law. Both Nebraska and Basin were aware of Wyoming law and Wyoming's position with respect to the Settlement Agreement when they entered that agreement. Basin Reply to Response of Nebraska and the United States at 28 (Docket No. 350). In fact, the possi-

31. Basin Electric Power Cooperative makes the cogent point that Nebraska's petition on its face alleges that operation of Grayrocks Reservoir itself violates the Decree and that the claim that Wyoming threatens somehow to interfere with the Settlement Agreement is a claim that Nebraska has not been given leave to assert in this action. Wyoming agrees that Nebraska's failure to raise this claim in her petition is alone ground to reject it.

bility of a new appropriator diverting water from the Laramie River was the very reason that the proposed Corn Creek Project was addressed in the Agreement. *Id.;* Settlement Agreement, ¶¶5-7 (Docket No. 23). Basin assumed the risk that new appropriations other than the Corn Creek Project might seek a permit from Wyoming to divert natural flow from the Laramie. Affidavit of Robert L. McPhail, at 2, ¶7, Appendix D to Basin Electric Power Cooperative's Memorandum in Support of Wyoming's Second Motion for Summary Judgment (Docket No. 293).

The Grayrocks Settlement Agreement embodies an obligation of a single Wyoming appropriator agreed to under the threat of a continuing injunction costing millions of dollars in construction delays. Basin Electric Power Cooperative's Memorandum in Support of Wyoming's Second Motion for Summary Judgment at 9-15 (Docket No. 293). That agreement did not effect an equitable apportionment.[32] Enforcement of any right of Nebraska under the Settlement Agreement is not a matter for the Court's original jurisdiction. *See California*

32. Nor did the Settlement Agreement secure any instream flow for endangered species habitat downstream in Nebraska. Although the possible effect on whooping crane habitat was the ground on which the lawsuit was brought against Basin, the Settlement Agreement was intended to provide water for Nebraska irrigators and money for the endangered species. *See* A. D. Tarlock, *Law of Water Rights and Resources,* §9.06[4][c], Clark Boardman Co., Ltd. (1989); Basin Electric Power Cooperative's Brief in Support of Wyoming Second Motion for Summary Judgment at 9-15 (Docket No. 293); Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2 (Docket No. 4). There was never any judicial determination of a need for flows from Wyoming to protect wildlife habitat in Nebraska. The basis of the district court injunction was that the federal agencies had failed even to consider under the National Environmental Policy Act, 42 U.S.C. §§4231-4361 (1990), whether Grayrocks had an impact on wildlife habitat. Moreover, at the time of

v. Nevada, 447 U.S. 125 (1980) (holding that the Court would not exercise jurisdiction over the issue of individual title claims even though they were closely related to the boundary dispute between the states).

C. *The Corn Creek Project Cannot Violate the Decree*

Wyoming is entitled to summary judgment that the Corn Creek Project does not violate the Decree for the simple reason that the Decree excludes the Laramie River. The further factual inquiry that the Special Master recommends is designed to consider whether in equity an apportionment or reapportionment of the Laramie is warranted. The Court has not exercised its jurisdiction over such an action.

If the Court were to accept such a case, equity would bar Nebraska's claim of injury from the Corn Creek Project. As between Nebraska and Basin Electric, Nebraska agreed to a reduction in flows from the Laramie River in the amount of 22,500 acre-feet per year due to the Corn Creek Project in exchange for Basin's agreement to replace half that amount (11,250 acre-feet) "from sources in Wyoming and/or the North Platte basin in Nebraska." Grayrocks Settlement Agreement at ¶¶5-7, Appendix to Wyoming Brief in Support of [First] Motion for Summary Judgment at A-26 to A-27 (Docket No. 23). Nebraska cannot in equity now assert that a reduction of 22,500 acre-feet will violate her equitable apportionment.

---

the Settlement Agreement, Nebraska law did not provide for protection of instream flows. Since enactment of Nebraska's instream flow law in 1984 (Neb. Rev. Stat. §§46-2,107 to 46-2,119 (1988 Reissue)), there has been no action taken to see that the releases under the Settlement Agreement get to the wildlife habitat area.

The Special Master suggests that the Court should exercise jurisdiction over the ancillary and only marginally related claim, raised by Nebraska counsel at oral argument, that the treatment of Corn Creek in the Settlement Agreement may have been based on a mutual mistake of fact. Second Interim Report at 70-71. Statements of counsel are not evidence and cannot raise factual issues at the summary judgment stage anymore than "mere allegations" in the pleadings can. Fed.R.Civ.P. 56(e).[33] Whether or not there is any merit to Nebraska's new-found theory, such a claim belongs before the federal district court that approved the Settlement Agreement, not in the original jurisdiction of the Supreme Court. *Cf. California v. Nevada, 447 U.S. 125 (1980).*

CONCLUSION

Wyoming respectfully requests the Court to deny the summary judgment motions of the State of Nebraska and the United States and to grant the summary judgment motions of the State of Wyoming and the State of Colorado as follows:

1. Declaring as a matter of law that the measure and the limit of Nebraska's apportionment under the Decree, and therefore of Nebraska's right to demand natural flow water from Wyoming, are the water requirements of the Nebraska canals in the Guernsey Dam to Tri-State Dam section of the North Platte River as those requirements were determined in the original proceeding;

---

33. *See also* Second Interim Report at 70 and n.94 where the Special Master refers to statements of counsel as "conflicting testimony." *See also id.* at 40 n.59.

2. Denying all of Nebraska's claims of Decree violations that are premised on injury to uses diverting below Tri-State Dam;

3. Declaring as a matter of law that Nebraska has failed to produce sufficient facts to warrant a trial on her claims that the construction and operation of Deer Creek Reservoir would violate the Decree or require the imposition of new injunctions on Wyoming;

4. Declaring as a matter of law that the use of Deer Creek Reservoir to supply water to Wyoming municipalities in the North Platte basin, either directly or by exchange, is exempt from any restriction under the Decree by reason of Paragraph X of the Decree;

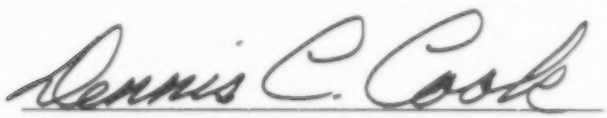
5. Declaring as a matter of law that the Inland Lakes have no priority for storage of natural flow under state law or under the Decree;

6. Declaring as a matter of law that the Laramie River was excluded from the apportionment in the Decree and, therefore, denying Nebraska's claims that Grayrocks Reservoir or the proposed Corn Creek Project violate the decreed apportionment;

7. Dismissing with prejudice each of Nebraska's claims in the Petition for an Order Enforcing Decree and for Injunctive Relief.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming



DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

APPENDIX

Page

Decree, *Nebraska v. Wyoming*, 325 U.S. 589 (1945) A-2

Order Modifying Decree, *Nebraska v. Wyoming*, 345 U.S. 981 (1953) A-11

Petition for an Order Enforcing Decree and for Injunctive Relief, (October 6, 1986) A-19

Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim, (March 18, 1987) A-22

Wyoming Motion for Summary Judgment, (September 11, 1987) A-31

Wyoming Second Motion for Summary Judgment, (February 22, 1991) A-36

United States Motion for Summary Judgment on the Inland Lakes, (March 1, 1991) A-40

Nebraska's Motion for Partial Summary Judgment, (March 1, 1991) A-41

Wyoming Second Motion For Summary Judgment - Inland Lakes, Extracted from Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States, (April 26, 1991) A-49

Colorado's Motion for Partial Summary Judgment, (February 22, 1991) A-51

NEBRASKA v. WYOMING
(325 U.S. 589)

DECREE
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water

in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and

Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss-Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover	8,360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the aver-

age proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water

hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming, and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, Original. Nebraska v. Wyoming (Colorado, Impleaded Defendant, and the United States, Intervenor.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation.

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953 the State of Colorado shall not institute any

proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When the Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado or Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow

of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage

of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper

Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined

and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class 'A' pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss-Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper

end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

PETITION FOR AN ORDER ENFORCING DECREE AND FOR INJUNCTIVE RELIEF

(October 6, 1986)

The State of Nebraska hereby petitions the Court for an order enforcing the provisions of its Decree of October 8, 1945, as amended on June 15, 1953, and for injunctive relief against the State of Wyoming, and in support hereof states:

1. The Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), equitably apportions the waters of the North Platte River among the states of Colorado, Wyoming, and Nebraska.

2. The Decree is premised on the recognition that Pathfinder and Guernsey Reservoirs in Wyoming are operated primarily for the benefit of lands in Nebraska. Consequently, the Decree establishes restraints on storage of water in those reservoirs to protect water users in Nebraska.

3. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by:

a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;

b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity

on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and

d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

4. The current and imminent actions of the State of Wyoming contravene the Court's opinion and invalidate the equitable balance of the North Platte River established in the Decree.

5. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and it continues to violate the provisions of the Decree.

6. The State of Wyoming's present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

7. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the State of Wyoming.

8. The Court expressly retained jurisdiction to resolve the present controversy in Article XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or

modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

* * *

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . . .

* * *

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

WHEREFORE, the State of Nebraska prays that the Court enter its order requiring the State of Wyoming to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953, and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

WYOMING ANSWER TO PETITION, MOTION FOR LEAVE TO FILE COUNTERCLAIM AND COUNTERCLAIM

(March 18, 1987)

ANSWER

Defendant, the State of Wyoming, pursuant to the Court's order dated January 20, 1987, answers the State of Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief as follows:

1. The allegation in paragraph 1 of the Petition is admitted, subject to the following qualifications:

(a) The Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), as modified, 345 U.S. 981 (1953) ("the Decree"), does not define the extent of Wyoming's right to use water from the North Platte River basin. The Decree does impose certain restrictions on water uses in Wyoming. Wyoming is entitled to use water beneficially from the North Platte River basin, subject only to the restrictions specified in the Decree.

(b) The apportionment of North Platte River natural flows to Nebraska provided by the Decree is only to supply the present beneficial use requirements of lands supplied by diversions at or above Tri-State Dam (including the Ramshorn Canal), up to the amount of water required by such lands irrigated at the time of the Decree. No other interests in Nebraska have any rights to natural flows of the North Platte River under the Decree.

2. The allegations in paragraph 2 of the Petition are denied. Pathfinder and Guernsey Reservoirs are operated for the benefit of lands in both Nebraska and Wyoming. The "restraints on storage" in those reservoirs (as well as Seminoe, Alcova and Glendo Reservoirs) provided by Paragraph IV of the Decree require that they be operated as junior to the priorities of the State Line Canals and the French Canal to the extent of the requirements of the Nebraska lands supplied by those canals, up to the instantaneous and seasonal diversion limitations specified in said Paragraph IV.

3. Wyoming denies each allegation in paragraph 3 of the Petition that it is "presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree". Wyoming denies that it has violated or threatens to violate the Decree in any respect. Wyoming answers further:

(a) Wyoming admits that Grayrocks Reservoir causes certain depletions of the flows of the Laramie River, but denies that such depletions violate the Decree. Wyoming states further that the water rights for Grayrocks Reservoir are administered in accordance with Wyoming law.

(b) Wyoming admits that the Corn Creek Irrigation District proposes to construct the Corn Creek Project, including diversion facilities near the mouth of the Laramie River. The project would be supplied primarily by storage water from Grayrocks and Glendo Reservoirs, and also by natural flow diversions from the Laramie River. Wyoming denies that the resulting depletion would violate the Decree.

(c) Wyoming admits that the Wyoming Water Development Commission, an agency of the State, proposes to construct Deer Creek Reservoir, a municipal storage project, on Deer Creek, a tributary of the North Platte River between Pathfinder and Guernsey Reservoirs, and that the project will cause certain depletions to Deer Creek and consequently to the North Platte River. Wyoming denies that such depletions will violate the Decree.

(d) Wyoming admits that on October 3, 1986 (before this suit was filed by Nebraska), Wyoming filed a suit on behalf of the Wyoming State Engineer against the United States in a Wyoming District Court relating to four reservoirs in Nebraska known as the Inland Lakes. The suit seeks to require the Bureau of Reclamation to comply with Wyoming law in its diversion of North Platte River natural flows in Wyoming for storage in the Inland Lakes. Wyoming denies that the filing of the lawsuit or the granting of the relief requested therein would violate Nebraska's rights under the Decree. Wyoming asserts that the Bureau of Reclamation has no right to divert natural flow water in Wyoming for storage in the Inland Lakes without the permits required by Wyoming law. Wyoming denies that its officials have taken any other action to prevent the Bureau of Reclamation's diversion of North Platte River water for storage in the Inland Lakes.

4. Each allegation in paragraph 4 of the Petition is denied.

5. Each allegation in paragraph 5 of the Petition is denied. Wyoming denies that Nebraska has made any

earnest effort to resolve the matters raised by the allegations in its Petition.

6. Each allegation in paragraph 6 of the Petition is denied.

7. Each allegation in paragraph 7 of the Petition is denied.

8. Wyoming admits the allegation in paragraph 8 of the Petition, subject to the following qualification: The relief requested in the Petition is enforcement of the existing Decree; "Nebraska does not seek to modify the Decree in any respect. . . ." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2. In Paragraph XIII of the Decree, this Court retained jurisdiction for the purpose, *inter alia,* of enforcement of the Decree and thus has retained jurisdiction for purposes of the relief requested in this suit. The Court's jurisdiction has not been invoked for any other purpose, and the references in the Petition to the Court's retained jurisdiction for other purposes therefore are irrelevant.

9. Each and every allegation in the Petition not expressly admitted or denied is hereby denied.

AFFIRMATIVE DEFENSES

1. Nebraska's Petition does not allege facts which, if true, would establish any violation or threatened violation of the Decree.

2. Nebraska has no right to water from the Laramie River because the Laramie River was fully apportioned

between the states of Wyoming and Colorado in *Wyoming v. Colorado*, 259 U.S. 419, *modified*, 260 U.S. 1 (1922); 353 U.S. 953 (1957). A claim to water from the Laramie River was asserted by Nebraska and rejected by this Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and that matter is *res judicata*.

3. Nebraska agreed to the construction and operation of the Grayrocks Reservoir in an Agreement of Settlement and Compromise dated December 4, 1978, among Nebraska, Basin Electric Power Cooperative (the operator of Grayrocks Reservoir) and others. That agreement provided for the construction and operation of Grayrocks Reservoir. Nebraska is estopped to assert that construction or operation of Grayrocks Reservoir in accordance with that agreement violates Nebraska's rights under the Decree.

4. Nebraska's claim here to water from the Laramie River was previously asserted by Nebraska in a court of competent jurisdiction. *In re Corn Creek Irrigation District*, Civil Action No. 19-460, District Court, Eighth Judicial District of Wyoming. The decree entered by that court on January 20, 1978, determined that Nebraska had no right to water from the Laramie River under the North Platte Decree or otherwise. Nebraska chose not to appeal that determination. The time for appeal has expired, and that determination bars Nebraska's claim to Laramie River water in this proceeding or any subsequent proceeding.

5. Nebraska's claim to water from the Laramie River is barred by laches.

6. The Deer Creek Project is a proposed municipal storage project to supply water for ordinary and usual

municipal purposes and consumption within the meaning of Paragraph X of the Decree. Therefore, Nebraska has no right under the Decree to complain about construction of Deer Creek Reservoir.

7. The Decree does not in any way restrict the use of water from any of the tributaries of the North Platte River below Pathfinder Dam. Therefore, the construction of Deer Creek Reservoir will not violate the Decree.

8. Nebraska's rights to natural flows under the Decree are limited to the irrigation canals specified in the Decree that supply lands in Nebraska with water diverted at or above Tri-State Dam (including the Ramshorn Canal). To the extent that Nebraska's claims here are asserted on behalf of interests other than those canals, Nebraska's claims are not cognizable under the Decree.

9. In the proceedings in which the Decree was entered, Nebraska affirmatively argued, and this Court determined, that the United States is subject to the laws of Wyoming with respect to the diversion or storage of water from sources in Wyoming. Nebraska is barred from asserting otherwise now.

10. The pending civil action regarding the Inland Lakes referred to in paragraph 3(d) of Wyoming's answer herein was initiated prior to this suit. That action was filed by Wyoming in a court of competent jurisdiction to determine the extent of the rights of the United States, a Wyoming appropriator, to divert the natural flows of the North Platte River in Wyoming for storage in the Inland Lakes. That pending action is the appropriate one to determine the water rights of the United States.

MOTION FOR LEAVE TO FILE COUNTERCLAIM

Defendant, State of Wyoming, hereby requests leave of the Court to file the counterclaim submitted herewith. The grounds for this motion are:

The Court has granted leave to Nebraska to file its Petition for an Order Enforcing Decree and for Injunctive Relief, and Wyoming has answered that Petition. The counterclaim submitted herewith would be permitted under Fed.R.Civ.P. 13(b). The Federal Rules of Civil Procedure may be taken as a guide to procedure in original actions in this Court. Sup.Ct.R. 9.2. The counterclaim would not unduly complicate this litigation, but instead would further clarify the parties' rights under the Decree. In the interests of judicial economy and equity, Wyoming should be allowed to seek redress in this original action for Nebraska's violations of Decree.

The United States and Colorado have not filed pleadings disclosing their positions in this proceeding. Wyoming therefore reserves the right to assert claims against those parties after their status and position have been disclosed.

COUNTERCLAIM

Defendant, State of Wyoming, assert the following counterclaim against Plaintiff, State of Nebraska:

1. This Court has jurisdiction of this counterclaim under Article III, Section 2, Clause 2, of the Constitution of the United States, under Title 28, United States Code, Section 1251(a), and under Paragraph XIII of the Decree.

2. Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:

(a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;

(b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree; and

(c) By using Glendo Reservoir water outside of the basin of the North Platte River in western Nebraska, for uses other than irrigation and as a substitute for storage water previously available under permanent arrangements.

3. Nebraska's past and continuing violations of the Decree have caused and continue to cause irreparable injury to Wyoming and its citizens.

4. Wyoming has no adequate remedy at law to enforce its rights against Nebraska. Injunctive relief is necessary to enforce the Decree and to restrain further violations by Nebraska.

WHEREFORE, having fully answered and having asserted its affirmative defenses and counterclaim, Defendant Wyoming prays that the Court enter an order granting judgment for Wyoming and against Plaintiff

Nebraska on each of Nebraska's claims and on Wyoming's counterclaim, and enjoining Nebraska from further violations of the Decree.

Wyoming further requests the Court to appoint a Special Master in this action. Wyoming has submitted herewith a Motion for Appointment of Special Master.

WYOMING MOTION FOR SUMMARY JUDGMENT

(September 11, 1987)

Defendant, State of Wyoming, hereby moves the Court pursuant to Sup.Ct.R. 9.2 and Fed.R.Civ.P. 56 to enter judgment for Wyoming and against Nebraska on all of the claims in Nebraska's Petition for Order Enforcing Decree and for Injunctive Relief and on part of Wyoming's counterclaim. The grounds for this motion are:

1. This is an action brought by the State of Nebraska against the State of Wyoming for enforcement of the decree in *Nebraska v. Wyoming,* 325 U.S. 665 (1945), modified, 345 U.S. 981 (1953) ("the Decree"). Nebraska alleges that Wyoming has taken and plans to take certain actions that have violated and threaten to violate the Decree. Wyoming has filed a counterclaim alleging Nebraska violations of the Decree.

2. The pleadings herein, together with the affidavits appended to this motion, show that no genuine issue of material fact exists with respect to Nebraska's claims, and that Wyoming is entitled as a matter of law to judgment denying Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief.

3. The following facts as to the actions and proposed actions in Wyoming alleged in Nebraska's petition are the controlling facts upon which Nebraska's claims are based, and are not in dispute:

   a. The operation of Grayrocks Reservoir on the Laramie River depletes the natural flow of the North Platte River. Nebraska Petition, para. 3.a.; Wyoming Answer, para. 3(a); Affidavit of Gordon W. Fassett.

b. The construction and operation of additional river pumping, diversion and storage facilities at the confluence of the Laramie and North Platte Rivers, such as the proposed Corn Creek Project, would deplete the natural flow of the North Platte River. Nebraska Petition, para. 3.b.; Wyoming Answer, para. 3(b); Affidavit of Gordon W. Fassett.

c. The construction and operation of storage reservoirs on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, such as the proposed Deer Creek Reservoir, would deplete the natural flow of the North Platte River. Nebraska Petition, para. 3.c.; Wyoming Answer, para. 3(c); Affidavit of Gordon W. Fassett.

d. Wyoming has brought an action against the United States Bureau of Reclamation to require the Bureau to obtain Wyoming permits for diversion of North Platte waters in Wyoming to storage in the Inland Lakes in Nebraska. Nebraska Petition, para. 3.d.; Wyoming Answer, para. 3(d).

4. The question whether the actions and proposed actions in Wyoming alleged in Nebraska's petition and admitted by Wyoming in its answer violate or threaten to violate the Decree is a question of law that should be decided on summary judgment.

5. The actions and proposed actions in Wyoming alleged by Nebraska do not violate or threaten to violate the Decree, as a matter of law. Wyoming therefore

is entitled to a judgment determining that such actions do not violate or threaten to violate the Decree, and denying Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief.

6. There may be disputed issues of material fact with respect to the Nebraska violations of the Decree alleged in Wyoming's counterclaim. However, the central issue of interpretation of the Decree involves no genuine issues of material fact and may be determined as a matter of law. Wyoming requests the Court pursuant to Sup.Ct.R. 9.2 and Fed.R.Civ.P. 56(d) to enter summary judgment for Wyoming determining that the Decree affords Nebraska no right to North Platte River water except for irrigation of lands served by canals specified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal). A ruling on that pure question of law will simplify the case and narrow the issues for trial. For example, if as Wyoming contends, Nebraska's rights under the Decree are limited to those canals diverting at or above Tri-State Dam, there will be no need for the parties to undertake discovery and technical studies of the water resources and the uses of water in the lower North Platte and Platte River basins in Nebraska.

Wyoming therefore requests the Court to enter judgment for Wyoming on each of the claims in Nebraska's petition and on the legal issue raised by Wyoming's counterclaim. Wyoming requests the Court to enter judgment specifically determining as follows:

a. The Decree does not restrict Wyoming's use of water from the Laramie River.

b. This Court's previous ruling that Wyoming's use of water from the Laramie River is not restricted is *res judicata*. Therefore, Nebraska has no right to water from the Laramie River under the Decree or otherwise, and is barred from asserting any claim to the Laramie River here.

c. Nebraska is estopped, by reason of the Agreement of Settlement and Compromise among Nebraska, Basin Electric Power Cooperative and others, to assert that construction or operation of Grayrocks Reservoir in accordance with that agreement violates the Decree or any rights claimed by Nebraska to the Laramie River.

d. Nebraska is estopped, by reason of the ruling of the Goshen County, Wyoming, District Court in *In Re Corn Creek Irrigation District*, Civil Action No. 19-460 (Jan. 20, 1978), to assert that construction or operation of the Corn Creek Project would violate the Decree or any rights claimed by Nebraska to the Laramie River.

e. Since the Decree does not restrict Wyoming's use of water from the tributaries of the North Platte River below Pathfinder Dam, the construction and operation of Deer Creek Reservoir would not violate the Decree.

f. The Decree affirmatively exempts ordinary and usual municipal uses from any restriction. The proposed Deer Creek Reservoir would supply water for ordinary and usual municipal uses. Therefore, the construction and operation of Deer Creek Reservoir would not violate the Decree or Nebraska's apportionment provided by the Decree.

g. Wyoming's suit pending in the federal district court to require the United States Bureau of Reclamation to obtain Wyoming permits for storage of water from sources in Wyoming in the Inland Lakes in Nebraska does not violate the Decree.

h. Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief is denied.

i. Nebraska's rights under the apportionment provided by the Decree are limited to the water supplies for Nebraska lands irrigated by the canals identified in the Decree that divert at or upstream of Tri-State Dam (including the Ramshorn Canal).

WYOMING SECOND MOTION FOR SUMMARY JUDGMENT

(February 22, 1987)

The defendant, the State of Wyoming, hereby moves the Court pursuant to Sup.Ct.R. 17.2 and Fed.R.Civ.P. 56 to enter judgment for Wyoming and against Nebraska denying the claims in Paragraphs 3a, 3b and 3c of Nebraska's Petition for order Enforcing Decree and for Injunctive Relief and determining certain issues of law. The grounds for this motion are:

1. This is an action brought by the State of Nebraska against the State of Wyoming for enforcement of the decree in *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953) ("the Decree"). Nebraska alleges that Wyoming is violating or threatening to violate Nebraska's apportionment under the Decree.

2. The pleadings herein, together with the affidavits, depositions, admissions, answers to interrogatories and documents produced in discovery, show that no genuine issue of material fact exists with respect to certain of the claims that Nebraska attempts to bring under her Petition for an Order Enforcing Decree, and that Wyoming is entitled to judgment as a matter of law denying those claims.

3. Nebraska has asserted in this case that the Decree implicitly apportioned to Nebraska a portion of the flows in the Laramie River in Wyoming. The record underlying the Decree has been made available and thoroughly reviewed and, through extensive discovery, the material facts regarding the historic interpretation and administration of the Decree have been identified. No genuine issue of material fact exists and Wyoming is entitled to

judgment as a matter of law. After full litigation of Nebraska's claims for an apportionment of the Laramie River in the earlier litigation, the Court excluded the Laramie River from the apportionment under the Decree. Therefore, Nebraska's claims that Grayrocks Reservoir (an existing project on the Laramie River) and the Corn Creek Project (a proposed project that would use Laramie River supplies) violate the Decree must be denied as a matter of law.

4. It is undisputed that Nebraska entered into an agreement with the owners and operators of the Grayrocks Reservoir in which she consented to, and withdrew all objection to, the construction and operation of Grayrocks Reservoir. The reservoir and the electric power generating plant that uses water from the reservoir were constructed and placed into operation at great expense in reliance on that agreement. As a matter of equity, Nebraska cannot now claim that operation of Grayrocks Reservoir in accordance with the Settlement Agreement violates the Decree.

5. Through discovery it has become apparent that Nebraska is attempting to assert claims to the continuation of flows in excess of her apportionment under the Decree that have passed Tri-State Dam since entry of the Decree. Specifically, Nebraska asserts a right to direct flow passing the Tri-State Dam and to return flows from diversions in excess of the water requirements of the North Platte Project Canals and the State Line Canals in Nebraska which form the basis of Nebraska's apportionment. The Supreme Court has not granted leave to Nebraska to assert such claims and, therefore, they should be denied as a matter of law. Moreover, Nebraska has no legal basis under the Decree for such claims.

6. Nebraska has asserted that the proposed Deer Creek Reservoir would violate Nebraska's apportionment under the Decree, but has failed to come forward with facts that would establish any injury to her apportionment for uses that divert at or above Tri-State Dam. Because it is apparent from the undisputed facts that Nebraska cannot meet her burden to show by clear and convincing evidence injury to her apportionment, her claims with respect to Deer Creek Reservoir should be denied as a matter of law.

7. The uses of Deer Creek Reservoir by direct delivery and by exchange to satisfy the water needs of the municipalities of Casper and other communities through their municipal water supply systems, as described in the Final Environmental Impact Statement prepared by the U.S. Army Corps of Engineers for the Deer Creek Reservoir Project, are ordinary and usual municipal uses within Paragraph X of the Decree.

8. The Special Master has already ruled that purely municipal uses of Deer Creek Reservoir are exempt under Paragraph X of the Decree. Wyoming requests the Special Master to recommend, and the Court to enter, partial summary judgment confirming that ruling. Partial summary judgment on that issue is necessary to prevent irreparable harm to Wyoming. Wyoming has been unable to commence construction of Deer Creek Reservoir even for purely municipal purposes because of the uncertainty caused by the pendency of this lawsuit.

9. Therefore, Wyoming requests the Special Master to recommend and the Court to enter partial summary judgment in favor of Wyoming as follows:

(a) Nebraska's claims that Grayrocks Reservoir and the proposed Corn Creek Project violate the Decree should be denied;

(b) Nebraska's claims that Wyoming is violating or threatening to violate the Decree should be denied to the extent they are based on (1) alleged reduction of direct flow passing Tri-State Dam or (2) alleged reduction of return flow from diversions in excess of the water requirements of the North Platte Project Canals and the Nebraska State Line Canals;

(c) The Court should confirm that evidence of instream uses and uses supplied by diversions below Tri-State Dam is immaterial to proof of violation of Nebraska's apportionment under the Decree. If Nebraska first proves a violation of her apportionment for uses supplied by diversions at or above Tri-State Dam, then such evidence may be offered for the purpose of establishing resulting injury;

(d) Nebraska's claim that Deer Creek Reservoir would violate Nebraska's apportionment under the Decree should be denied or, in the alternative, the Court should confirm by partial summary judgment that Paragraph X of the Decree exempts the proposed municipal uses of Deer Creek Reservoir as those uses are described in the Final Environmental Impact Statement for that project.

UNITED STATES MOTION FOR SUMMARY JUDGMENT ON THE INLAND LAKES

(March 1, 1991)

The United State [sic] hereby moves for summary judgment for the United States and against Wyoming on the legal validity of the December 6, 1904 water rights of the Interstate Canal to divert natural flow out of the North Platte River in Wyoming for storage in the Inland Lakes in Nebraska or to temporarily store this water in Guernsey or Glendo Reservoir before transfer to the Inland Lakes. The validity of these water rights and operations is *res judicata* and cannot be relitigated, as is more fully explained in the accompanying brief.

NEBRASKA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(March 1, 1991)

COMES NOW the State of Nebraska, pursuant to Sup.Ct.R. 9.2 and Fed.R.Civ.P. 56, and hereby moves the Court to enter judgment for Nebraska, declaring as a matter of law that: 1) the Inland Lakes are entitled to store 46,000 acre feet of natural flow during the months of October, November, and April, with a priority of December 6, 1904, as part of Nebraska's equitable apportionment, and that actions by Wyoming to prevent the continued diversions of natural flow of the North Platte River for storage in the Inland Lakes under the priority of December 6, 1904, constitute a violation of the North Platte Decree; 2) Nebraska is entitled to all of the flows of the Laramie River over and above Colorado's and Wyoming's entitlements as set forth in *Wyoming v. Colorado,* 259 U.S. 419, 496 (1922), *modified,* 260 U.S. 1 (1922) (hereinafter *"Wyoming v. Colorado"*), as part of Nebraska's equitable apportionment under the North Platte Decree, that such flows of the Laramie River are commingled with the North Platte River and become subject to the 75%/25% apportionment between Nebraska and Wyoming, respectively, and that by past depletions and through threatened future depletions of the Laramie River, Wyoming has violated and is threatening to violate the North Platte Decree; and 3) the equitable apportionment between Nebraska and Wyoming was predicated upon adequate return flows below Tri-State Dam, derived from appropriations in the Whalen Dam to Tri-State Dam reach diverting quantities of water approximating historical averages, that unavoidable operational "waste" passing Tri-State Dam does not constitute a violation of the Decree, that storage water was not appor-

tioned by the Decree, that Nebraska can administer its equitable apportionment according to Nebraska state law, and that the Decree does not contain restrictions or limitations on diversions or acres irrigated by Nebraska appropriators. Nebraska also requests the Court to enjoin Wyoming from any actions that may interfere with Nebraska's apportionment as set forth herein. As grounds therefore, Nebraska states:

1. This is an action brought by the State of Nebraska against the State of Wyoming under the retained jurisdiction of the Supreme Court, as set forth in Paragraph XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953).

2. No genuine issues of material fact exist with respect to Nebraska's claims as stated herein, and the pleadings and affidavits in support of this motion prove that Nebraska is entitled to judgment as a matter of law granting this motion and denying Wyoming's efforts to relitigate matters previously determined by the Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945) (hereinafter *"Nebraska v. Wyoming"*).

3. The following undisputed material facts with regard to the Inland Lakes support Nebraska's motion for partial summary judgment:

A. The Inland Lakes, consisting of Lake Alice, Lake Minatare, Lake Winters Creek, and Little Lake Alice, are an integral component of the North Platte Project, which has a priority date of December 6, 1904.

B. The engineering design of the North Platte Project, specifically the Interstate Canal, incorporated the Inland Lakes as storage reservoirs for natural flow during the non-irrigation season.

C. Since the inception of the Inland Lakes' operation, the Interstate Canal has supplied natural flow to the Inland Lakes during the non-irrigation season for storage and later use during the irrigation season.

D. During the original proceedings in *Nebraska v. Wyoming*, the parties litigated the use and requirements of the Inland Lakes, specifically the quantities of natural flow to be stored in the Inland Lakes during the non-irrigation season.

E. During the original proceedings in *Nebraska v. Wyoming*, the United States, Wyoming, and Colorado attempted to maximize non-irrigation season storage of natural flow in the Inland Lakes in order to reduce irrigation season demands for the Interstate Canal.

F. During the original proceedings in *Nebraska v. Wyoming*, neither the legal validity of the Inland Lakes to store natural flow during the non-irrigation season nor the priority date of December 6, 1904, as it applied to the North Platte Project, including the Inland Lakes, was disputed.

G. Special Master Doherty and the Court determined that storage of natural flow in the Inland Lakes during the non-irrigation season in the amount of 46,000 acre feet should be charged against the Interstate Canal irrigation season requirement.

H. Special Master Doherty and the Court determined that the Inland Lakes were part of the North Platte Project and that the North Platte Project had a priority of December 6, 1904.

I. Special Master Doherty and the Court determined that the Inland Lakes had the right to store 46,000 acre feet of natural flow in October, November, and April.

J. Since the apportionment of the North Platte River by the Court in 1945, the Inland Lakes ownership account has accrued 46,000 acre feet of natural flow in October, November, and April, with a priority of December 6, 1904.

4. The following undisputed material facts with regard to the Laramie River support Nebraska's motion for partial summary judgment:

A. In *Wyoming v. Colorado,* the Court adjudicated the relative priorities of Wyoming and Colorado to the Laramie River, allocating 272,500 acre feet annually for the irrigation of 181,500 acres in Wyoming, and allocating 15,500 acre feet for diversion by junior Colorado appropriators.

B. During the original proceedings in *Nebraska v. Wyoming,* the Laramie River was recognized as an important tributary of the North Platte River, and the parties' respective claims to the Laramie River were litigated.

C. During the original proceedings in *Nebraska v. Wyoming,* Nebraska and Wyoming offered evidence as to the priority and quantity of irrigated acreage on the Laramie River in Wyoming. Nebraska sought to prove that certain Wyoming irrigation rights adjudicated by the Court in *Wyoming v. Colorado* should be reduced because of the failure of Wyoming appro-

priators to fully develop their rights with due diligence.

D. Special Master Doherty heard testimony on the validity of priorities and irrigated acreage on the Laramie River, but decided not to redetermine the adjudicated rights already established by the Court in *Wyoming v. Colorado.*

E. Wyoming, Nebraska, and the United States included the flows of the Laramie River in their determinations of available supplies of the North Platte River subject to apportionment.

F. Special Master Doherty and the Court recognized that over and above the entitlements acquired by Wyoming and Colorado in the Laramie Decree, the Laramie River materially contributed to the supply of the North Platte River in the "critical reach" between Whalen Dam and Tri-State Dam.

G. The average seasonal contribution of the Laramie River to the North Platte River from 1931 to 1940, *viz.*, 23,230 acre feet, was included in the computation for the available water supply in the Whalen Dam to Tri-State Dam reach by the Special Master and the Court in weighing the supply and demand.

H. Since entry of the North Platte Decree in 1945, Laramie River flows to the North Platte River have been apportioned 75%/25% between Nebraska and Wyoming, respectively.

5. The following undisputed material facts with regard to the Tri-State issues support Nebraska's motion for partial summary judgment:

A. Special Master Doherty and the Court considered the North Platte and Platte rivers from North Park, Colorado, to Grand Island, Nebraska, as being subject to an equitable apportionment.

B. During the original proceedings in *Nebraska v. Wyoming,* the parties introduced evidence pertaining to the hydrology of the North Platte and Platte rivers, including an analysis and quantification of return flows.

C. The evidence presented in the original litigation established that decreased diversions in the Whalen Dam to Tri-State Dam section of the North Platte River resulted in decreased return flows downstream.

D. The evidence presented in the original litigation established that reductions in return flows would result in increased priority calls against upstream users.

E. Special Master Doherty and the Court determined that with the existing regimen of the river, sufficient supplies were available below Tri-State Dam arising from return flows, unavoidable flows past Tri-State Dam, and other local supplies to alleviate the necessity of equitably apportioning the North Platte River below Tri-State Dam.

F. In order to insure adequate return flows below Tri-State Dam, appropriators in the Whalen Dam to Tri-State Dam reach of the North Platte River must continue to divert water in quantities approximating historical averages.

G. Special Master Doherty and the Court recognized that unavoidable operational "waste" would pass Tri-State Dam and be available supply for downstream uses.

H. Water passing Tri-State Dam which is unavoidable operational "waste" does not constitute a violation of the Decree.

I. Storage water was not equitably apportioned by the Court in the original proceedings in *Nebraska v. Wyoming.*

J. Special Master Doherty and the Court determined that Nebraska could administer its equitable apportionment according to Nebraska state law.

K. Neither Special Master Doherty, the Court, nor the Decree placed restrictions or limitations on diversions or acres irrigated by Nebraska appropriators.

WHEREFORE, Nebraska respectfully requests the Court to declare that the following determinations were made in the original proceedings in *Nebraska v. Wyoming,* and are therefore final and conclusive, and to enjoin Wyoming from interfering with Nebraska's apportionment:

1. The Inland Lakes enjoy a priority of December 6, 1904, for the accrual to storage of natural flow of the North Platte River in the amount of 46,000 acre feet during the months of October, November, and April.

2. The flows of the Laramie River over and above Colorado's and Wyoming's entitlements as estab-

lished by the Court in *Wyoming v. Colorado* are apportioned to Nebraska, and when such Laramie River flows are commingled with the North Platte River, such supply is incorporated in the total natural flow in the Whalen Dam to Tri-State Dam reach and apportioned 75%/25% between Nebraska and Wyoming, respectively.

3. Nebraska has an equitably cognizable interest under the North Platte Decree to return flows from North Platte waters resulting from the equitable apportionment of North Platte waters diverted at or above Tri-State Dam. The return flows and other local supplies in the North Platte River below Tri- State Dam were expressly considered in the determination of the equitable apportionment between Nebraska and Wyoming, and the Special Master and the Court recognized that the apportionment would be undermined if return flows were decreased. Unavoidable operational "waste" flowing past Tri-State Dam is not a violation of the Decree. Storage water was not apportioned by the Court. Nebraska can administer its equitable apportionment intrastate according to Nebraska law, and the Court did not restrict diversions or irrigated acreages of Nebraska appropriators.

WYOMING SECOND MOTION FOR SUMMARY JUDGMENT - INLAND LAKES

Extracted from

WYOMING BRIEF IN RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT OF NEBRASKA AND THE UNITED STATES

at pp. 103 to 105

(April 26, 1991)

Nebraska and the United States have failed to sustain their claim that the Decree established a storage water right for the Inland Lakes. Therefore, the Court must deny their motions for summary judgment. The Court can, however, by partial summary judgment at this time, clarify the relationship between winter storage in the Inland Lakes and Nebraska's apportionment under the Decree. The Special Master should recommend that the Court grant summary judgment as follows:

(1) Confirming that Nebraska's apportionment was based on the irrigation requirements of her lands irrigated by diversions at or above Tri-State Dam and that the irrigation season requirement of the Interstate Canal was reduced by 46,000 acre-feet of river gains below Alcova diverted for storage in the Inland Lakes during October, November and April;

(2) Confirming that Nebraska's apportionment does not entitle her to demand from Wyoming more water for the Interstate Canal than the requirements determined by the Court in *Nebraska v. Wyoming (I);* therefore, the sum of the amount of water diverted at the Interstate Canal for storage in the Inland Lakes outside the irrigation season and the amount diverted at the Interstate Canal during the irrigation season may not exceed the determined water requirement;

(3) Confirming that the Inland Lakes have no priority for storage under state law;

(4) Confirming that, to the extent the United States foregoes storage in Guernsey or Glendo Reservoirs in order to credit the first gains below Alcova to the Inland Lakes, the priority of Guernsey or Glendo Reservoirs may not be asserted to require priority regulation of other water rights in Wyoming under state law; and

(5) Confirming that the Decree does not establish a right to use Glendo or Guernsey Reservoirs to store Inland Lakes water.

COLORADO'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(February 22, 1991)

Defendant, the State of Colorado, pursuant to Sup.Ct.R. 17.2 and Fed.R.Civ.P. 56, hereby moves the Court to enter judgment for Colorado and against Nebraska on the following claims in Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief. The grounds for this motion are:

1. This is an action brought by the State of Nebraska against the State of Wyoming for enforcement of the decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953) (the Decree). Nebraska alleges that Wyoming is violating or threatening to violate Nebraska's apportionment under the Decree. The State of Colorado is also named as a defendant in this action.

2. Through discovery it has become apparent that Nebraska is attempting to assert claims to the continuation of flows that may have passed Tri-State Dam since entry of the Decree and that are clearly in excess of her apportionment under the Decree. Specifically, Nebraska asserts a right to direct flow passing Tri-State Dam and to return flows from diversions in excess of the water requirements of the North Platte Project Canals and the State Line Canals in Nebraska which form the basis of Nebraska's apportionment. Nebraska is not entitled to assert claims for uses that do not divert at or above Tri-State Dam in an action to enforce the Decree, and the Supreme Court did not accept jurisdiction to consider modification of the Decree to enlarge Nebraska's apportionment. Therefore, such claims should be denied as a matter of law.

3. Although Nebraska's claims are ostensibly against Wyoming, Nebraska may also be asserting claims against Colorado. When asked to admit that "Nebraska's assertion of injury to uses below Tri-State Dam is based solely upon Wyoming's alleged violation(s) or prospective violation(s) of the Decree apportionment for uses above Tri-State Dam," Nebraska responded:

> Denied. Nebraska asserts that equities below Tri-State may be injured by actions of *any party* which threaten the regimen of the river created by the apportionment under the Decree. While Nebraska's petition is premised on violations or prospective violations of the Decree by Wyoming, Nebraska will not preclude its right under Article XIII of the Decree to seek relief based on changed needs as well as threatened injuries that could result from the actions of *any party*.

Nebraska's Answers to Colorado's First Set of Requests for Admission at 4-5, Request No. 6 (emphasis added).

4. The pleadings, depositions, answers to interrogatories, documents produced in discovery, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact with respect to Nebraska's claims to flows below Tri-State Dam and that Colorado is entitled to judgment denying those claims as a matter of law.

5. In support of this motion, Colorado relies on and adopts Argument II of Wyoming's Brief in Support of Second Motion for Summary Judgment, "Uses of Water Below Tri-State Dam."

6. Wherefore, Colorado requests the Special Master to recommend and the Court to enter partial summary judgment in favor of Colorado as follows:

a. Any claims by Nebraska that Colorado is violating or threatening to violate the Decree should be denied to the extent they are based on (1) alleged reduction of direct flow passing Tri-State Dam or (2) alleged reduction of return flow from diversions in excess of the water requirements of the North Platte Project Canals and the Nebraska State Line Canals;

b. The Court should confirm that evidence of instream uses and uses supplied by diversions below Tri-State Dam, is immaterial to proof of violation of Nebraska's apportionment under the Decree. If Nebraska first proves a violation of her apportionment for uses supplied by diversions at or above Tri-State Dam, then such evidence may be offered for the purpose of establishing resulting injury.

39

Supreme Court, U.S.
FILED
JUL 1 1992
OFFICE OF THE CLERK

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

July 1, 1992

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

134 HP

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

The State of Nebraska takes exception to certain legal conclusions in Special Master Olpin's First and Second Interim Reports of June 14, 1989, and April 9, 1992:

1. Nebraska takes exception to the Master's conclusion that the Court did not expressly apportion 75% of the inflows of the Laramie River to Nebraska in ¶ V of the North Platte Decree, as recommended by Special Master Doherty in 1944, *Nebraska v. Wyoming,* 325 U.S. 665, 667 (1945), *modified,* 345 U.S. 981 (1953);

2. Nebraska takes exception to the Master's reading of ¶ X of the North Platte Decree, 325 U.S. at 670. Paragraph X is a single sentence which provides that the provisions of the Decree which affect or restrict uses of irrigation water "shall not affect or restrict" municipal uses. While ¶ X was intended to shield municipal uses from the restrictions imposed on irrigation uses, the Special Master reads ¶ X as providing municipalities with an affirmative right to deplete the water supplies apportioned for irrigation; and

3. Nebraska takes exception to the Master's contravention of the Court's retained jurisdiction in ¶ XIII(c) to address "[t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries ... between Pathfinder Reservoir and Guernsey Reservoir." 325 U.S. at 672. Paragraph

XIII(c) allows the Court to assess the impact of new tributary storage, *e.g.*, the impact of depletions of natural flow on existing irrigation storage in Guernsey and Glendo reservoirs and the Inland Lakes reservoirs of the North Platte Project. Because the exercise of the Court's jurisdiction pursuant to ¶ XIII(c) could limit new tributary storage in order to protect the existing irrigation apportionment, whether for irrigation, industrial, or municipal purposes, the Special Master concludes that ¶ X preempts an evaluation of any municipal project under ¶ XIII(c), denying the Court's jurisdiction and endorsing the very depletions the Court and Special Master Doherty sought to preclude.

The State of Nebraska urges the Court: 1) to reaffirm the apportionment of the inflows of the Laramie River in ¶ V of the Decree as recommended by Special Master Doherty and adopted by the Court in 1945; 2) to limit ¶ X to its plain and unambiguous meaning; and 3) to exercise the jurisdiction preserved in ¶ XIII(c) of the Decree.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General
JAMES C. BROCKMANN
JAY F. STEIN
Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S BRIEF IN SUPPORT OF EXCEPTIONS

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

July 1, 1992

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S BRIEF IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

1. Did the Court expressly add 3% of the apportioned accretions inadvertently omitted from the evidence of accretions between Whalen and Tri-State Dam — the "pivotal reach of the river" — to the apportionment in ¶ V of the Decree without necessarily acknowledging the presence of 26% of the apportioned accretions which were contained in the evidence comprising the natural flow fund apportioned by the Court?

2. Is there a rational basis to support a reading of ¶ X which changes the words '[t]his decree shall not affect or restrict municipal uses' to mean 'municipal uses can upset the apportionment set forth in the provisions of the Decree?'

3. Does ¶ X, which is a qualification of the operative provisions of the North Platte Decree, qualify ¶ XIII(c), thus vitiating the Court's retention of jurisdiction to evaluate the effect of the construction or threatened construction of any storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir?

4. Should the Court accept a recommended reading of ¶ X which generates contradictions and internal inconsistencies in the Decree which do not arise when ¶ X is given its plain meaning?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PARTIES INVOLVED	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	14
A. Laramie River Inflows	14
B. Paragraphs X and XIII(c)	16
ARGUMENT	
I. THE COURT DID NOT EXPRESSLY ADD 3% OF THE APPORTIONED ACCRETIONS WHICH HAD BEEN INADVERTENTLY OMITTED IN THE WHALEN/TRI-STATE REACH WITHOUT NECESSARILY ACKNOWLEDGING THE PRIOR INCLUSION OF 26% OF THE APPORTIONED ACCRETIONS	18
A. The Whalen/Tri-State Apportionment Fund	19
B. Spring Creek	27
II. THE PLAIN MEANING OF ¶ X OF THE DECREE CANNOT BE GLEANED FROM A READING WHICH INVERTS THE SUBJECT AND OBJECT OF THE SENTENCE AND UPENDS ITS SYNTAX, RESULTING IN THE VITIATION OF THE COURT'S RETENTION OF JURISDICTION IN ¶ XIII(C)	32
A. A Plain Reading of ¶ X Cannot Invert the Subject and Object of the Sentence and Simultaneously Change the Predicate from a Negative Term to a Positive Term	35
B. Paragraph X, Which Immunizes Municipal Uses from the Operation of the Provisions of the Decree, Does Not Apply to the Court's Retained Jurisdiction to Resolve Disputes Yet to be Addressed by the Court	41
C. The Special Master's Revision of ¶ X Creates Numerous Problems of His Own Making	47
CONCLUSION	54
APPENDIX	

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 32

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 18

Hindelider v. La Plata & Cherry Creek Irrigation Co., 304 U.S. 92 (1938) 36

Nebraska v. Rural Electrification Administration, 12 E.R.C. 1156 (1978), *appeal dismissed*, 594 F.2d 870 (8th Cir. 1979) 11, 12

Nebraska v. Wyoming, 296 U.S. 553 (1935) 1

Nebraska v. Wyoming, 304 U.S. 545 (1938) 1

Nebraska v. Wyoming, 325 U.S. 589, 665 (1945) .. 1, 2, 3, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16, 19, 20, 22, 23, 27, 28, 30, 32, 33, 37, 38, 39, 40, 42, 44, 45, 46, 47, 51, 52

Nebraska v. Wyoming, 326 U.S. 683 (1945), ... 1

Nebraska v. Wyoming, 345 U.S. 981 (1953) 2

Nebraska v. Wyoming, 479 U.S. 1051 (1987) 1, 3

Nebraska v. Wyoming, ____, U.S. __, 112 S. Ct. 1930 (1992) 1, 3

Wyoming v. Colorado, 259 U.S. 419 (1922) 4, 15, 19, 20, 21, 22

STATE CASES

Town of Newcastle v. Smith, 28 Wyo. 371, 205 P. 302 (1922) 50

CONSTITUTIONS

U.S. Const. Article III, § 2, cl. 2 2

STATUTES

Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1989) 11

National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1989) 11

Judiciary Act, 28 U.S.C. § 1251(a) (1988) 2

MISCELLANEOUS

Black's Law Dictionary (4th Ed. 1968) 43

PARTIES INVOLVED

This suit was commenced in 1934 by the State of Nebraska against the State of Wyoming. Following the denial of Wyoming's motion to dismiss, which was predicated on the indispensability of the State of Colorado and the United States of America, Colorado was impleaded as a defendant and the United States was granted leave to intervene. *Nebraska v. Wyoming*, 296 U.S. 553 (1935); *Nebraska v. Wyoming*, 304 U.S. 545 (1938). The Court entered its original Opinion and Decree in 1945. *Nebraska v. Wyoming*, 325 U.S. 589 (1945);[1] *Nebraska v. Wyoming*, 326 U.S. 683 (1945).

On October 7, 1986, Nebraska filed her motion for leave to reopen the case, seeking relief solely against Wyoming. (Docket No. 1).[2] The motion was granted on January 20, 1987. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). Colorado and the United States have participated in the same capacities as in the initial proceedings. Relief is also sought against Wyoming and the United States in Nebraska's motion for leave to amend her petition dated October 9, 1991. (Docket No. 407). Consideration of the motion to amend was deferred by the Court's Order of May 18, 1992. *Nebraska v. Wyoming*, ___ U.S. ___, 112 S. Ct. 1930 (1992) (Docket No. 477).

Five entities sought to intervene in 1987, *viz.*, Basin Electric Power Cooperative ("Basin"), Central Nebraska Public Power and Irrigation District ("Central"), the Nebraska Public Power District ("NPPD"), the Platte River Whooping Crane Critical Habitat Maintenance Trust ("Trust"), and the National Audubon Society ("Audubon"). (Docket Nos. 7, 8, 14, 16). Special Master Olpin denied the motions to intervene, but allowed the active participation of the would-be intervenors as *amici*. *See* Owen Olpin, Special Master, First

---

[1] *Nebraska v. Wyoming*, as used throughout this brief refers to the initial decision in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), unless otherwise indicated.

[2] By agreement of the parties and the Special Master, pleadings contained in the Special Master's Docket are identified by docket number in parentheses.

Interim Report (June 14, 1989) ("First Interim Report") (Docket No. 140).

On June 8, 1991, the Special Master invited the *amici* to re-petition to intervene. (Docket No. 366). Audubon, Central, and the Trust repetitioned. (Docket Nos. 382, 384, 387). Basin had a pending motion to reconsider the denial of its first motion for intervention. (Docket No. 120). Master Olpin recommended denial of all petitions in his Second Interim Report. *See* Owen Olpin, Special Master, Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention (April 9, 1992) ("Second Interim Report") (Docket No. 463).

JURISDICTION

The State of Nebraska invoked the original jurisdiction of the Court under ¶ XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953). Paragraph XIII retained the Court's jurisdiction "for the purpose of any order, direction, or modification of the decree" to address future developments or "[a]ny change in conditions making modification . . . or the granting of further relief necessary or appropriate."[3] 325 U.S. at 671-72. The Decree was entered under Article III, Section 2, Clause 2, of the United States Constitution and the Judiciary Act, 28 U.S.C. § 1251(a) (1988).

The petition to reopen requested enforcement of "the provisions of its Decree," as well as injunctive relief "enjoining . . . Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of . . . Nebraska's apportionment under the Decree." Nebraska's Petition at 1, 3-4 (Docket No. 1).[4] Nebraska seeks to

---

[3]As used in this brief, the "Decree" refers to the 1945 decree, 325 U.S. 665, as modified by the Court's order in 1953, 345 U.S. 981.

[4]Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for *(cont'd.)*

construe or clarify the Decree, to modify it as necessary by the addition of appropriate provisions, and to enforce it. *See* 325 U.S. at 671-72.

Nebraska v. Wyoming was initially docketed as No. 6, Original. When the case was reopened on January 20, 1987, it was redocketed as No. 108, Original. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). On June 22, 1987, the Court appointed the Honorable Owen Olpin as Special Master. (Docket No. 20a).

On September 11, 1987, Wyoming filed a motion for summary judgment seeking to dispose of the case in its entirety, except for her counterclaim. (Docket No. 23). Master Olpin denied the motion in his First Interim Report on June 14, 1989. (Docket No. 140).

In February and March, 1991, Colorado, Nebraska, Wyoming and the United States filed cross-motions for summary judgment, with Colorado and Wyoming generally aligned against Nebraska and the United States. (Docket Nos. 292, 294, 296, and 297). Master Olpin's recommended disposition of the cross-motions is contained in his Second Interim Report of April 9, 1992. (Docket No. 463).

Pursuant to the Court's Order of May 18, 1992, the parties were granted forty-five days to file exceptions to the first and second interim reports. *Nebraska v. Wyoming*, ____ U.S. ____, 112 S. Ct. 1930 (1992) (Docket No. 477).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case does not directly involve specific constitutional or statutory provisions. The North Platte River Decree is reprinted in the Appendix. *See* Appendix at A-1-15.

Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) (Docket No. 1).

STATEMENT OF THE CASE

Equitable apportionment is the body of federal common law which governs disputes among states over their rights *parens patriae* to the use of the waters of an interstate stream. In this case, each of the party states adheres intrastate to the doctrine of prior appropriation, which is predicated on the climatological fact that demand will inevitably exceed the supply. Priority of appropriation thus posits the principle that the first appropriator in time is the first in right and that each senior water right is to be satisfied in full before water is allowed to flow to successively junior users. Individual regimes of state water law, however, are not tailored to conflicting claims on an interstate stream. Based on the jurisprudence of equitable apportionment in 1934, Nebraska filed this suit against Wyoming to extend the concept of priority of appropriation across the state line, which, according to a contemporaneous decision, afforded "the only basis . . . consonant with the principles of right and equity applicable to such a controversy . . .." *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922).[5]

The North Platte River is a non-navigable interstate stream flowing wholly within the states of Colorado, Wyoming, and Nebraska. It rises in the mountains of northern Colorado and flows northerly to the vicinity of Casper, Wyoming, where it turns to the east and proceeds in a southeasterly direction through Wyoming and into Nebraska. Its principal tributary below Pathfinder Reservoir — the Laramie River — also rises in the mountains of northern Colorado and flows northerly to Wheatland Reservoir in Wyoming, where it turns to the northeast and flows to its confluence with the North Platte River between the Whalen Diversion Dam and the Tri-State Diversion Dam. *See* Appendix at A-16.

Pursuant to the Reclamation Act of 1902, a large reclamation project had been constructed along the North Platte in the early 1900s, *viz.*, the North Platte Project, serving lands in Wyoming and

---

[5] *Wyoming v. Colorado* as used throughout this brief refers to *Wyoming v. Colorado*, 259 U.S. 419 (1922), unless otherwise indicated.

Nebraska. Another large federal project under construction when the North Platte Decree was entered in 1945 was the Kendrick Project, which serves lands in Wyoming. Five major reservoirs are associated with these projects. Pathfinder, Guernsey and Glendo reservoirs store water for the North Platte Project, and Seminoe and Alcova reservoirs store water for the Kendrick Project.[6] Releases from each of the principal reservoirs generate hydroelectric power. The stored water is normally released for irrigation in middle to late summer.

Nebraska v. Wyoming was precipitated by the beginning of a decade of drought in 1931 and the initial construction of the Kendrick project in Wyoming. 325 U.S. at 599. The North Platte River had long been over-appropriated when the suit was filed. Doherty Report at 7; 325 U.S. at 608. Essentially all of the surface water of the North Platte was used for irrigation when this suit was filed. In some reaches of the mainstem and the tributaries, the demand exceeded the supply; in other reaches, the supply exceeded the demand. Overall, there was not enough water to satisfy the irrigation season requirements in the three states.

Dealing only with the natural flows of the system and limiting the allocation of the supply to agricultural needs during the irrigation season, *i.e.*, May 1 to September 30 of each year, the object of the parties and Special Master Doherty was to protect existing uses to the extent possible and to ascertain and allocate the supply to meet the demand in the various reaches of the river. While the parties took differing conceptual approaches to the apportionment, all were agreed that the supply had to be determined in each reach in order to meet the progressive downstream demands. *See generally* Doherty Report at 99-101. *See also, e.g.*, Nebraska Exhibit Nos. 10, 11, 85, 86, 302, 431; Wyoming Exhibit Nos. 80, 81, 86-98, 112, 146, 150, 151, 170,

---

[6]Smaller reservoirs include Kortes, Gray Reef, Lake Alice, Lake Minatare, Little Lake Alice, and Lake Winters Creek. The latter four are located off-channel in Nebraska and are collectively referred to as the Inland Lakes.

173, 177, 180; United States Exhibit Nos. 116, 117, 125, 136, 143, 271; Engineers' Stipulation — May, 1942.

For the purpose of analyzing supply and demand, the North Platte River falls into several natural sections. The evidence at trial dealt with the sectional requirements, supplies, and allocations in six reaches of the North Platte River: 1) North Park, Colorado; 2) the Colorado-Wyoming state line to Pathfinder Reservoir; 3) Pathfinder Reservoir to Whalen, Wyoming; 4) Whalen to Tri-State Dam, Nebraska; 5) Tri-State Dam to Kingsley Reservoir; and 6) Kingsley Dam to Grand Island. Doherty Report at 7; 325 U.S. at 593; *see also* Appendix at A-16. Master Doherty determined the water supplies and irrigation demands in each section of the North Platte River and reached conclusions about the equitable distribution in each section, weighing the competing demands in successive downstream reaches.

In section one, the Special Master found that accretions to the river averaged 635,100 acre feet per year and that Colorado was consuming 104,540 acre feet annually. Doherty Report at 21, 125; 325 U.S. at 593 n.3, 600. Though Colorado had a large share of junior appropriators compared to Wyoming and Nebraska, Master Doherty determined that Colorado had not exceeded her equitable share of the North Platte River. Doherty Report at 125-27; 325 U.S. 621-23. Because the water supply in the remainder of the river basin was insufficient to meet the demands of downstream senior water users, however, the Master determined that any additional consumption by junior appropriators in North Park would be inequitable *vis-a-vis* established downstream uses. Accordingly, he limited future depletions of the North Platte River in Colorado. Doherty Report at 177; 325 U.S. at 665 (Decree ¶ I).

In section two, from the Colorado-Wyoming state line to Pathfinder Reservoir, the Master reached the same conclusion. Doherty stated that "no additional burden can be placed on the supply without encroachment on present rightful uses, and therefore [I] propose that present uses as defined should be set as the measure of Wyoming's equitable share in respect to this section." Doherty

Report at 136. The average annual accretion from this section of the river was 1,059,240 acre feet, and consumption averaged 162,400 acre feet annually. *Id.* at 22, 133-136; 325 U.S. at 593 n.3. Because of the over-appropriated condition of the river downstream, the Special Master limited Wyoming to existing water uses on the tributaries above Pathfinder Reservoir. Doherty Report at 177; 325 U.S. at 665-66 (Decree ¶ II).

In section three, Pathfinder Reservoir to Whalen Dam, the accretions were determined to be 390,000 acre feet annually.[7] Doherty Report at 22; 325 U.S. at 593 n.3. The Master found that Wyoming's irrigated acreage on the mainstem, 14,000 acres, consumed 19,500 acre feet of water annually. Doherty Report at 146; *see also* 325 U.S. at 603. He determined that restrictions should be placed on diversions from the mainstem of the river, but that limitations were not necessary on the tributaries because there was no threat of development. Doherty Report at 145-48, 177; 325 U.S. at 624-25, 665-66 (Decree ¶ II).

Section four, the Whalen to Tri-State reach, is "the pivotal reach" of the North Platte River. 325 U.S. at 604. Concentrated in this 43-mile span of the river is a demand as great as in the preceding 415 miles. Doherty Report at 53; 325 U.S. at 596, 604. During the 1931-1940 drought period, the accretions of natural flow in this section were found by the Master to be 86,450 acre feet annually, including the contributions of the Laramie River. Doherty Report at 67 (Table III). By contrast, the requirements for irrigated lands were 1,072,514 acre feet. *Id.* at 59 (Table II). To meet the diversion requirements in this section of the river, Master Doherty recognized the need to

---

[7]Most of the federal storage reservoirs are located in this section of the river. In apportioning the North Platte, the Court distinguished between storage water and natural flows, apportioning only the latter. Storage was "left for distribution in accordance with the contracts which govern it." 325 U.S. at 631. The storage water and natural flows have been segregated on a daily basis for administrative purposes since the Decree was entered in 1945.

assure that significant flows entered the reach from upstream sources. He therefore restricted upstream uses where there was a threat of further development. Over the period 1931-1940, which formed the basis of the Master's and the Court's determinations of sectional accretions between Whalen and Tri-State, the upstream inflow to reach four averaged 972,195 acre feet annually. Doherty Report at 67 (Table III). To meet the irrigation requirements, the Master compiled a table of the inflow at Whalen, the contribution of the Laramie, and the other accretions in the reach to arrive at an average annual supply — consisting of storage water and natural flow — of 1,058,645 acre feet.[8] *Id.* It was this average amount of water, minus its storage component, that Master Doherty recommended be apportioned between Wyoming and Nebraska in reach four.[9] *See id.*

---

[8]Table III was based on the Engineers' Stipulation and Wyoming Exhibit Nos. 148 and 173. The figures reflecting the contribution of the Laramie River during 1931-1940, as shown in column 2, Table III, were taken from Wyoming Exhibit No. 173. Wyoming described these inflows as the minimum amount of "usable accretions" that should be included in the apportionment of the natural flows in the Whalen/Tri-State reach. *See, e.g.*, Brief of Defendant, State of Wyoming (Jan. 29, 1945) at 41, 62. Wyoming Exhibit No. 170 showed that the average historical runoff of the Laramie at its mouth 1904-1940 was 132,000 acre feet. Wyoming's principal expert witness, Mr. E. K. Nelson, "reconstructed" the historical average to account for the additional development and depletion of Laramie waters as of 1938. *See* Wyoming Exhibit No. 173. Based on Wyoming Exhibit No. 173, Nelson testified that 85,000 acre feet annually (35,500 acre feet during the irrigation season) would be available for "future . . . downstream use." Brief of State of Wyoming, Defendant (Sept. 5, 1942) at 142. Accordingly, Wyoming's position before Master Doherty was that her "[c]onclusion with reference to the Laramie river is that the decree [in *Wyoming v. Colorado*] should not be disturbed and that its future contribution to the North Platte supply will be as outlined by Nelson." *Id.*

[9]Nebraska initially sought an equitable apportionment extending to Grand Island, Nebraska. Ultimately, Nebraska withdrew its claim for direct diversions below Bridgeport based on the recognition that the return flows from the North Platte Project and the construction of Kingsley Dam would satisfy the downstream requirements. 325 U.S. at 607. Approximately 50% of the water diverted for irrigation is actually consumed by evapotranspiration. The remaining 50% returns

(cont'd.)

at 71 (Table IV) (segregating storage); 325 U.S. at 667 (Decree ¶ V).

During the proceedings before Master Doherty, Wyoming sought a "mass allocation" of the available supplies, *i.e.*, the allocation of a quantum of water to each state, to be distributed intrastate as each state saw fit. By the time the case came before the Court, Wyoming believed that the Master had made "an acceptable form of mass allocation" with respect to "all sections of the stream except the Whalen-Tri-State section and the Kendrick Project." Brief of Defendant, State of Wyoming (Jan. 29, 1945) at 36. Based on the total requirement of 1,027,000 acre feet in the Whalen to Tri-State reach, Wyoming sought a mass allocation of 790,000 acre feet annually to Nebraska and 237,000 acre feet to herself.[10] *Id.* at 37. Because of the significant shortages of natural flow in the Whalen to Tri-State reach, including upstream contributions, the Master determined that it would be most equitable to apportion the natural flow in this interstate reach of the river 75% to Nebraska and 25% to Wyoming.[11] Doherty Report at 67 (Table III), 71 (Table IV), 148-162. The apportionment recommended by Special Master Doherty was adopted by the Court. *See, e.g.*, 325 U.S. at 620-21, 626-27, 638-46. After considering each of the proposed alternatives, the Court held "that the flat percentage method recommended by the Special Master is the most equitable method of apportionment." *Id.* at 646.

---

to the regimen of the river by surface returns, ground water drains, and accretions through ground water percolation.

[10]Wyoming subtracted out of the total irrigation season requirements in the Whalen to Tri-State reach — 1,072,514 — 46,000 acre feet which the Master determined would be allocated to the Inland Lakes during the non-irrigation season in order to reduce the irrigation season demand in this reach.

[11]The Court denied Wyoming's request for a mass allocation in this reach because Wyoming did not convince the Court "that [she had] shown an adequate supply to justify the allocation she [sought]." 325 U.S. at 626. The Court also rejected the alternatives proposed by the other parties.

As noted above, the Special Master determined that the dependable accretions in the Whalen/Tri-State reach were 86,450 acre feet annually. Doherty Report at 67 (Table III). In making that determination, Master Doherty relied on Wyoming Exhibit Nos. 148 and 173. Wyoming, however, had made a mistake in Exhibit No. 148, inadvertently omitting the return flows from Spring Creek to the surface supply in the Whalen/Tri-State reach. The omission was corrected in Wyoming Exhibit No. 150, adding 2,855 acre feet annually to be apportioned in the pivotal reach. After being apprised of the omission by Wyoming, the Court adjusted Table III of Doherty's Report to account for the additional 2,855 acre feet that "should be taken into account in computing Nebraska's requirement of water from Wyoming." 325 U.S. at 648. To make this aspect of the apportionment explicit, the Court added the phrase "including the contribution of Spring Creek" to the apportionment in ¶ V of the natural flows in the Whalen/Tri-State reach, 75% to Nebraska and 25% to Wyoming.[12] *See* 325 U.S. 667 (Decree ¶ V).

Since the Decree was entered in 1945, the states of Wyoming and Nebraska and the Bureau of Reclamation have agreed on a daily computation of the natural flow available for allocation in the Whalen/Tri-State reach pursuant to the Decree. In the computation, the Wyoming "tributary flow" is the sum of all tributary flows to the North Platte from Whalen, Wyoming, to the state line, including the Laramie River. The Laramie River flows are measured near its mouth and tabulated on a daily basis. The annual contribution of the

---

[12]The Spring Creek returns of 2,855 acre feet, rounded to 2,900 acre feet, were added to the average of 63,220 acre feet, appearing in Table III at the bottom of column 3 (63,220 + 2,900 = 66,120). When added to the remaining accretions, including the Laramie inflows of 23,230 acre feet in the reach, the Spring Creek returns to the reach amounted to 3% of the apportioned accretions in the reach. The minimum Laramie inflows, which were correctly compiled in Wyoming Exhibit No. 173 and were incorporated in Table III of Doherty report, amounted to 26% of the apportioned accretions in the reach.

Laramie to the natural flow has ranged from 6% to 31%. The Laramie River flows have been included as the most significant part of the "total Wyoming tributary inflows" and have been subject to the 75%/25% apportionment in ¶ V of the Decree since 1945.

When the suit was reopened in 1986, Nebraska was concerned that Wyoming would deplete the flows of the Laramie River that had been apportioned in ¶ V. While Wyoming has taken the position that she is entitled to deplete the Laramie River in its entirety, Nebraska was specifically concerned with two projects, *viz.*, Grayrocks Reservoir and the Corn Creek Project.

Situated on the Laramie River below Wheatland Reservoir, Grayrocks Reservoir was designed to provide water for cooling a coal-fired electric power generating plant. Prior to its construction in the late 1970s, it was understood that the operation of the reservoir could reduce the flows of the North Platte River and interfere with the apportionment to the State of Nebraska. The State of Nebraska, joined by the National Wildlife Federation and others, filed suit under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988 & Supp. 1989), and the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988 & Supp. 1989), to ensure compliance with federal law and to protect the apportioned flows of the North Platte. The suit sought to enjoin the construction of Grayrocks because it would have adversely affected the critical habitat of whooping cranes downstream in Nebraska. *See Nebraska v. Rural Electrification Administration*, 12 E.R.C. 1156 (1978), *appeal dismissed*, 594 F.2d 870 (8th Cir. 1979). Enjoining the construction of Grayrocks would have protected critical wildlife habitat, hydropower production, irrigation, and recreational interests in Nebraska, as well as the apportionment in ¶ V during the irrigation season.

Nebraska prevailed in *Nebraska v. Rural Electrification Administration*, and the case was appealed to the Eighth Circuit. 594 F.2d 870 (8th Cir. 1979). The case was settled on appeal by the Agreement of Settlement and Compromise dated December 4, 1978 ("Settlement Agreement"). The Settlement Agreement restricted the use of Lara-

mie River water, created a trust fund to enhance the whooping cranes' critical habitat, and provided for minimum instream flows in the Laramie. Additionally, Nebraska's apportionment was protected. The State of Wyoming, however, was not a party to the litigation, the Settlement Agreement, or the stipulation of February 20, 1979, which resulted in the Eighth Circuit's order dismissing the case and vacating the district court's judgment enjoining construction of the dam. Accordingly, Wyoming has refused to honor the Settlement Agreement or the stipulation.

In the Settlement Agreement, Nebraska agreed to the construction of Grayrocks Reservoir in exchange for certain water consumption limitations by the Grayrocks power plant, guaranteed releases during both the irrigation and the non-irrigation seasons, and an additional supply of electricity for use in Nebraska. Since the entry of the Settlement Agreement, however, Wyoming has threatened to administer the Laramie River contrary to the operation of Grayrocks, as set forth in the Settlement Agreement, to allow further development to dewater the Laramie at or near its confluence with the North Platte River.

In order to facilitate the administration of the North Platte Decree, annual "Natural Flow" meetings are attended by the representatives of states of Wyoming and Nebraska and the Bureau of Reclamation. Since the meeting on May 14, 1979, the State of Wyoming has made it clear that because she was not a party to the Grayrocks Settlement Agreement any water released from Grayrocks Reservoir to meet the terms of the agreement would be subject to diversion by water users in Wyoming. In other words, the State of Wyoming threatens not to preserve the tributary inflows from the Laramie that were apportioned in ¶ V of the Decree, which Nebraska sought to preserve in *Nebraska v. Rural Electrification Administration.* On the contrary, Wyoming has asserted the right to completely dewater the Laramie at its mouth.

Another threat which precipitated reopening the suit in 1986 was the threat to authorize diversions from the Laramie River for the

proposed Corn Creek Project. The Corn Creek Irrigation District is situated in Goshen County, Wyoming and extends south of the confluence of the Laramie and North Platte rivers. The District, which has not developed its irrigation facilities, encompasses approximately 70,000 acres. On July 24, 1974, the District's predecessor contracted with the Basin Electric Power Cooperative on behalf of the Missouri Basin Power Project for the future delivery of 22,500 acre feet annually from Grayrocks Reservoir. Additional water supplies needed by the District would come from new depletions of the natural flows of the Laramie and North Platte rivers. The proposed project consists of a surface water diversion system, a large capacity pump station at the confluence of the Laramie and North Platte rivers, a storage reservoir, and a pipeline distribution system. By admission of the State of Wyoming at oral argument on March 9, 1992, Corn Creek "is an active vital project" and thus remains an imminent threat to Nebraska. Transcript of Hearing at 72 (Docket No. 435).

Aside from the facts bearing on the threat to the apportionment of the Laramie River inflows to the North Platte River in ¶ V of the Decree, the proposed construction of tributary storage in Wyoming threatens to undermine the Decree's apportionment. When the suit was reopened in 1986, Nebraska was concerned with the proposed Deer Creek Project near Casper, Wyoming. The proposed project raises an issue left unresolved by the Court in 1945. In ¶ XIII(c) of the Decree, the Court expressly retained jurisdiction to address "[t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. . .."[13] 325 U.S. at 672. Deer Creek is the second

---

[13]At the close of the evidence, the United States insisted that regulation of the tributaries between Pathfinder and Guernsey reservoirs was essential because the possibility of future storage on the tributaries could deplete tributary inflows to the

(cont'd.)

tributary east of Casper in the section between Pathfinder and Guernsey. The proposed Deer Creek Project is a large scale multi-purpose project for municipal, industrial, agricultural, recreational, and hydropower uses. An assessment of the hydrological effects of the Project falls under ¶ XIII(c).

In addition to ¶ XIII(c), the threatened construction of the Deer Creek Project has implicated ¶ X of the Decree. Paragraph X is a single sentence providing that "[t]his decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption." 325 U.S. at 670. The purpose of ¶ X was to assure that the apportionment provisions for irrigation in the Decree did not adversely affect or restrict municipal uses pursuant to Colorado or Wyoming law.

SUMMARY OF ARGUMENT

A. Laramie River Inflows

While the Special Master has recognized that Nebraska has an entitlement to the continued inflows of the Laramie River to the North Platte River, he stopped short of concluding that the inflows were apportioned to Nebraska in ¶ V of the Decree. Failing to address the evidence which demonstrates that the inflows were

---

North Platte available for storage in Guernsey Reservoir and the Inland Lakes. 325 U.S. at 624-625. The only existing tributary storage was LaPrele Reservoir with a capacity of 20,000 acre feet, the effects of which had been unaddressed. Because Master Doherty had concluded that the evidence showed no need to limit tributary storage in 1945, the Court found "no evidence of any present threat to the water supply from this source." *Id.* at 625. Accordingly, the Court concluded that "[i]f such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction." *Id.*

actually apportioned, the Master mischaracterizes Nebraska's position as an assertion of an "implicit" apportionment.

Contrary to Wyoming's current argument that every drop of the Laramie River was apportioned in *Wyoming v. Colorado*, the Court allocated the supply between Colorado and Wyoming in that case down to the diversion for the Wheatland Project in Wyoming. The water below Wheatland was not at issue in *Wyoming v. Colorado*, including water passing the Wheatland diversion, return flows below the project, and accretions to the river on the mainstem and from tributaries between Wheatland and the mouth of the Laramie. In *Nebraska v. Wyoming*, Wyoming acknowledged that the Court did not consider the supply below Wheatland in *Wyoming v. Colorado*. Wyoming also analyzed the recorded Laramie inflows to the North Platte River and urged that the Court treat the inflows as a continuing source of supply to satisfy irrigation demands in Nebraska.

A review of Master Doherty's report facilitates an understanding of the Court's treatment of the Laramie River in *Nebraska v. Wyoming*. Doherty noted that the bulk of the irrigation demand along the North Platte is in the Whalen/Tri-State reach of the river, one of four reaches analyzed in relation to one another in an attempt to satisfy all of the irrigation demands. After preserving the inflows to successive downstream reaches by restricting uses in the upstream reaches or concluding that there was no threat of future development in the upstream reaches, Master Doherty added the inflows at Whalen to the net accretions in the Whalen/Tri-State reach to arrive at an apportionment fund. Rejecting the apportionment theories advanced by each of the parties because of the shortage of supply to demand in the lower reach, Master Doherty recommended that the natural flow in the reach be apportioned 75% to Nebraska and 25% to Wyoming. The Laramie inflows were an express and integral part of the apportionment fund set forth by Master Doherty in column 2 of Table III of his report and apportioned 75%/25% by the Court.

In compiling the apportionment fund in Table III for the water-short reach, Master Doherty relied on Wyoming exhibits, one of

which reproduced the Laramie River inflows to the reach and one of which calculated the net accretions in the reach. On exceptions to the Court in 1945, Wyoming alerted the Court to an error in the latter exhibit, *viz.*, the omission of the contribution of Spring Creek to the apportionment fund which Master Doherty recommended be distributed 75%/25% in ¶ V of the Decree. As a result, the Court added the phrase "including the contribution of Spring Creek" to ¶ V of the Decree. 325 U.S. at 667. The Spring Creek contribution amounted to 3% of the apportioned accretions in the reach. The Laramie inflows, which had not been omitted from the apportionment fund in Table III, amounted to 26% of the apportioned accretions. The fact that the Court bent over backwards to expressly include 3% of the apportioned supply underscores the prior inclusion of 26% of the apportioned supply.

The record before Special Master Olpin raises no genuine issue of material fact. The apportionment of the Laramie inflows is not debatable. Accordingly, the Court should modify the Master's recommendations to reflect that 75% of the Laramie inflows was expressly apportioned to Nebraska in 1945.

B. Paragraphs X and XIII(c)

Paragraph X of the Decree states:

> This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado and Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

325 U.S. at 670. Stated simply, ¶ X provides that "[t]his decree shall not affect or restrict municipal uses."

Instead of giving ¶ X its plain and unambiguous meaning, Master Olpin construes ¶ X as an affirmative grant to municipalities of an unqualified right to deplete the natural flows of the North Platte. Master Olpin changes the words "[t]his decree shall not affect or restrict municipal uses" to mean "municipal uses can affect or

restrict the apportionment set forth in the provisions of the Decree." By changing the syntax of the sentence, Master Olpin inexplicably inverts the subject and object of ¶ X, replacing "decree" with "municipal uses," and simultaneously changes the predicate of the sentence from a negative term ("shall not affect or restrict") to a positive term ("can affect or restrict"). The Master's reading of ¶ X is exactly the same as equating "dogs cannot hurt cats" with "cats can hurt dogs." To arrive at his "plain meaning," Master Olpin makes two violent changes in the syntax of the sentence, creating a "municipal exemption."

Master Olpin states that "[t]here is little to be found in the Record of the original proceedings on the origin or nature and scope of the paragraph X municipal exemption." Second Interim Report at 78 (Docket No. 463). The record shows, however, that all of the parties, Master Doherty, and the Court intended ¶ X to prevent the provisions applicable to the irrigation apportionment in the Decree from interfering with municipal diversions and uses. *See* Doherty Report at 180.

As a result of his incorrect reading of ¶ X, Master Olpin reads ¶ XIII(c), in which the Court retained jurisdiction to address an unresolved issue, as a substantive provision of the Decree subordinated by the "municipal exemption." A provision in a decree which mandates that the decree shall not affect or restrict something, *i.e.*, that the operative provisions of a decree shall in no way define, limit, constrain, or diminish something, refers only to those other provisions which have decided something and have the power to define, limit, constrain, or diminish something else. Such a provision does not refer to a provision which retains jurisdiction to determine something in the future. In reaching the conclusion that ¶ X both qualifies and vitiates the Court's retention of jurisdiction in ¶ XIII, Master Olpin has not only divined the outcome of a potential future exercise of the Court's jurisdiction, but has also tacitly construed ¶ XIII(c) as a provision which has decided something in a way which

has the power to define, limit, constrain, or diminish something else. Paragraph XIII(c), however, has decided nothing.

Finally, Master Olpin's revision of ¶ X creates numerous problems which he describes as "vexing questions," "complex issues," and "mysteries," including conflicts which result from his construction of ¶ X and the provisions of ¶¶ XII(a) and XIII(f). He also discerns contradictions between the 'strenuous battle over 2,[9]00 acre feet' in 1945 and his view that ¶ X gives municipalities the unqualified right to deplete the apportioned flows. The proposed Deer Creek Project, for example, would impound 9,600 acre feet of apportioned natural flows on an average annual basis. The Master does not understand, however, that the contradictions and other problems he discerns are of his own making. *i.e.*, that they result from his distorted reading of ¶ X.

ARGUMENT

POINT I

THE COURT DID NOT EXPRESSLY ADD 3% OF THE APPORTIONED ACCRETIONS WHICH HAD BEEN INADVERTENTLY OMITTED IN THE WHALEN/TRI-STATE REACH WITHOUT NECESSARILY ACKNOWLEDGING THE PRIOR INCLUSION OF 26% OF THE APPORTIONED ACCRETIONS

In her motion for partial summary judgment, Nebraska sought a declaration that the inflows of the Laramie River to the North Platte River were apportioned 75% to Nebraska and 25% to Wyoming in ¶ V of the Decree. *See* Nebraska's Motion for Partial Summary Judgment (Docket No. 296). In his Second Interim Report, Special Master Olpin concluded that "[n]othing in the Doherty Report [or] the Court's Opinion reflects any consideration, much less final resolution, of [the disposition of the Laramie inflows]." Second Interim Report at 47 (Docket No. 463). In the context of summary judgment, the Master's conclusion is tantamount to a finding that Nebraska has not

demonstrated the absence of a genuine issue of material fact, *i.e.*, has not established the underlying factual certainty requisite to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Accordingly, the Master further concluded that "Nebraska deduces that the Special Master and the Court *implicitly* apportioned to her the . . . Laramie flows." Second Interim Report at 53 (emphasis added) (Docket No. 463). Based on his conclusions, Master Olpin has declined to recognize that Nebraska's admitted entitlement to Laramie River inflows was part of the express apportionment in ¶ V.

Both of the Special Master's conclusions are flatly wrong. First, not only Master Doherty's report and the Court's opinion in *Nebraska v. Wyoming*, but also the express language of ¶ V of the Decree, reflect the consideration and resolution of the disposition of the Laramie inflows.[14] *See* 325 U.S. at 667. Second, Nebraska has not deduced an implicit apportionment. The apportionment of the Laramie inflows in ¶ V is express and unqualified. The error in Master Olpin's conclusions is explained by the way in which Master Doherty and the Court in 1945 arrived at "the total sectional natural flow fund," which was apportioned 75%/25% in ¶ V of the Decree, and how the phrase "including the contribution of Spring Creek" in ¶ V substantiates the express inclusion of the Laramie inflows in the apportioned fund of natural flow.

A. The Whalen/Tri-State Apportionment Fund

Special Master Olpin describes the cross-motions for summary judgment with respect to whether 75% of the inflows of the Laramie River was apportioned to Nebraska in ¶ V of the Decree as having their genesis in the "seeming contradiction" between the mathemati-

---

[14]Master Olpin does not recite the evidence which bears on the apportionment of the Laramie inflows in either his First Interim Report or his Second Interim Report.

cal inclusion of those flows in the apportionment and ¶ XII(d) of the Decree, which provides that the Decree "shall not affect . . . "[t]he apportionment heretofore made [of the Laramie River in *Wyoming v. Colorado*, 259 U.S. 419 (1922)] . . . ." Second Interim Report at 44, 41-47 (Docket No. 463); 325 U.S. at 671. This "seeming contradiction" allows Wyoming to press its claim that "every drop of the Laramie" was fully apportioned in *Wyoming v. Colorado* in 1922 while Nebraska asserts the fact that the inflows of the Laramie were affirmatively apportioned as part of the natural flows described in ¶ V of the Decree in *Nebraska v. Wyoming*. *See* Second Interim Report at 44 n.62 (Docket No. 463). Once it is discerned, however, that the "seeming contradiction" is not a contradiction, it becomes equally clear that Wyoming's interpretation is untenable and that the apportionment of the Laramie inflows in ¶ V is unquestionable. Rather than being contradictory, the proposition that the Laramie Decree was "left undisturbed" and the fact that the Laramie inflows to the North Platte were apportioned to Nebraska in 1945 are entirely complementary.

In support of her view that every drop of the Laramie River was apportioned between Wyoming and Colorado in *Wyoming v. Colorado*, Wyoming has argued that the North Platte Decree expressly states that it shall not affect "[t]he apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River. . .." 325 U.S. at 671 (Decree ¶ XII(d)). The Court's disposition of the Laramie inflows to the North Platte in ¶ V, however, does not contravene this provision of the Decree.

In *Wyoming v. Colorado*, Wyoming sought to enjoin Colorado's proposed diversions of water from the Laramie for future use. Wyoming introduced evidence to preserve a level of appropriation which was based on rights with priorities senior to proposed Colorado diversions. The Court quantified existing and proposed uses in both states and determined the available supply, concluding that the "entire supply available for the proposed Colorado appropriation and the Wyoming appropriations *down to and including the diversions for*

the Wheatland District is 288,000 acre-feet."[15] 259 U.S. at 488 (emphasis added). The Court made no mention of the status of the Laramie waters between Wheatland and the confluence of the Laramie with the North Platte. The opinion did not address water passing the Wheatland diversion, the status of return flows below Wheatland, or accretions to the river on the mainstem and from tributaries between Wheatland and the mouth of the Laramie. The water below Wheatland was not at issue in *Wyoming v. Colorado.*[16]

After quantifying the available supply in *Wyoming v. Colorado,* the Court determined how to apportion it. The evidence shows that the amount allocated to Wyoming was based on defined irrigation requirements associated with particular lands. The Court declared:

> The evidence shows that the Wyoming appropriations having priorities senior to the one in Colorado, and which are dependent on the available supply before named, cover *181,500 acres of land and that the amount of water appropriated and reasonably required for the irrigation of these lands is 272,500 acre-feet. . . .*

* * *

---

[15]The Wheatland Project has direct flow and storage rights with a priority of 1883 to irrigate 60,000 acres. It is located approximately two-thirds down river from the headwaters of the Laramie, about 50 miles upstream from the confluence with the North Platte. The ideal diversion is 135,000 acre feet, with a return flow of 56% or 75,600 acre feet. Major tributaries to the Laramie enter the river below the project lands.

[16]In her brief before Special Master Doherty, Wyoming prefaced her recommended apportionment to Nebraska of 35,500 acre feet of Laramie inflows during the irrigation season by stating that "[t]he Court did not consider supply or use below the Wheatland project [in *Wyoming v. Colorado*]." *See* Brief of State of Wyoming, Defendant (Sept. 5, 1942) at 138, Appendix at A-19. Master Doherty noted that Colorado, Wyoming, and the United States were of the view "that the Laramie is removed from the present case by the decree in *Wyoming v. Colorado,* except for such contribution as the Laramie may make to the North Platte after any use by Colorado and Wyoming permitted under the terms of that decree." Doherty Report at 270-71. Master Doherty ultimately adopted a figure of 23,230 acre feet — considerably less than proposed by Wyoming.

> As the available supply is 288,000 acre-feet and the amount covered by senior appropriations in Wyoming is 272,500 acre-feet, there remain 15,500 acre-feet which are subject to this junior appropriation in Colorado.

259 U.S. at 495-96 (emphasis added). The Court concluded its opinion by the issuance of an injunctive decree which limited the amount of water Colorado could divert from the Laramie for use in the Laramie-Poudre Project to 15,500 acre feet.[17] *Id.* at 496.

The Laramie Decree makes no mention whatsoever of Wyoming's asserted entitlement to "all the remaining" waters of the Laramie. The holding in *Wyoming v. Colorado* was confined to the evidence, which only embraced appropriations "down to and including diversions for the Wheatland District." *Id.* at 488. Accordingly, the preservation of the Laramie Decree in *Nebraska v. Wyoming* does not conflict with Master Doherty's recommendation and the Court's apportionment of the Laramie River inflows in the North Platte Decree.

In *Nebraska v. Wyoming* the depletions of and accretions to the natural flows of the North Platte River and its tributaries were analyzed by all of the parties, Master Doherty, and the Court by reaches of the river. In the upper reaches, the goal was to meet the existing demands in each reach without depleting the supplies entering successive reaches of the river. The Whalen/Tri-State reach differed from the upstream reaches because it was the last and most important reach, containing the bulk of the irrigation demands along the entire river and the least accretions of natural flows. The concern

---

[17]Master Olpin has noted Wyoming's argument that the Court's adoption of the "dependable supply" formula in *Wyoming v. Colorado* recognized the over-appropriated condition of the Laramie River, thus leaving no water for Nebraska. *See* Second Interim Report at 45 (Docket No. 463). The over-appropriated condition of the Laramie, however, does not take away the return flows and accretions below Wheatland. Nor does it render void Wyoming's analysis in *Nebraska v. Wyoming* of the dependable inflows to the North Platte.

was to get enough water into the reach to meet the irrigation needs. While the object in the upper reaches had been to ensure outflows to meet downstream irrigation demands, the apportionment concept in the Whalen/Tri-State reach was to divert and use the entire supply entering the reach within its boundaries, allowing no more than nominal flows or necessary operational waste to continue downstream below Tri-State dam.

To the extent necessary, the Special Master restricted upstream activities to ensure sufficient inflows to the lower sections of the river. Doherty stated, however, that any regulation of the tributary diversions in the Pathfinder to Whalen apportionment would be of no real benefit to anyone. He felt that given the existing conditions, which included the physical nature of the flows in the area, economic considerations, and the seniority of irrigation rights, there was little possibility for future projects of any nature in that section.[18] Doherty Report at 147.

---

[18]Wyoming has argued that because the Decree imposed restrictions on other sections of the North Platte but placed no express limitations on Wyoming's use of the Laramie, the Court implicitly assigned to Wyoming an entitlement to all Laramie flows not previously allocated to Colorado. Wyoming ignores the actual treatment of upstream tributaries by the parties and in the Decree.

In the Pathfinder to Whalen reach, Special Master Doherty and the Court declined to apply restrictions on storage to the tributaries. Doherty Report at 145-46; 325 U.S. at 624-625. In response to the United States' concern that tributary projects similar to the LaPrele Project could deplete the supply for Guernsey and Inland Lakes reservoirs, the Court held that "[i]f such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction." 325 U.S. at 625; *see also id.* at 671-72 (Decree ¶ XIII(c)).

Similarly, the Court determined that nothing more than a limitation on irrigated acreage was necessary for the mainstem above Guernsey and the tributaries above Pathfinder, citing the Special Master's conclusions that the practical difficulties of applying restrictions to individual irrigators on the tributaries above Pathfinder to reduce the amount of water used outweighed any slight benefit to downstream reaches. *Id.* at 624; *see* Doherty Report at 134-135.

Addressing the lower section of the river between Whalen and Tri-State Dam, the Master noted that he was dealing with a much more complicated reach: "[T]his section presents a special situation calling for special consideration and treatment." *Id.* at 148. Doherty stated that it was necessary to determine the available water supply "as accurately as possible for two purposes: first, to learn whether it is sufficient or insufficient to meet the requirements; second, to determine what volume of water there is for apportionment if it is to be apportioned." *Id.* at 61. Wyoming had argued that there was no shortage and therefore no need of apportionment. If it was to be apportioned, Wyoming urged that natural flow and storage be pooled and treated as a common fund. *Id.* After examining the evidence of supply based on both the long term mean and the drought period, Doherty emphasized that the supply could meet the demand "only if properly regulated and diversions are held to reasonable requirements." *Id.* at 68.

In Table III of his report, Doherty set forth the supply or volume of water which Wyoming, the United States, and Master Doherty thought was reliably available in the Whalen to Tri-State reach during the irrigation season. *Id.* at 67. The Laramie inflows were based on Wyoming's testimony. Their contribution, according to E. K. Nelson, Wyoming's principal expert, was conservatively 85,000 acre feet annually, 35,500 of which was available during the irrigation

---

Finally, it never occurred to Master Doherty to restrict development on the Laramie because Wyoming had routed the contemporaneous development through the mean supply, 1904-1940, and had affirmatively urged the apportionment of the remaining inflows to the North Platte to Nebraska. The notion that the Court excluded the Laramie contributions from the Decree by imposing general limitations on some, though not all, of the upstream tributaries, but not on the Laramie River, misconstrues the Master's and the Court's efforts to simplify the regulation and apportionment of the waters in the various reaches of the North Platte.

season.[19] *See* Appendix at A-25. The total supply was reached by combining the supply above Whalen, as determined and stipulated by the parties' engineers, the Laramie River inflow, based on the "reconstructed" flows in Wyoming Exhibit No. 173 between 1904 and 1930 and the actual recorded flows during the decade 1931-1940, and the net accretions between Whalen and the state line, based on Wyoming's Exhibit No. 148, as modified by a United States exhibit which excluded unusable accretions.[20]

---

[19]Master Olpin comments that "Nebraska does not address Master Doherty's failure to include the Laramie in the portions of his Report describing drainage and irrigation in the North Platte Basin." Second Interim Report at 46 (Docket No. 463). In this regard, Master Olpin overlooks the significance of the acceptance of the Laramie River Decree, which was "left undisturbed." Instead of revisiting the irrigation demands for the entire Laramie drainage, Master Doherty — as well as Wyoming — picked up where the Laramie Decree left off, *i.e.*, below Wheatland. The return flows and accretions below Wheatland were included in the Whalen/Tri-State "apportionment fund" at the urging of Wyoming. Summing up her own position, Wyoming stated: "[Our] [c]onclusion with reference to the Laramie river is that the decree should not be disturbed and that its future contribution to the North Platte supply will be as outlined by Nelson." Brief of State of Wyoming, Defendant (Sept. 5, 1942) at 142, Appendix at A-23; *see also* Appendix at A-24-32.

[20]Wyoming "reconstructed" the long-term mean, 1904-1940, by routing the development and new storage capacity as of 1938 through the mean flows. *Compare* Wyoming Exhibit No. 170 with Wyoming Exhibit No. 173; Appendix at A-35-36, A-37-39. Advocating that "the existing use of the Laramie within Wyoming should be left undisturbed," Wyoming thus reduced the recorded mean of 132,000 acre feet to 35,500 acre feet during the irrigation season. Appendix at A-23. The figure was reduced to 23,230 — the actual mean — during 1931-1940, because the use of 35,500 during that period would have inflated the actual supply. *See* testimony of E. K. Nelson, Record at 27554-27560, Appendix at A-24-32.

The accretions to the river of Spring Creek, amounting to 3% of the apportioned accretions in the reach, were inadvertently omitted from Wyoming Exhibit No. 148, Appendix at A-33. *See infra* at 27-32.

Table III shows the following flows:

ANALYSIS, REQUIREMENT, AND SUPPLY 1931-1940
WHALEN/TRI-STATE DAM SECTION

Year	Supply Above Whalen (1)	Laramie River Inflow (2)	Whalen State Line Usable Net Accretions (3)	Total Supply	Requirement	Excess or Deficiency
1931	1,074,600	16,700	49,000	1,140,300	1,027,000	113,300
1932	1,315,000	19,300	45,200	1,379,500	1,027,000	352,500
1933	1,379,000	35,700	77,400	1,492,100	1,027,000	465,100
1934	452,900	2,700	56,000	511,600	1,027,000	-515,400
1935	771,300	48,800	49,900	870,000	1,027,000	-157,000
1936	963,880	17,300	51,300	1,032,480	1,027,000	5,480
1937	1,153,750	37,800	60,800	1,252,350	1,027,000	225,350
1938	1,040,550	33,800	95,800	1,170,150	1,027,000	143,150
1939	994,150	9,300	89,600	1,093,050	1,027,000	66,050
1940	576,820	10,900	57,200	644,920	1,027,000	-382,080
Average	972,195	23,230	63,220	1,058,645	1,027,000	31,645

(1) Engineers Stipulation, p. 13.

(2) W-173.

(3) Total net sectional accretions from W-148, from which are deducted unusable accretions in the section from U.S.-271, Column 48.

Doherty Report at 67.

The tabulation reflected the seasonal supply from all sources, including storage releases. *Id.* In recommending the 75%/25% apportionment which was adopted by the Court in ¶ V of the Decree, however, Master Doherty recommended the apportionment only of natural flow. The segregation of storage water and natural flow appears in Table IV of his report. *Ibid.* at 71. Taking the inflows from the upper reach, Master Doherty added the "[u]sable net accretions between [Whalen] and [Tri-State] . . . to the natural flow found to have passed [Whalen] to make up *the total sectional natural flow fund.*" *Id.* at 70 (emphasis added).[21]

[21]There is no hydrologic difference between "Guernsey Reservoir" and "Whalen." The designations have been used interchangeably by Master Doherty, Master Olpin, and the Court.

In its opinion, the Court referred to the deficiencies in the natural flow fund in the Whalen/Tri-State reach using Master Doherty's calculations from Table III and Table IV, thus including the contributions from the Laramie River. In reciting these variations in supply, the Court expressly acknowledged that Master Doherty defined "natural flow" to mean "all water in the stream except that which comes from storage water releases." 325 U.S. at 604-605. This is the "fund" of natural flow that the Court apportioned 75% to Nebraska and 25% to Wyoming.[22] *See* 325 U.S. at 642.

B. Spring Creek

With the segregation of natural flow and storage water, Table III of Master Doherty's report sets forth the apportionment fund in the Whalen/Tri-State reach, expressly including the Laramie inflows in column 2. Doherty Report at 67. The Court affirmed the amount of supply for the section, including the Laramie contribution. 325 U.S. at 604 n.9, 605. While Special Master Olpin has repeatedly recognized that Nebraska was given an entitlement to the Laramie River inflows, he has declined to characterize the entitlement as part of the express apportionment in [illegible] V.[23] Master Olpin was apprehensive about recommending what he mischaracterized as an "implied apportionment" because he did not appreciate the evidence which demonstrates that the apportionment was express.

---

[22]While Master Doherty recommended a 75%/25% apportionment of the sectional natural flow, Wyoming sought a "mass allocation" based on the sectional requirements. 325 U.S. at 638, 642. The Court held that "the inadequacy of the supply is too clear to permit adoption of Wyoming's formula." *Id.* at 642. Nebraska wanted to extend priority of appropriation across the state line. The United States pressed alternative proposals, *i.e.*, a strict priority apportionment and an allocation on a priority basis to each of seven blocks. *Id.* at 642-43. Colorado simply wanted the case dismissed. Contrary to the proposals of each of the parties, the Court adopted Master Doherty's recommendation.

[23]Second Interim Report at 17, 39-40, 43-44, 48, 51, 55, 58-59, 60, 64 (Docket No. 463).

The Court rewrote ¶ V to expressly add 2,855 acre feet in the accounting of net accretions between Whalen and Tri-State, which already expressly included the flows of the Laramie, *viz.*, 23,230 acre feet. Doherty Report at 67; 325 U.S. at 648. The express recognition of the contribution of Spring Creek in ¶ V of the Decree confirms the apportionment of the inflows of the Laramie River. Spring Creek is a north-bank return flow stream which flows in Wyoming, crosses the state line into Nebraska, and enters the North Platte River in Nebraska above Tri-State Dam. Its inflows to the North Platte average 2,855 acre feet during the irrigation season. The Laramie River is a south-bank tributary of the North Platte which has its confluence in Wyoming. Its irrigation season inflows average *eight times* the amount of Spring Creek's.

Paragraph V of the 1945 Decree states:

> The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, **including the contribution of Spring Creek**, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five percent to Nebraska . . ..

325 U.S. at 667 (emphasis added). Immediately upon reading ¶ V, a question arises with respect to the express inclusion of Spring Creek's contribution to the 75%/25% apportionment in the Whalen to Tri-State reach. A mistake in Wyoming Exhibit No. 148, upon which column 3 of Table III was based, provides the answer.

The addition of the Spring Creek language arose out of the resulting omission in Master Doherty's calculation of the total amount of return flows contributing to the supply in the Whalen/Tri-State reach, *i.e.*, the Whalen/State Line Usable Net Accretions in column 3 of Table III of his report. *Ibid.* at 67. Because return flows from lands served by the Interstate Canal, are collected in drains and channels and physically return to the North Platte above Tri-State Dam, they were included in Master Doherty's calculation in Table

III, column 3, of Whalen/Tri-State waters, which he apportioned 75%/25%. His calculations were based on Wyoming Exhibit Nos. 86-95 and 148.[24] In Wyoming Exhibit No. 150, however, Wyoming determined that there was an additional contribution of 2,855 acre feet annually from Spring Creek, a "return flow stream" which collects returns from lands served by the Interstate Canal and enters the North Platte just above Tri-State Dam.

A footnote in Wyoming Exhibit No. 150 reads as follows:

> Due to incomplete record this Return Flow stream [Spring Creek], entering Nebraska from Wyoming a short distance north of the main gaging station on the North Platte River, was omitted from Wyoming Exs. 86 to 95 and from later exhibits [Wyoming Exhibit No. 148, in particular]. This run-off enters the river above the Tri-State Canal head gate. The amount of run-off is to be added to Return Flow between Whalen and the Nebraska Line. In the Return Flow between Nebr. Line and Bridgeport the amount of water would show up as a channel accretion in the flows in the exhibits and is not to be added thereto. The amount of run-off should also be added as the inflow from Wyoming to Nebraska at the State Line. It has not been added in the Exhibits.

See Appendix at A-34.

---

[24]Wyoming Exhibit Nos. 86-95 consist of 10 four-page summaries of the "stream flows and canal diversions" between Whalen and the state line for the period 1929-1939. The tributaries included for each year are the Laramie River, Lingle Power Return Less Laramie River Diversion, and Rawhide Creek. The "return flows" listed are Cherry Creek and Katzer Drain. Spring Creek was omitted. The "canal wastes" consist of various creeks, draws, or drains, also delivering return flow.

In its brief in support of its exceptions to Doherty's Report, Wyoming pointed out:

> One source of additional supply above the Whalen-Tri-State Dam section has not heretofore been considered, nor [is it] mentioned in the Master's Report. Spring Creek, a tributary of the North Platte, enters the stream below the Wyoming-Nebraska state line and above the Tri-State dam. . . . From [Wyoming Exhibit No. 150] it appears that the average May-September contribution of this stream was 2,855 acre feet. A number of unusually dry years are included in this period and we think it safe to use a round figure value of 2,900 acre feet. Taking this supply into account, together with the accretions between Alcova and the state line, there is a total of 230,350 acre feet which, for conveniences, we will assign as 230,000. Therefore, of the 1,027,000 acre feet required in the May-September period in the Whalen-Tri-State Dam section, 230,000 is available from sources below Alcova. Consequently, under average conditions prevailing in the 1904 to 1940 period, excepting only that we have used for accretions below Whalen and contribution of the Laramie River drought decade values of 1931 to 1940 as taken from Table III, page 67 of the Master's Report, 230,000 acre feet may be supplied below Alcova, leaving the required release at Alcova [of] 797,000 acre feet.

Brief of Defendant, State of Wyoming (Jan. 29, 1945) at 62-63, Appendix at A-41-42.

In its decision, the Supreme Court agreed with Wyoming, noting that the Master had failed to account for the accretions from Spring Creek, and concluding that "this accretion should be taken into account in computing Nebraska's requirement of water from Wyoming." 325 U.S. at 648. Accordingly, the language "including the contribution of Spring Creek" was added to ¶ V of the Decree. The Spring Creek addition was an amount above the net accretions shown in Table III. The Court would not have expressly included the Spring

Creek inflows (3% of the supply), which Doherty inadvertently left out because of an omission in Wyoming Exhibit No. 148, and have simultaneously excluded the Laramie (26% of the supply), which Doherty had expressly included. In other words, the fact that the Court bent over backwards to expressly include 3% of the apportioned supply proves that the Court necessarily recognized the prior inclusion of the Laramie inflows, *i.e.*, 26% of the apportioned supply.

Master Olpin's implied exclusion of the Laramie from the ¶ V apportionment contradicts the purpose of the express inclusion of Spring Creek. While ¶ V does not say, "including the inflows of the Laramie," to have done so would have been redundant of their express inclusion in Table III and would have required the listing of all other tributaries in the section as well. Additionally, the Court did not expressly mention the Laramie River in ¶ V for the simple reason that Master Doherty did not omit the Laramie inflows as he had done with respect to the Spring Creek inflows.

The Court's inclusion of the comparatively insignificant Spring Creek inflows in order to ensure that all sources of supply were included in the apportionment fund in the Whalen/Tri-State reach, makes it patently clear that the more important Laramie inflows had been previously included.[25] Ironically, Master Olpin's mischaracterization of Nebraska's position as an assertion of an "implied apportionment" results from his mistaken inference that the Laramie inflows were not apportioned because the phrase "including the

---

[25]If Master Doherty did not recommend the apportionment of the Laramie inflows and the Court did not apportion those flows, ¶ V would have read:

> The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, but excluding the contribution of the Laramie River, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five percent to Wyoming and seventy-five percent to Nebraska . . ..

The phrase "excluding the contribution of the Laramie River" was obviously not added because the Court had no intention of gutting the apportionment.

contribution of the Laramie River" was not added to ¶ V of the Decree. The problem lies in Master Olpin's failure to recognize that the Laramie River had already been accounted within the apportioned natural flow fund before ¶ V was amended.

Nebraska has fully satisfied her burden for obtaining summary judgement. There are no outstanding factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The record unequivocally demonstrates that 75% of the flows of the Laramie was expressly apportioned to Nebraska.

POINT II

THE PLAIN MEANING OF ¶ X OF THE DECREE CANNOT BE GLEANED FROM A READING WHICH INVERTS THE SUBJECT AND OBJECT OF THE SENTENCE AND UPENDS ITS SYNTAX, RESULTING IN THE VITIATION OF THE COURT'S RETENTION OF JURISDICTION IN ¶ XIII(C)

Nebraska takes exception to the Special Master's conclusion that ¶ X of the Decree provides a "municipal exemption" which gives municipal water users a right to deplete the apportionment of irrigation season flows of the North Platte River and to his related conclusion that the Court cannot exercise its retained jurisdiction pursuant to ¶ XIII(c) to address the effect of "the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . .." 325 U.S. at 672; *see* Second Interim Report at 77-83 (Docket No. 463). Both exceptions relate to Master Olpin's consideration of the proposed Deer Creek Project in Wyoming.

Deer Creek is a tributary "entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir," approximately 21

miles downstream from the City of Casper. 325 U.S. at 672. The proposed Deer Creek Project consists of a 66,000 acre foot reservoir to be built on Deer Creek, designed to capture the entire tributary inflow from Deer Creek above the reservoir in most years. The Project is planned and permitted by state and federal agencies as a multi-purpose project for "municipal, irrigation, industrial, fish and wildlife, recreation, flood control, and possibly hydropower production." *See* Nebraska's Response to Wyoming's Motion for Summary Judgment (Aug. 22, 1988) at 48-49 (Docket No. 81). With the exception of the relatively small amount of water consumed historically by irrigation, all of the Deer Creek inflows reaching the North Platte are apportioned between Nebraska and Wyoming pursuant to the Decree.[26]

On September 11, 1987, Wyoming moved the Special Master for summary judgment, seeking a declaration that "[t]he Decree affirmatively exempts ordinary and usual municipal uses from any restriction." Motion of the State of Wyoming for Summary Judgment at 5 (Docket No. 23). The object of the motion was to facilitate the construction of the proposed Deer Creek Project without having to address the adverse impacts of the project on Nebraska's irrigation apportionment. While acknowledging that depletions would result from the construction of Deer Creek Reservoir, Wyoming argued that such depletions were "immaterial to the question of whether Deer Creek Reservoir violates the Decree." Brief in Support of Motion at

---

[26]During the non-irrigation season, the inflows from Deer Creek have contributed to the Inland Lakes account since the commencement of the operation of the North Platte Project. Inflows have also contributed to the irrigation storage accounts in Guernsey and Glendo reservoirs. These accounts are protected by the injunctions in ¶¶ III and XII(a). The only non-irrigation season apportionment in 1945 was made to Nebraska in the amount of 46,000 acre feet for transfer to the Inland Lakes. The apportionment of 46,000 acre feet to the Inland Lakes during the non-irrigation season, including the inflows from Deer Creek, benefited Wyoming because it was adopted as a charge against the seasonal requirement for the Interstate Canal, reducing the irrigation season demand for natural flow in the Whalen/Tri-State Dam reach of the river. Doherty Report at 61.

91 (Docket No. 23). Wyoming's conclusion was based on its argument that ¶ X empowers municipalities with the unqualified right to interfere with the apportionment effectuated by the Decree. *Id.* at 92-94.

Master Olpin denied the motion, noting that under ¶ XIII(c) "the Court expressly retained jurisdiction for the purpose of examining 'the effect of the construction or threatened construction of storage capacity not now existing on tributaries . . . between Pathfinder Reservoir and Guernsey Reservoir.' " Tenth Memorandum of Special Master at 55 (Docket No. 119). He noted the potential impact on the Inland Lakes if Wyoming's view prevailed. *Id.* at 56. This view was incorporated into the First Interim Report of June 14, 1989. *Ibid.* at 27-30 (Docket No. 140).

On February 22, 1991, Wyoming again moved for summary judgement, maintaining that Nebraska had failed "to come forward with facts that would establish any injury to her apportionment" as a result of the threatened construction of Deer Creek Reservoir. Wyoming Second Motion for Summary Judgment at 3-4 (Docket No. 294). Alternatively, Wyoming moved for partial summary judgment, asserting that under the Special Master's previous ruling "purely municipal uses of Deer Creek Reservoir are exempt under Paragraph X of the Decree." *Id.* at 4. Wyoming sought confirmation that the Deer Creek Project was embraced by the alleged "municipal exemption." *Id.* at 4-5. In doing so, Wyoming asserted that it would ignore the state and federal planning and permitting documents which define the Deer Creek Project as a multi-purpose project. Wyoming argued that she would take it upon herself to limit Deer Creek to purely municipal uses, thus allowing the Project to fit within the so-called municipal exemption.

Nebraska responded to Wyoming's alternative motion by maintaining that Deer Creek must be evaluated by XIII (c).[27] *See* Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgement (Apr. 25, 1991) at 71-77 (Docket No. 335). The underlying premise was that ¶ X does not foreclose an inquiry under ¶ XIII(c) concerning the effect of new tributary storage capacity, whether for municipal use or any other purpose.

A. A Plain Reading of ¶ X Cannot Invert the Subject and Object of the Sentence and Simultaneously Change the Predicate from a Negative Term to a Positive Term

After concluding that there are genuine issues of material fact relating to the extent to which the Deer Creek Project would undermine Nebraska's apportionment, Master Olpin stated that the parties would proceed to trial on the effects of Deer Creek "*unless* Wyoming can establish that the . . . Project fits within the Decree's paragraph X exemption." Second Interim Report at 77 (emphasis in original) (Docket No. 463). While describing ¶ X as "a broadly stated exemption" for municipal uses, the word "exemption" appears nowhere in the record in the 1945 proceedings or in Master Doherty's recommendations, the Court's opinion, or the Decree. *Id.* at 72. Master Olpin also states that "[t]here is little to be found in the Record of the original proceedings on the origin or nature and scope of the paragraph X municipal exemption." *Id.* at 78. Viewed as an *exemption*, Master Olpin is correct. There is considerable evidence in

---

[27]This was the basis of Nebraska's Petition in relation to the Deer Creek Project. Paragraph 3(c) of the Petition requested the following relief:

> 3. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by:
>
> • • •
>
> c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir . . . .

Nebraska's Petition at 2 (Docket No. 1).

the original proceedings, however, which explains the purpose, as well as the nature and scope of ¶ X.

The essence of Master Olpin's error lies in his conclusion that ¶ X "exempts consumption for domestic, municipal and stock watering purposes *and thereby countenances some reductions in water supplies* . . . ." *Id.* at 86 (emphasis added). To arrive at his "plain meaning," Master Olpin makes two rather violent changes in the syntax of the sentence. He does not recognize the difference between the proposition that ¶ X expressly states that the Decree will not take anything away from municipalities as opposed to granting to municipalities an affirmative right to reduce the water supply.[28] His view that ¶ X gives municipalities the affirmative power to reduce or deplete the water supply, *i.e.*, to deplete the water apportioned for irrigation purposes by the provisions of the Decree, contrasts sharply with the language of ¶ X. It is possible that Master Olpin construes ¶ X as a grant of an

---

[28]Elsewhere Master Olpin states that "the common sense reading of the words is that [municipal uses] are simply to be allowed under the Decree and that the equitable apportionment pursuant to the Decree's remaining provisions act only upon the water remaining after [the municipal uses]. . . ." *Id.* at 82-83. Paragraph X, however, does not create a special category of municipal water and then state that the irrigation apportionment was created out of a separate body of water. Master Olpin's reading is not a common sense reading, but rather an undoing of the plain language of ¶ X. As is discussed below, Master Olpin's distortion of ¶ X may derive from a misunderstanding of the water rights preference system in the West. *See infra*, pp. 48-51.

Under the Master's interpretation of ¶ X in which municipal rights rise to a superior class above agricultural or industrial rights, an inconsistency is created with intrastate preference law. Under the principles announced in *Hinderlider v. La Plata & Cherry Creek Irrigation Co.*, 304 U.S. 92 (1938), the superior municipal right created by Master Olpin preempts state preference law allowing a taking without compensation. His reading also negates ¶ XII(a), which confirms priority of appropriation intrastate, as well as negating his recognition that "Nebraska is now in agreement with Wyoming that the municipal water rights of Casper . . . are properly administered in priority with other Wyoming water rights." Second Interim Report at 72 n.98 (Docket No. 463).

affirmative right to deplete by reading the sentence to say that there are *no* restrictions on municipal uses. As written, ¶ X reads:

> **This decree** shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

325 U.S. at 670. Master Olpin may be reading the sentence this way:

> **Nothing** shall affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

By misreading ¶ X in this manner, one could conclude that municipal uses are superior or placed in a preferred category by ¶ X. This rendition of ¶ X does not appear in the Decree, however.

To state the basic error simply, Master Olpin changes the words '[t]his decree shall not affect or restrict municipal uses' to mean 'municipal uses can affect or restrict the apportionment set forth in the provisions of the Decree.' In doing so, Master Olpin inexplicably inverts the subject and object of ¶ X, replacing "decree" with "municipal uses," and simultaneously changes the predicate of the sentence from a negative term ("shall not affect or restrict") to a positive term ("can affect or restrict").[29]

The history of ¶ X in the original proceedings supports Nebraska's position. Master Olpin's statement to the contrary is simply incorrect. *See* Second Interim Report at 78 (Docket No. 463). Beginning with his own proposition that ¶ X creates a right to deplete, Olpin errs by misstating that Master Doherty "recommended to the Court

---

[29]In logic, the Master's error is referred to as an immediate inference on the square of opposition. The Master's reading of ¶ X is exactly the same as equating "dogs cannot hurt cats" with "cats can hurt dogs," *i.e.*, inverting the subject and object and changing the verb from the negative to the positive.

an exemption for ordinary and usual domestic and municipal uses served by diversions from the North Platte River in Colorado and Wyoming." *Id.* (incorrectly paraphrasing Doherty's Report at 180). What Doherty recommended, however, was not that municipalities enjoy a special status in terms of the right to deplete the North Platte, but rather — in certain terms — that the injunctions recommended in the Decree were not intended to interfere with such diversions and uses. *See* Doherty Report at 180.

On exceptions to Doherty's Report, only Wyoming addressed the municipal use aspect of the recommendations. Specifically, Wyoming wished to include tributary waters and stock watering uses. Exceptions of Defendant, the State of Wyoming, to the Report of Michael J. Doherty, Special Master (Nov. 16, 1944) at 24, Appendix at A-48. In its brief on exceptions, Wyoming's proposed municipal Decree provision was "that the injunctions herein contained shall not comprise any restriction upon the diversion from the North Platte River and tributaries in Colorado and Wyoming of water for ordinary and usual domestic, municipal and stock-watering purposes." Brief of Defendant, State of Wyoming (Jan. 29, 1945) at 84, Appendix at A-45. In other words, both Master Doherty and Wyoming recommended that the Court fashion a decree which would release or immunize municipalities from the operation of the injunctions in the Decree. Provisions of the Decree which had no coercive effect were thought harmless.

In its opinion in 1945, the Court described the parties' agreement regarding municipal uses *vis-a-vis* the recommended decree by using Wyoming's language:

> The Special Master reports that the parties are agreed that there should be no restriction upon the diversion from the North Platte River in Colorado or Wyoming of water for ordinary and usual domestic and municipal purposes and

> consumption and that nothing in the recommended decree is intended to or will interfere with such diversions and uses.

325 U.S. at 656. The Court made no changes from the related language in the Master's report other than to adopt as "appropriate" Wyoming's suggestions to protect the tributaries as well as the mainstem of the river and to include stock-watering purposes. *Id.* The Court's language in its opinion was repeated by Nebraska in formulating its Proposed ¶ X Decree provision.[30] *See* Complainant's Proposed Form of Decree and Request for Permission to Oppose Proposals of Other Parties at 9-10, Appendix at A-53-54. Supporting reference was made to Doherty's Report at 180 and the Court's opinion at 656. The same language was also recommended by Wyoming, Colorado, and the United States. Their proposed ¶ XI provided that "[t]his decree shall not affect or restrict" municipal uses or diversions. *See* Form of Decree Proposed by the State of Wyoming, Defendant, the State of Colorado, Impleaded Defendant, and the United States of America, Intervenor at 8, Appendix at A-57. It did *not* say that "**nothing** shall affect or restrict" municipal uses or diversions, *i.e.*, that municipalities can do what they please.

In his Second Interim Report, Olpin also omits any discussion of the parties' objections to one another's proposed form of decree, all of which reinforced the parties' intent to avoid onerous requirements on domestic, municipal, and stockwatering uses. In relation to Nebraska's proposed ¶¶ I(b) and II(b), Nebraska sought decree provisions that merely stated that Colorado and Wyoming would be restricted in the storage of water in North Park, Colorado, and above

---

[30]The Court had instructed the parties to submit a form of decree within 90 days of the Court's opinion. 325 U.S. at 657. A two-day conference was held, but the parties were able to agree to the language of the Decree only in part, resulting in separate proposals. The Court's expression of the Special Master's and Wyoming's comments on domestic, municipal, and stockwatering uses was agreed upon by all parties at the two-day conference. Where agreement had been reached, Nebraska proposed "the exact language proposed by the other parties." Complainant's Proposed Form of Decree at 2.

Pathfinder Reservoir in Wyoming. Complainant's Proposed Form of Decree and Request for Permission to Oppose Proposals of Other Parties at 3 and 4, Appendix at A-51-52; *cf.* ¶¶ I(b) and II(b), 325 U.S. at 665-666. Wyoming and Colorado objected to Nebraska's proposed ¶¶ I(b) and II(b), stating that it was necessary to add the phrase "for irrigation purposes" to the limitations. They reasoned:

> (a) The issues made up by the pleadings in this case only involved water uses for irrigation purposes, and the Court specifically states (Opinion p. 1) that "the controversy pertains to the use for irrigation purposes of the water of the North Platte River, a non-navigable stream."
>
> (b) If this phrase is omitted ["for irrigation purposes"], Paragraph IX Nebraska Proposal - Paragraph X Joint Proposal - would require records of storage in stock ponds, municipal water tanks, and fish ponds.
>
> (c) If the phrase is omitted, there is an inconsistency with Nebraska Paragraph X - Joint Paragraph XI.

Form of Decree Proposed by the State of Wyoming, Defendant, the State of Colorado, Impleaded Defendant, and the United States of America, Intervenor at 11, Appendix at A-58. They were concerned that despite Nebraska's proposed ¶ X, Nebraska's proposed ¶¶ I(b) II(b) and ¶ IX would result in restrictions on municipal uses requiring an accounting of municipal storage in North Park, Colorado, and above Pathfinder Reservoir in Wyoming.

Nebraska did not believe that the additional language was needed in Nebraska's proposed ¶¶ I(b) and II(b) because the language was surplus to what ¶ X had already accomplished, according to the parties' previous agreement. Objections of State of Nebraska to Joint Proposal for Decree filed by the State of Wyoming, Defendant, the State of Colorado, Impleaded Defendant, and the United States of America, Intervenor at 3, Appendix at A-63. The Court did add the language "for irrigation purposes" in ¶¶ I(b) and II(b) in order to make ¶¶ I(b) and II(b) consistent with ¶ X, as Colorado and

Wyoming had argued. Unaffected, however, was that ¶ X's only purpose was to keep the Decree from interfering with municipal uses and to shield those uses from burdensome accounting requirements.

Notwithstanding the history — indeed, without attributing any significance to it — Master Olpin reads the "common sense" or "plain meaning" of ¶ X to mean that municipal, domestic, and stockwatering uses have free access to the entire river before the Decree comes into play. Second Interim Report at 82-83 (Docket No. 463). Ignoring Wyoming law, Master Olpin believes that only after these non-irrigation uses are filled can any remaining supply be apportioned to or used for irrigation purposes. With respect to the proposed Deer Creek Project, Master Olpin's interpretation means that any part of the river, whether on the mainstem or tributaries, could be completely depleted without consideration of the effect on the irrigation uses set forth in the Decree. In essence, Olpin creates a separate, artificial pool of water, which is skimmed from the common pool of natural flows of the North Platte and its tributaries, available only for use by domestic, municipal, and stockwatering users. This interpretation gives municipal uses an absolute superiority over irrigation uses, directly upending the law of priority of appropriation in Wyoming. Such a violation of the principles of intrastate law brings the Master's interpretation of ¶ X into conflict with the Decree, including ¶ XII(a). *See supra* p. 36 n.28.

B. Paragraph X, Which Immunizes Municipal Uses from the Operation of the Provisions of the Decree, Does Not Apply to the Court's Retained Jurisdiction to Resolve Disputes Yet to be Addressed by the Court.

Master Olpin's revision of ¶ X causes the greatest difficulty by its application to the Court's retained jurisdiction under ¶ XIII. The Master's recommendation of a trial phase to "determine whether Deer Creek qualifies under paragraph X of the Decree," would contravene the Court's retention of jurisdiction in ¶ XIII(c) to evaluate the impact of tributary storage on the apportionment. Aside from changing the plain meaning of ¶ X, the Special Master's critical

error lies in his use of ¶ X to override the intent of ¶ XIII. As a matter of law, ¶ X does not grant municipal storage projects immunity from review by the Court in accordance with ¶ XIII of the Decree.

Nebraska sought review of the Deer Creek Project under ¶ XIII(c). Paragraph XIII retains broad jurisdiction for the Court to address issues which may bear an apportionment made by the Decree:

> XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-672.

In denying Wyoming's first motion for summary judgment, the Special Master acknowledged that in ¶ XIII(c) "the Court expressly retained jurisdiction for the purpose of examining 'the effect of the construction or threatened construction of storage capacity not now existing on tributaries . . . between Pathfinder Reservoir and Guern-

sey Reservoir." Tenth Memorandum of Special Master at 55 (Docket No. 119). While the Master's decision appeared to rest on ¶ XIII(c), he also adopted the "municipal exemption" language promoted by Wyoming. Tenth Memorandum at 59-62 (Docket No. 119); First Interim Report at 31-32 (Docket No. 140).

Having adopted Wyoming's argument that ¶ X exempts municipal uses from the Decree, Master Olpin determined that such an exemption necessarily prevents the exercise of jurisdiction in ¶ XIII(c), even if the ¶ X "exemption" may be inapplicable to the other provisions of ¶ XIII:

> I do not accept [that paragraph X does not foreclose the XIII(c) inquiry] as there is nothing on the face of paragraph X to support such a narrowing of the municipal exemption.
>
> * * *
>
> That is not to say, of course, that municipal uses can in no circumstances be scrutinized. . . . Should threatened municipal uses turn out to pose risks of significant impacts on natural flows, paragraph XIII(f) can be invoked.

See Second Interim Report at 74 n.99 (Docket No. 463). Master Olpin does not view ¶ XIII(c) as a procedural provision which retains jurisdiction to address a potential future problem, *i.e.*, the effects of the future development of tributary storage. Instead, he views ¶ XIII(c) as a substantive provision which is subordinated to the "municipal exemption" granted in ¶ X. This view, however, makes no sense.

A decree is the final declaration of a court announcing the legal consequences of the facts found. *See* Black's Law Dictionary (4th Ed. 1968). It results from the application of legal principles to the facts presented and determines the rights and obligations of the parties as they appear from the evidence, as found by the court.

Jurisdiction is the authority by which a court takes cognizance of and decides a case or an issue. *See id.* It is the legal right by which a court exercises its authority. A retention of jurisdiction is the preservation of the right and power of a court to adjudicate particular matters.

With respect to certain unaddressed and unresolved aspects of a case, a court may retain its jurisdiction to treat the matter at a later time, when the matter becomes ripe and its resolution is necessary. A retention of jurisdiction is accomplished by a decree provision. By its nature, however, a decree provision retaining jurisdiction does not grant or deny a remedy sought or in any way determine the rights or obligations of the parties. Such a provision does not apply the law to the facts found from the evidence, but retains the court's legal authority to receive evidence and apply the law at a later time.

A provision in a decree which mandates that the decree shall not affect or restrict something, *i.e.*, that the operative provisions of a decree shall in no way define, limit, constrain, or diminish something, refers only to those other provisions which have decided something and have the power to define, limit, constrain, or diminish something else. Such a provision does not refer to a provision which retains jurisdiction to determine relative rights and obligations in the future.

In this case, the Court retained jurisdiction in ¶ XIII(c) to address "[t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. . . ." 325 U.S. at 672. Paragraph X of the Decree states that "[t]his Decree shall not affect or restrict" municipal uses of water. Because the proposed Deer Creek Project is in part a municipal project, Master Olpin has stated that "should the Deer Creek Project qualify for the municipal exemption, it may proceed even if its depletions would otherwise exceed the limitations that might be imposed under ¶ XIII(c)." Hearing Draft of Second Interim Report at 99 (Docket No. 428). In reaching this conclusion, Master Olpin has not only divined the outcome of a potential future

exercise of the Court's jurisdiction, but has also tacitly construed ¶ XIII(c) as a provision which has decided something in a way which has the power to define, limit, constrain, or diminish something else. Paragraph XIII(c), however, has decreed nothing.[31]

An examination of the record also demonstrates that ¶ XIII(c) was not intended to be preempted by ¶ X. Paragraph XIII(c) has its roots in the drought conditions of 1931-1940 when the evidence was taken. In his Draft Report in 1944, Special Master Doherty expressed his concern that future development could exhaust the dependable supply:

> . . . [I]n view of the possibility that the present demand may substantially exhaust or exceed the present resources of the river, I should say, generally speaking, that no reservation should be made for future development (assuming such reservation ever to be proper) unless and until it is demonstrated that the supply under future conditions shall be more than adequate to serve existing demands.

Draft Report at 8, Appendix at A-67. Master Doherty went on to affirm that "[o]n the oral argument it was suggested that further construction of storage facilities should be restricted, since the result of such construction might be to reduce the outflow from the tributaries now available for storage in the off-channel reservoirs of the Interstate Canal." *Id.* at 26, Appendix at A-71.

---

[31]The Court was fully aware of the broad scope of ¶ XIII, which occasioned a dissent by Justices Roberts, Frankfurter, and Rutledge. 325 U.S. at 657-664. The gravamen of the dissent was that through ¶ XIII the Court "undertakes to assume jurisdiction over three quasi-sovereign states and to supervise, for all time, their respective uses of an interstate stream on the basis of past use . . . ." 325 U.S. at 657. The dissenting justices fully understood the breath of ¶ XIII and its applicability to disputes such as this. Although time has not justified their fears of a repeated use of the Court's original jurisdiction, it would be incorrect to disable ¶ XIII on the basis of a misreading of ¶ X.

Because of the possibility of increased river flows, and the lack of specific evidence on future threatened depletions, Doherty declined to recommend a present restriction. Instead Master Doherty recommended:

> (1) A present decree effecting a water distribution by means of the imposition of a minimum of restriction and by the simplest possible method that will serve present and near future purposes. (2) Retention by the Court of jurisdiction to amend the decree if and when it shall be made to appear that important changes of condition have occurred or that any assumption or forecast as to the future upon which the decree was based has by subsequent experience proved erroneous, and that by reason of such changes of condition or errors of prediction equity requires amendment of the decree.

Doherty Report at 122.

The Court agreed with Master Doherty:

> The United States, however, insists that some regulation of the tributaries between Pathfinder and Guernsey is essential. It claims that there are possibilities of future additional storage on these tributaries and that if future storage is increased there will be a reduction in tributary flows into the main river available for storage in the Guernsey, Lake Alice and Lake Minatare reservoirs of the North Platte Project. . .. In absence of evidence showing what contribution these tributaries now make to the supply of the reservoirs or what additional storage projects may be possible or what their effect might be, the Special Master concluded there was an insufficient basis for any present limitation on storage. We find no evidence of any present threat to the water supply from this source. If such threat appears and it promises to disturb the delicate balance of

> the river, application may be made at the foot of the decree for an appropriate restriction.

325 U.S. at 624-625. Paragraph XIII(c) was added to address these potential depletions on the tributaries. *Id.* at 672. The unqualified language of ¶ XIII(c) was chosen to permit the review of any storage project, whether for irrigation, recreation or municipal uses, which could adversely affect or deplete the flows from the Pathfinder to Whalen reach of the river. In view of Master Olpin's concern that Nebraska and the United States are reading ¶ X too narrowly, it is ironic that he has interpreted ¶ XIII(c) in the same manner.[32]

C. The Special Master's Revision of ¶ X Creates Numerous Problems of His Own Making.

The result of Master Olpin's revision of ¶ X creates many discrete problems. Given his reading of ¶ X, numerous "vexing questions," "complex issues," and "mysteries" are brought to his attention. Second Interim Report at 73, 79, 87 (Docket No. 463). Master Olpin is compelled to express concern over questions raised solely by his own analysis of ¶ X. For example:

> Indeed, paragraph X poses some mysteries, as the United States has shown. During the original proceedings, the parties strenuously battled over small quantities of water, such as the 2,[9]00 acre feet of inflows from Spring

---

[32]Olpin refuses to read ¶ X "narrowly" because it "exempts municipal uses of water "from the North Platte River and its tributaries," including the tributaries between Pathfinder and Guernsey. He does not give equal treatment to ¶ XIII(c), which refers, without qualification, to any "storage capacity not now existing on tributaries ... between Pathfinder ... and Guernsey. ..." *See* Second Interim Report at 74 n.99 (Docket No. 463); 325 U.S. 672.

> Creek. *See* Decree ¶ 5. Yet, all of the parties agreed to paragraph X.[33]

Second Interim Report at 79 (Docket No. 463). Master Olpin also admits that his reading of ¶ X creates problems with respect to the intrastate administration of prior appropriation. *Id.* at 72-73 n.98. Each of these problems, however, arises from Master Olpin's upended reading of ¶ X.

His principal vexing question derives from his discussion of Wyoming's water rights preference system which he uses to support his criticism of the correct reading of ¶ X. Master Olpin's reasoning, however, reflects a misunderstanding of the preference system, as well as a misunderstanding of the significance of ¶ XII(a). He attempts to explain the matter this way:

> After expressing some inconsistent views earlier in the present proceedings, Nebraska is now in agreement with Wyoming that the municipal water rights of Casper and the other Wyoming communities are properly administered in priority with other Wyoming water rights. March 1992 Transcript at 39-40. This shared view is consistent with paragraph XII(a) of the Decree, which provides that the relative rights of water users within the three States are not affected "except as may be otherwise specifically provided herein." There is no Decree provision that specifically calls for a contrary administration of municipal water rights.

---

[33]There is no mystery, of course, unless ¶ X is misread to give municipalities an unqualified right to deplete the river. Master Olpin also fails to recall the strenuous battle over the Spring Creek inflows as it related to the apportionment of the Laramie inflows. Why he finds the battle significant in the context of his reading of ¶ X, but meaningless in relation to the Laramie troubles both Nebraska and the United States. During oral argument, counsel for the United States commented that given that the Court found the supply met only 48% of demand and that the parties were fighting for every drop of water, "It's not plausible to believe that they were contemplating a 60,000 acre foot storage project when they agreed to [¶ X]." June 7, 1991 Transcript at 44, (Docket No. 366).

> Under both Wyoming and Nebraska law, preference is accorded municipal uses to the extent "that a municipal use could deprive a senior irrigator or other nonpreferred user of water only if compensation were paid for the taking." (Citation omitted). Wyoming has declared that "[n]either state ever asserted that a municipal water right should be exempt from the intrastate law of prior appropriation." *Id.* Those principles of intrastate administration pose vexing questions for the interpretation and application of paragraph X . . . .

Second Interim Report at 72-73 n.98 (Docket No. 463).

The combination of Master Olpin's apparent misunderstanding of water rights preference systems in the West and his reading of ¶ X creates an anomaly which he describes as the possibility of "inequitable treatment of holders of senior Nebraska appropriative rights." *Id.* at 86. He explains the anomaly this way:

> Now that all parties are agreed that Wyoming will administer municipal water rights in priority, a circumstance might arise making it necessary for Wyoming to acquire senior water rights for a proposed municipal water project. The United States raises the specter of Wyoming invoking eminent domain powers that are available under Wyoming law to condemn only the water rights of impacted senior Wyoming water users, while adopting the rationale that paragraph X authorizes the reductions in supplies so far as Nebraska's senior users are concerned. Thus while both the Wyoming and Nebraska senior rights would be taken or impaired, there would be payment of just compensation only

> to the Wyoming water users. *See* March 1992 Transcript at 83-88.

Id. at 86-87 (footnote omitted).[34]

It is apparent that Master Olpin does not understand Wyoming's preference system. Like the preference systems in other western states, the Wyoming system allows a municipality to condemn an irrigation right for just compensation and to transfer the right for municipal use. A change to a preferred use conveys only the right condemned — it does not subordinate the rights of others to the preferred use, *i.e.*, changing a use of water to a preferred use does not alter the priority of the condemned right. *Town of Newcastle v. Smith*, 28 Wyo. 371, 376-378, 205 P. 302 (1922). The transfer of the right is also done in such a way as to keep the river system whole. If an irrigation right is condemned by a municipality and transferred to municipal use, Wyoming law — as well as the laws of the other western states — requires that the regimen of the river be kept whole by limiting the municipality to the same consumption or depletive effect on the river. The result is to insure the continuation of the historic flows below the condemned right.

While recourse to the preference system under Wyoming law, if properly applied, would leave the same amount of natural flow in the Whalen/Tri-State reach of the river, Olpin mistakenly believes that "while both . . . Wyoming and Nebraska senior rights would be taken or impaired, there would be payment of just compensation only to the Wyoming water users." Second Interim Report at 86-87 (Docket No. 463). Master Olpin does not understand that there would be no taking or impairment of rights in Nebraska. He simply describes this "problem" as a "vexing question." *Id.* at 73 n.98. If he gave ¶ X its plain and unambiguous meaning, however, the question would never arise.

---

[34]The "specter" that Master Olpin alludes to was not raised by the United States. *See* March 1992 Transcript at 76-88 (Docket No. 435). The specter is a consequence of Master Olpin's analysis.

Further, the Master recognizes that his reading of ¶ X can upset parts of Nebraska's apportionment which he himself confirmed, *viz.*, the right of the Inland Lakes to store 46,000 acre feet of natural flow during the non-irrigation season. *See* Second Interim Report at 86 n.104 (Docket No. 463). However, if ¶ X is correctly used as a qualification to the provisions of the Decree and not as the grant of a right, the Inland Lakes entitlement will be protected by ¶ XIII(c) or by condemnation of senior agricultural rights by municipalities, resulting in no additional depletions to the regimen of the river.

A related problem is that Master Olpin's reasoning with respect to ¶ X eviscerates ¶ XII(a) of the Decree, which uses the same language as ¶ X in stating that "[t]his decree *shall not affect* . . . [t]he relative rights of water users within any one of the States . . . except as may be otherwise specifically provided herein . . . ." 325 U.S. at 671 (emphasis added). While Olpin notes that "[t]here is no Decree provision that specifically calls for a contrary administration of municipal water rights," it eludes him that the very purpose of the proposed Deer Creek Project is to create contrary administration by allowing a new appropriation of surface water to facilitate continued out-of-priority diversions by Casper.[35] The new appropriation would also be much greater than the Spring Creek flows that the parties

---

[35]To the extent the Deer Creek Project is represented to be a municipal project in reality it is a supplemental irrigation project. The Project was precipitated by the fact that Casper's diversion rights have very junior priorities. Given the over-appropriated status of the North Platte River, Casper diverts out-of-priority under Wyoming law, subjecting the city to potential priority calls from downstream irrigators and individual users with senior water rights. To obviate the possibility of being shut down, the Deer Creek Project was designed as a storage reservoir on a downstream tributary, the mouth of which is above the senior irrigators and industrial users. The alleged "exchange" is to impound natural flow and release it to the irrigators and industrial users, as they need it, thus allowing Casper to continue diverting out of priority upstream. The scheme is designed to eliminate priority of appropriation as between Casper and the downstream seniors.

(cont'd.)

insisted be an explicit part of Nebraska' entitlement in 1945. As noted above, Master Olpin finds it vexing that in 1945 the parties "strenuously battled over small quantities of water, such as the 2,[9]00 acre feet of inflows from Spring Creek." Second Interim Report at 79 (Docket No. 463). In relation to his reading of ¶ X, which in the case of Deer Creek would allow the loss to the system of 9,600 acre feet on an average annual basis, Master Olpin discerns a rather conspicuous contradiction. The plain reading of ¶ X, however, does not state or remotely suggest that it licenses municipalities to deplete the apportioned water supplies. It is the Master's construction of ¶ X that creates the problem. Paragraph X should be read as keeping the Decree from interfering with municipal uses, not as a license to deplete that rises above state law. There was no contradiction between ¶ X and the parties' concern over 2,855 acre feet in 1945 because the parties never thought of Master Olpin's reading of ¶ X.

Master Olpin does not understand that his reading of ¶ X allows him to use ¶ X to alter priorities intrastate, contrary to the express prohibition in ¶ XII(a). He also fails to see that the alteration of priorities illustrates the transparency of the alleged municipal nature of the Deer Creek Project. Aside from elevating Casper's junior priorities, the real purpose of the Deer Creek Project is to provide a supplemental supply to senior irrigation rights. Because he has mistakenly given municipalities the power to destroy the apportionment, Master Olpin runs into another "complex issue."

A third problem of Master Olpin's own making is one he has not recognized. The Master states:

> Moreover, the applicability of the paragraph X exemption to the tributaries upstream of Pathfinder is acknowledged

---

Paragraph XII(a) of the Decree states that the Decree "shall not affect . . . [t]he relative rights of water users within any one of the States . . . ." 325 U.S. at 671. In the context of Deer Creek, Master Olpin's reading of ¶ X of the Decree makes ¶ XII(a) meaningless. Paragraph XII(a) should preclude the construction of the Deer Creek Project in and of itself.

> expressly in paragraph IX, which excuses Colorado and Wyoming from record-keeping duties respecting municipal uses in those upstream reaches. There is nothing in paragraph X's text that supports an argument for different treatment of municipal uses on tributaries depending on whether they enter the mainstem upstream or downstream of Pathfinder. Thus, paragraph X means exactly what it says in its statement that the Decree does not affect or restrict municipal uses or diversions of water" from the North Platte River and its tributaries."
>
> That is not to say, of course, that municipal uses can in no circumstances be scrutinized. Paragraph XIII(f) of the Decree contains a catch-all reopener provision authorizing further relief if there should be "any change in conditions making modification of the decree or the granting of further relief necessary or appropriate." Should threatened municipal uses turn out to pose risks of significant impacts on natural flows, paragraph XIII(f) can be invoked. Neither Nebraska nor the United States, however, has sought at this stage to have the municipal exemption itself examined under paragraph XIII(f).

Second Interim Report at 74 n.99 (Docket No. 463). Master Olpin does not realize that his reading of ¶ X would necessarily do one of two things — either the Master is incorrect in his view that Deer Creek could be scrutinized under ¶ XIII(f) or ¶ XIII(f) applies only to municipal development that is not on the North Platte River or its tributaries.

If ¶ X grants municipalities an affirmative right to deplete the apportionment, as Olpin concludes, and it applies, as it says, to municipal uses or diversions of water "from the North Platte River and its tributaries," ¶ X not only would usurp the Court's retained jurisdiction under ¶ XIII(c), but also under ¶ XIII(f). There is no logical difference in the retained jurisdiction under ¶¶ XIII(c) and XIII(f) as those provisions relate to ¶ X. Either ¶ X precludes

examination under both provisions or under neither provision. As noted above, a depletion of 9,600 acre feet on an average annual basis as a result of the Deer Creek Project would be nearly four times more significant than the Spring Creek inflows which the parties battled so strenuously over. Such a significant impact could not be addressed under ¶ XIII(f) because — according to the logical extension of Master Olpin's interpretation — it falls within ¶ X's municipal exemption. Accordingly, the only way the effects of the Deer Creek project could be addressed, if one were to follow Master Olpin's logic, is if the project were developed on some river other than "the North Platte River and its tributaries."

CONCLUSION

The State of Nebraska urges the Court to reaffirm the express apportionment in ¶ V of the inflows of the Laramie River as originally recommended by Special Master Doherty and explicitly affirmed and adopted by the Court in 1945. Master Olpin's report and recommendations should be modified accordingly.

With respect to ¶ X, Nebraska urges the Court to limit the sentence to its plain and unambiguous meaning. Paragraph X does not provide that **nothing** shall not affect or restrict municipal uses; it states that "[t]**his decree** shall not affect or restrict" municipal uses. When limited to its plain meaning, ¶ X immunizes municipal uses from any adverse affect or restriction caused by the operation of the substantive provisions of the Decree. When read as Master Olpin read it, ¶ X grants municipalities an unqualified right to undermine the Decree. The latter reading not only stands ¶ X on its head, but vitiates the Court's retention of jurisdiction in ¶ XIII(c) and results

in numerous contradictions and anomalies which further eviscerate the Decree.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
446 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

APPENDIX

TABLE OF CONTENTS

	Page
North Platte River Decree	A-1-15
Map - North Platte River Basin	A-16
Brief of State of Wyoming, Defendant (Sept. 5, 1942) (Excerpts)	A-17-23
Transcript of Testimony (E. K. Nelson) (Excerpts)	A-24-32
Wyoming Exhibit No. 148	A-33
Wyoming Exhibit No. 150	A-34
Wyoming Exhibit No. 170	A-35-36
Wyoming Exhibit No. 173	A-37-39
Brief of Defendant, State of Wyoming (Jan. 29, 1945) (Excerpts)	A-40-46
Exceptions of Defendant, State of Wyoming, To Report of Doherty (Excerpts)	A-47-48
Complainant's Proposed Form of Decree (Excerpts)	A-49-54
Form of Decree Proposed by the State of Wyoming, et al. (Excerpts)	A-55-60
Objections of State of Nebraska to Joint Proposal for Decree (Excerpts)	A-61-64
Memorandum Regard Proposed Findings, Master Doherty (Excerpts)	A-65-71

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NEBRASKA v. WYOMING
(325 U.S. 589)
Decree

DECREE.
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam

for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal,

and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five percent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Losses-Second Feet				
		May	June	July	Aug.	Sept.
Alcova to Wendover	8,360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres)

because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River,

and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, Original. Nebraska v. Wyoming (Colorado, Impleaded Defendant, and the United States, Intervenor.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado and Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a

substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjusted to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and denied, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District ...	Tri-State	748	183,050
Ramshorn Irrigation District ..	Ramshorn.....	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of

Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the appropriation of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoir.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by coefficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a coefficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Losses-Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir.....	6,470	43	61	70	61	45
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line.....	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

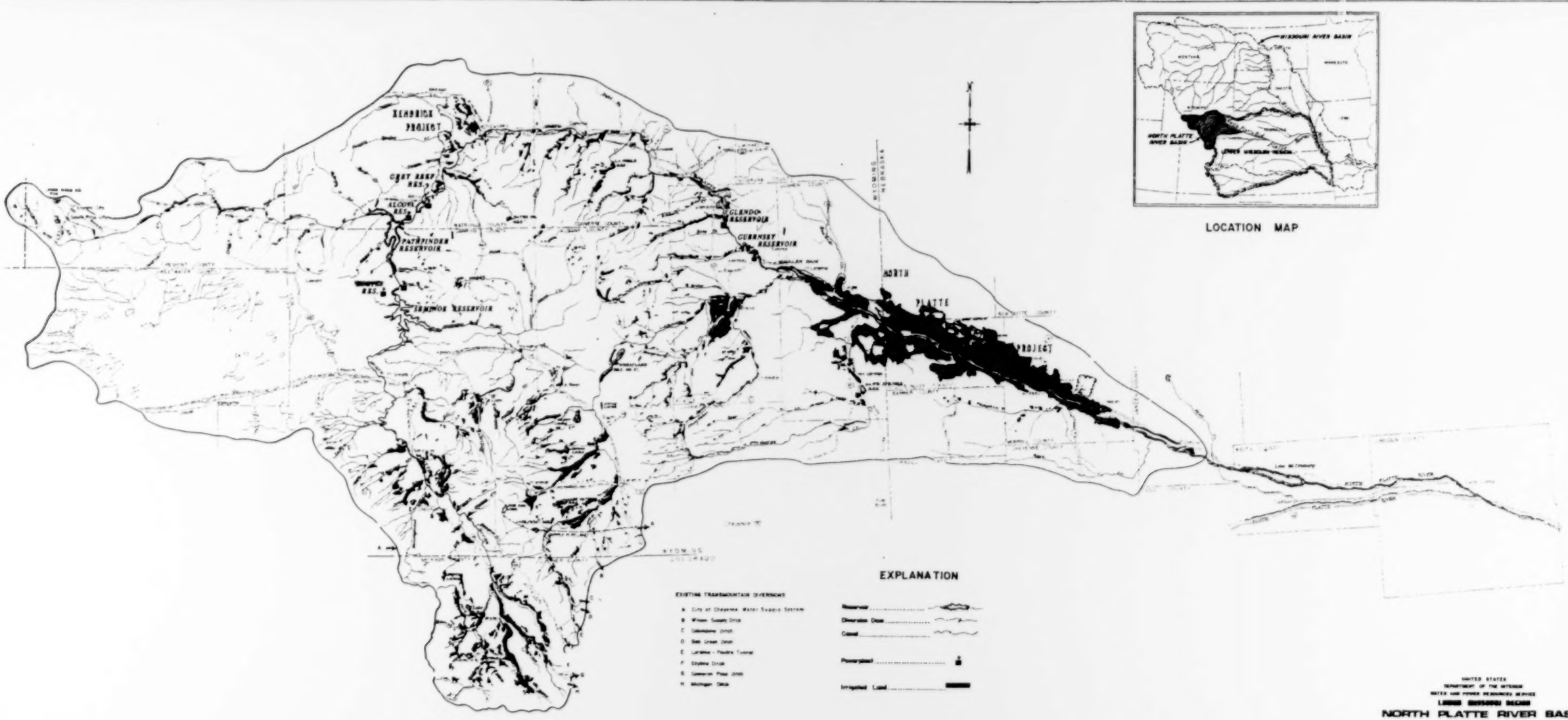
Above table does not contain computed loss for section of river from Pathfinder Dam to head to Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash*, Assistant Attorney General, for the State of Nebraska, *Howard B. Black*, Attorney General, for the State of Wyoming, *Duke W. Dunbar*, Attorney General, *H. Lawrence Hinkley*, Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.

BEST AVAILABLE COPY



IN THE

Supreme Court of the United States

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING,
Defendant,

THE STATE OF COLORADO,
Impleaded Defendant,

UNITED STATES OF AMERICA,
Intervener.

BEFORE HON. M. J. DOHERTY, SPECIAL MASTER

BRIEF OF STATE OF WYOMING, DEFENDANT

EWING T. KERR,
Attorney General,

W. J. WEHRLI,
Special Counsel,

C. M. CROWELL,
Assistant Special Counsel.

PRAIRIE PUBLISHING CO., CASPER

as it is a border-line region where irrigation is not practiced at all in many years, and fluctuates widely with cycles of dry and wet years (pp. 25682, 24053, 24084-88, 24814-16). We submit that in this region pumping is ideally adapted to the needs of dry years as the expense of continuously maintaining gravity irrigation facilities is obviated. The pumps can be used when necessary in the dry years, and the large maintenance cost of intervening periods when irrigation is much restricted or not used at all will be eliminated. Throughout the upper reaches of the basin in Nebraska it would seem also that the pump is the ideal solution for meeting the larger demands of years of low precipitation and irrigation supply, either or both, as it will provide an additional supply inexpensively when needed without imposing the burden of continuous maintenance of additional gravity facilities. The pump is peculiarly adapted to meet the demands of a stand-by or supplemental supply.

As a matter of equity between Nebraska and the upper states, the lower state should not be permitted to refrain from using an inexhaustible available underground water supply, the application of which to irrigation purposes will relieve the demand upon the stream, thereby permitting additional use and development above. Especially is this true when a large portion of the demand in Nebraska that may be supplied by pump irrigation is intermittent in character, occurring chiefly in the dry years, and of a standby or supplemental nature. The stream system should not be continuously and indefinitely compelled to respond to any demand that can be readily met by the use of underground supplies which can be economically applied to irrigation use. While much argument may be advanced against the use of this underground supply and contention made that it imposes an additional financial burden upon Nebraska irrigators, the proof of the pudding is in the eating, and the pumping development that has actually occurred in Nebraska in the past ten years is complete establishment of the fact that Nebraska irrigators have found it satisfactory, economical and feasible, with definite advantages over gravity supplies.

LARAMIE RIVER

The Laramie River, a tributary of the North Platte, rises in northern Colorado and flows northeasterly into Wyoming and across that state to its confluence with the North Platte near the

town of Ft. Laramie. The course of the stream in Colorado may be observed on C-119-A, and through Wyoming on W-48, the latter exhibit also showing in a general way location of irrigated lands upon the Laramie and its tributaries in Wyoming. Since no part of the Laramie basin is within Nebraska, and since an apportionment of the supply of this stream was made by the Supreme Court of the United States by modified decree rendered October 9, 1922, in Wyoming v. Colorado, 259 U. S. 419; 66 L. Ed. 999, copy of said decree appearing at page 1026 of the Law Edition, we do not conceive that the Laramie river presents any issue in this case, believing that the decree of the Supreme Court is final and conclusive. In the opinion in that case the Court found there was a dependable supply of the Laramie river at Woods, Wyoming, nine miles north of the Colorado line, of 170,000 ac. ft. annually, and an additional supply from the Little Laramie of 93,000 ac. ft., and 25,000 more from lower tributaries usable by the Wheatland project, or a total of 288,000 ac. ft., and that such supply existed after use in Colorado of 18,000 ac. ft. by the Skyline ditch, and 4,250 by the meadowlands. The Court did not consider supply or use below the Wheatland project (Law Edition, p. 1022). The Court found 272,500 ac. ft. sufficient for the irrigation of 181,500 acres in Wyoming with priorities senior to that of the Laramie-Poudre tunnel, a proposed transmountain diversion, which the Court found entitled to an October, 1909, priority, although October, 1902, was claimed. It was determined the supply was adequate for the Wyoming appropriators with a surplus of 15,500 ac. ft. for the Laramie-Poudre tunnel and the decree, therefore, recognized the right of Colorado to divert from the stream 18,000 ac. ft. for the Skyline ditch, 4,250 for the meadow-lands and 15,500 for the Laramie-Poudre tunnel, a total of 37,750. It was further found that Colorado was entitled to continue diversions from Deadman creek through the Wilson Supply or Divide ditch, and in a later decision in the same case involving enforcement of the decree, the Court specified 2,000 ac. ft. per annum as the quantity of this use (286 U. S. 494; 76 L. Ed. 1245, p. 1248 L. Ed.). Including, therefore, this additional 2,000 ac. ft., the total quantity allocated to Colorado is 39,750 ac. ft., and this amount of water Colorado is permitted to divert annually irrespective of what the total supply may be.

While the Court found there was a dependable supply of 272,500 ac. ft. available for Wyoming use after satisfaction of

the Colorado allotment, this quantity has not actually been available since commencement of the suit in 1911, as the study of Mr. Nelson shows that in the 1911-1938 period average annual supply was only 242,500 ac. ft., or 30,000 ac. ft. less (W-111; W-112; p. 19777).

Although the Supreme Court found 181,500 acres in Wyoming to and through the Wheatland project only dependent upon the supply of 272,500 ac. ft., Mr. Patterson made a determination of 180,820 acres irrigated in the entire Laramie river basin in Wyoming (C-118), of which he testified 30,940 were below the Wheatland project (p. 25247). The latest Census data discloses that in 1939 there was irrigated in the Laramie river basin in Wyoming only 164,276 acres (US-204-C, p. 19). Shrinkage in acreage irrigated in Wyoming is no doubt due to the drouth conditions of the past decade, and this is fairly deducible from the Wyoming testimony relating to projects in the Laramie basin, some of which will be hereafter reviewed.

While the Wyoming dependable supply of 272,500 ac. ft. provides only 1.5 ac. ft. per acre for 181,500 acres, without allowance for evaporation losses, particularly in the reservoirs of the Wheatland project which the Court thought would be compensated for by return flows (66 L. Ed. 1021), Meeker, on N-87, estimated headgate diversion of 2.5 ac. ft. on 120,000 acres of meadows, and 2 ac. ft. per acre on 60,000 acres of and near the Wheatland project, or a total of 420,000 ac. ft. He explains this large diversion, which on N-431 he shows to be 20,000 ac. ft. in excess of the supply in the entire basin, by the use of return flows (p. 1859). However, since he shows on N-77 reservoir evaporation losses in the Laramie basin of 41,000 ac. ft., this latter quantity would also have to be accounted for from return water. This is extremely doubtful, and we think the difficulty lies in the assumption of headgate diversions of 2.5 ac. ft. per acre. Upon the lands for which Meeker estimates headgate diversion of 2.5 ac. ft. per acre on N-87, he shows on N-77, 1.1 ac. ft. per acre stream depletion, or return flow of 56%. In marked contrast his exhibit N-77 discloses 1.3 ac. ft. per acre consumptive use on the 60,000 acres in the Wheatland area with headgate diversion of only 2 ac. ft. per acre, as shown on N-87, or return flow of 35%. It is hardly conceivable that consumptive use of 1.3 ac. ft. per acre can be supplied with a headgate diversion of only 2 ac. ft., nor is a return flow of only 35% probable.

Our conclusion is that while Meeker's estimated headgate diversions for the Wheatland project of 2 ac. ft. per acre may not be inappropriate, the consumptive use value is too high, and we do not believe any such supply as 2.5 ac. ft. per acre for the meadowlands has ever been enjoyed. Without intervention of drouth conditions 2 to 2¼ ac. ft. per acre at the headgate is sufficient for normal crop production on the Wheatland project (p. 19067). A major portion of the supply is reservoir water (p. 27299).

The Wheatland project has direct flow appropriations with priority of May 23, 1883, for 58,503 acres comprising 633 sec. ft. from the Laramie river and 135 from Sybille creek (W-74; pp. 19002; 18974). Storage capacity has been provided for the Wheatland project of 7,136 ac. ft. in Wheatland No. 1 reservoir, and 99,000 ac. ft. in Wheatland No. 2, which has been enlarged an additional 91,000 ac. ft. (Engineers' Stipulation, p. 6). 49,341 acres are irrigated (W-75; p. 19032). In addition, 2,800 acres are irrigated in the Bordeaux tract (p. 19015), and 100 acres in the Mule Shoe, or Sybille tract (p. 18970). The latter two tracts comprise respectively 8,666 and 21,000 acres (pp. 19015; 18970). Total irrigated in the original project, Bordeaux and Mule Shoe tracts, is 52,241 acres.

The Laramie Rivers Company project comprises lands irrigated under the Pioneer and Lake Hattie canals from the Big Laramie and Little Laramie rivers. Irrigable lands are shown on W-54; and W-56 is a list of adjudicated rights and permits. Originally it was contemplated 300,000 acres would be irrigated under these systems, and there are presently 139,500 acres under existing rights, and 60,000 acres can be supplied by constructed works (pp. 18589-90). Engineering and construction cost was $1,700,000.00 (p. 18590). Fourteen thousand is the maximum acreage that has ever been irrigated (p. 18605), and was watered up to and including 1934, and for several years prior thereto, but during the past five seasons, including 1939, only 7,200 or 7,300 acres have been irrigated due to shortage of water (p. 18593). Under the Pioneer canal with early rights of April 19, 1879, and October 1, 1884 (W-56), only 7,500 acres have been irrigated the past few years (p. 18606).

The James Lake project comprises 36,000 acres (p. 18699). There are three sources of supply for the James Lake reservoir, the Little Laramie river, Seven Mile and Four Mile creeks

(p. 18700), and other lands are supplied by direct flow rights from the Big Laramie river through the Oasis ditch. In 1939 about 2,000 acres were irrigated from the Big Laramie river (pp. 18702-03), and the largest acreage irrigated between 1934 and 1939 from the James Lake supply was 500 (p. 18705). Prior to 1929 as much as 10,000 acres were irrigated altogether, but acreage has declined very rapidly since 1929, and the James Lake reservoir hasn't been used extensively in the last ten years, and in the last six years not at all, in order to save evaporation and seepage losses (p. 18704).

The North Laramie project is supplied from the North Laramie river and is fully constructed, comprising 7,000 acres (p. 19249). Six hundred forty acres are presently irrigated and the most that has ever been irrigated is about two sections (p. 19246).

The evidence as to the foregoing Wyoming developments in the Laramie basin show large available irrigable acreages for which facilities are constructed which are not irrigated due to lack of water supply. In addition, large areas lie within proposed projects construction of which has not been, or cannot be consummated due to shortage of water. The evidence also shows that large tracts under senior rights such as those of 1879 and 1884 of the Pioneer canal, and 1883 of the Wheatland project, are not irrigated, and with specific reference to the former the testimony is definite that development has been arrested because of lack of water supply (p. 18593).

Without going into greater detail the conclusion is well-founded that large additional opportunities for utilization of the Laramie river supply exist in Wyoming under old priorities. A very moderate supply of only 1.5 ac. ft. per acre at the headgate was provided in the decree of the Supreme Court based upon 181,500 acres on the assumption that 272,500 ac. ft. were available, while as shown by Nelson, actual annual average of the 1911-1938 period is only 242,500 ac. ft. (W-112). Economy of use in the lower state was most certainly and effectively imposed by the decree of the Court.

Meeker states that the discharge of the Laramie river to the North Platte is not a dependable flow and is a very negligible supply (p. 133), and that no dependable water reaches the North Platte from the Laramie basin during the irrigation season (p.

176). That this is true, due to consumptive use upon old rights in Wyoming and Colorado, and that the situation should not be disturbed after uninterrupted enjoyment of these uses for more than 60 years, and more than 20 years subsequent to the equitable apportionment of the stream between Colorado and Wyoming, is apparent.

On W-170 average historical runoff of the Laramie river at its mouth 1904-1940 is 132,000 ac. ft. On his reconstructed up-river water supply at Whalen and other net accretions above the Wyoming-Nebraska line (W-173), Nelson estimates for the future available for downstream use 85,000 ac. ft. annually, of which 49,500 is in the October-April months, and 35,500 May-September (p. 27554). He assumes there will be additional depletion over that represented by the runoff in the 1904-1940 period in the Laramie river basin of 20,000 ac. ft.; that 10,000 ac. ft. will be used to allow for reduction to present conditions of the historical gain between Pathfinder and Guernsey, and an additional 12,000 for losses that may accrue between Pathfinder and Whalen (pp. 27536-37). A conservative appraisal has been placed upon the supply available for downstream use in the future by Mr. Nelson, but one which we think justified due to shortages in the Laramie river basin experienced heretofore, but which may be partially alleviated by reason of recently constructed additional storage for the Wheatland project.

Conclusion with reference to the Laramie river is that the decree should not be disturbed and that its future contribution to the North Platte supply will be as outlined by Nelson.

SOUTH PLATTE RIVER

The South Platte river basin is portrayed on C-160. The South Platte unites with the North Platte to form the Platte river about five miles east of the city of North Platte, Nebraska. Maximum distance from the headwaters of the South Platte in the state of Colorado to the junction of the two rivers is 450 miles (p. 25322), and distance from the point where the river crosses the Nebraska-Colorado line to the confluence of the North and South Platte rivers is 83 miles (p. 25320). The North Platte is a somewhat longer basin since, as shown by C-72, it is 200 miles from the junction of the North and South Platte rivers to the Wyoming-Nebraska line, 455 miles to Pathfinder, and 710 miles to the headwaters of the North Platte in Colorado (pp.

Testimony of E.K. Nelson — Direct — November 27, 1941

..PAGES
Page 27553
..TEXT

return flows were assumed, therefore — we will assume that the previous year was a low year — the return flows were therefore assumed as of the high values from May up to the next May; and likewise, in a low year, during which diversions were made, May to September, the return flows were likewise carried through as low values to the next year. That is, this does not follow a water-year, but is followed, as stated, on the assumption that diversion first must be made to produce return flows.

Q. — Do you have before you Wyoming Exhibit No. 173?

A. — I have.

Q. — How many sheets are there in that exhibit?

A. — The exhibit consists of fourteen pages.

Q. — Does that cover data for the 1904-1940 period, of thirty-seven years?

A. — It does.

Q. — And the same lines are included, are they, for each year?

A. — Yes, sir.

Q. — With reference to the run-off at Guernsey, directing your attention to the first year, 1904, from what source was the data obtained for that?

A. — Colorado Exhibit 96, and Wyoming Biennial Reports.

Q. — Those are historical values?

A. — Yes, sir.

Q. — Will you explain Line 2, the Laramie River, and what values you have used on that?

Nelson — Direct — November 27, 1941

..PAGE
Page 27554
..TEXT

A. — I previously stated that I had used Laramie River as a depletion factor to allow for the use of historical gains from Pathfinder to Guernsey; that is, I have reduced Laramie River actually nearly 50,000 acre feet from the historical to the value adopted, and for the period of 1904 to 1930, inclusive, I have used this value for Laramie River — that is, the 85,000 acre feet — and have distributed it with relation to what did occur in 1938, that being approximately an average year, and the run-off being approximately the same amount as I have used. Using this distribution gives a May-September values for Laramie River of 35,500 acre feet, which is probably somewhat low, but that was what I had decided upon since there would be no question about its values.

Q. — Is it your purpose on this exhibit to show what the water supply would have been in that respect, reconstructed in the manner that you have indicated?

A. — That is correct.

Q. — Have you used the same values, then, for the Laramie River throughout the exhibit?

A. — Through 1930, inclusive, whereupon the historical values were used.

Q. — From 1931 to 1940, inclusive?

A. — That is correct.

Q. — Why did you use historical values for the 1931-1940 period?

A. — Because they were low, drouth[Sic drought?]-period values, and to have used these would have added some water that was not there.

Nelson — Direct — November 27, 1941

..PAGE
Page 27555
..TEXT

Q. — In Line 3 what have you indicated?

A. — This is the Kendrick project return flow, which is from an exhibit just introduced. Its values is used throughout as indicated by the United States exhibit referred to, excepting for the November-March distribution, which I have assumed.

Q. — That values is the same for each year throughout the exhibit, is it not?

A. — Exactly throughout the exhibit.

Q. — What is the item in Line 4, Mr. Nelson?

A. — That is the net return flow which has accrued to the river during the so-called drouth [Sic drought?] period of 1931-1940, from Whalen to the Nebraska line, as has been computed on a previous exhibit and is merely transferred here.

Q. — Is that a mean of the 1931-1940 period?

A. — That is right.

Q. — And are the values in that line the same for each year, on this exhibit?

A. — They are.

Q. — Whh [Sic Why?] did you use the 1931-1940 mean for that value?

A. — For the reason that from the values determined by a previous exhibit, they represent mean values during a drouth [Sic drought?] period, and they would be stabilized and provide at least that much — provide that much of a supply.

Q. — Was it your purpose in that connection to use a value that, while it might be exceeded at some time and probably would be ex-

..PAGE
Page 27556
..TEXT

ceeded in years of better supply, would in all probability never be less?

A. — That is correct.

Q. — In Line 5 you have a total. What is that, please?

A. — That is the total of all the values above, of Lines 1 to 4, inclusive; that is, this total represents the run-off at Guernsey, Laramie River, the return flow from Kendrick, and the return flow of the Whalen-State line section. That is the total discharge.

Q. — As to the return flow in the Whalen-State line section, that actually represents, does it not, the entire accretion to the stream in that section in the 1931-1940 period; that is a mean of that period excepting the Laramie River?

A. — That is correct.

Q. — What is Line 6?

A. — Line 6 is historical. That is the recorded discharge below Pathfinder reservoir and Alcova reservoir after it began storage.

It is contained as indicated on Sheet 1, in Colorado Exhibits 93 and 96, and Wyoming exhibits, and the information is also available on one or two Nebraska exhibits.

Q. — Will you explain Line 7, please?

A. — Line 7 is obtained by subtracting from the values of Line 5 the value of Line 6. It is the gain between Pathfinder and Guernsey. In order that it may be more easily checked or explained, and to indicate further what the historical situation was, I have shown that in Line 10 for convenience; that is to say, the values

..PAGE
Page 27557
..TEXT

of net gain, reconstructed, of Line 7 could also be obtained by adding the value of Line 10 to the values of Lines 2, 3 and 4.

Q. — What is the significance of the term "reconstructed," Line 7?

A. — Because at the present time there is no Kendrick project, and Laramie River did not flow in the past as I have used the value hereon.

Q. — Will you state again between what points that net gain originates?

A. — That is the net gain now from Pathfinder reservoir to the Nebraska line.

Q. — What is Line 8, Mr. Nelson?

A. — That is the future conditions inflow as to Pathfinder, designated as such, and hereafter designated as "Adjusted inflow to Pathfinder," on the basis of Exhibit 172 of Wyoming. These are the monthly values which are obtained by the use of the depletion values of Exhibit 172, month by month.

Q. — Will you explain Line 9?

A. — Line 9 is the sum of the inflow to Pathfinder and the net gain from Pathfinder to the Nebraska line. It is a water fund from which uses, or upon which demands can be made and, of course, is predicated upon a complete development of the Kendrick project.

Q. — Have you portrayed in Line 9 the total water fund available for uses, giving consideration to the depletion that you have made as to the Laramie River supply, the effect of the complete development of the Kendrick project, and using for return flow data between

Nelson — Direct — November 27, 1941

..PAGE
Page 27558
..TEXT

Whalen and the Nebraska line a mean of the 1931-1940 period?

A. — I have.

Q. — You have also included the effect of an additional depletion above Pathfinder?

A. — That is correct.

Q. — As a matter of fact, Mr. Nelson, you have superimposed these new conditions that you assume would prevail in the future upon the water supply as it actually existed for the year 1904.

A. — That is correct. I am assuming all these elements in operation. It must be understood, however, that this total water fund is a water fund other than is shown hereon. That is, taking, for example, for the value under October on Sheet 2 hereof, the future condition inflow to Pathfinder, which has been added to the value of Line 7 to give the value of Line 9, would have occurred had not diversions been made for Kendrick project to supply the water; that is to say, this is a water fund, not waters which have come to any particular point — not run-off.

Q. — Line 10 has no particular significance, has it, Mr. Nelson?

A. — No, sir; it is just for convenience in checking.

Q. — At the right of the exhibit do you have yearly quantities, which cover the water-year?

A. — I have.

Q. — Also, for the October-April period, and separately for the May-September period?

A. — That is correct.

Nelson — Direct — November 27, 1941

..PAGE
Page 27559
..TEXT

Q. — Is the formula the same for each of the years on this exhibit, from 1904 to 1940, inclusive?

A. — Yes. No, excepting for some; that is, the actual flow of the Laramie River has been used for the 1931-1940 period and, of course, the other values will be historical.

Q. — But the same setup is used as to your ten lines on the right-hand margin?

A. — Yes, that is correct, the same setup is used.

Q. — You have used for the 1931-1940 period the mean flow of the Laramie, since that was less than the 85,000?

A. — That is correct. I used the historical flow of the Laramie River.

Q. — Will you turn to Page 14 of this exhibit?

A. — Yes.

Q. — Do you have two sets of means?

A. — Yes, sir.

Q. — For what period?

A. — A mean for the total period of thirty-seven years, 1904 to 1940, inclusive, and for the period of 1931-1940, inclusive.

Q. — For the 1904-1940 period, what is the water-year mean of the reconstructed water fund of Line 9?

A. — Under the year, for the average, it is 1,825,200 acre feet.

Q. — And what is the similar figure for the 1931-1940 mean?

A. — 1,361,000 acre feet.

Q. — I see a footnote (a) at the bottom of Page 14, apparently

Nelson — Direct — November 27, 1941

..PAGE
Page 27560
..TEXT

keyed to Laramie River, Line 2, the means of 1904-1940. Will you explain that?

A. — Yes, sir. The value of Laramie River used for 1904-1930 I have just described, and this note appeared here because I studied quite carefully the regimen of the Laramie River before adopting a value for is use, and I find that for the 1915-1940 period the annual run-off as shown on a previous exhibit was 132,000 acre feet average. However, I note here that I also gave consideration to the period of 1920-1939, inclusive, in which the man annual run-off was 127,000 acre feet. I should like to explain another item for the convenience of checking.

Q. — Go ahead.

A. — In the "Year" column, in the 1904-1940 means, will be found, after Line 8, the value 1,224,500 acre feet. This value, subtracted from the present condition run-off at Pathfinder as indicated on a previous exhibit of 1,293,000 acre feet, gives the value that I pointed out a minute ago of the effect of the attempt to consume 75,000 acre feet a year above Pathfinder, and that subtraction results in the actual reduction of 68,500 acre feet.

Q. — Do you have anything additional or in further explanation you want to give about this exhibit?

A. — Yes, sir. The average run-off at Guernsey for the period is indicated in the 1904-1940 mean paragraph, which is historical, being 1,562,000 acre feet, and the actual mean of the whole period of Laramie River annually was approximately 80,000 acre feet, which

..PAGE
Page 27561
..TEXT

results from combining the 85,000 for the first part of the period and the historical run-off for the last decade. Line 3, of course, is a constant, and Line 4 is a constant, and the computation of Line 7 indicates the future condition net gain in water between Pathfinder and the Nebraska line, of 600,700 acre feet, of which approximately 285,000 acre feet comes in the May-September period. It is interesting to note that on the bottom line the historical long-time mean gain — Line 10 of these 1904-1940 means — of 287,000 acre feet, occurs approximately half in the October-April period and half in the May-September period. That is an average of historical values. Also, it is interesting to note that in the May-September value of 141,000 acre feet, approximately half of that occurs during the month of May, which is indicated to be 72,200 acre feet. The flow is generally smoothed out during the winter months, is erratic during the May-September months, but is in large part a usable flow.

Q. — Is that all you have to comment on?

A. — I think that covers it, yes, sir.

WYOMING EXHIBIT NO. 148

Elmer K. Nelson, C.E.
1941

NORTH PLATTE RIVER
NET RETURN FLOWS AND ACCRETIONS
Thousands Acre Feet

Season	Net Return Flow Accretions: Whalen-Neb.Line May-Sept.	Whalen-Neb.Line Year	Nebr.Line-Bridgeport May-Sept.	Nebr.Line-Bridgeport Year	Return Flows and Other Accretions-Sectional: Bridgeport-Oshkosh May-Sept.	Bridgeport-Oshkosh Year	Oshkosh-North Platte May-Sept.	Oshkosh-North Platte Year	Totals May-Sept.	Totals Year
	a.		b.		c.					
1929-30	77.2	166.6	577.4	1153.4	45.8	158.6	120.9	283.1	821.3	1761.7
1930-31	49.0	152.7	403.0	925.6	21.6	190.7	87.5	276.5	561.1	1644.5
1931-32	54.9	109.0	403.7	749.0	43.6	126.6	155.5	381.2	657.7	1365.8
1932-33	78.1	171.1	456.3	863.7	57.8	208.6	201.8	444.6	794.0	1688.0
1933-34	56.0	142.9	227.7	623.1	28.2	173.5	84.8	281.6	396.7	1220.9
1934-35	63.5	118.8	291.0	583.2	65.4	150.7	164.8	338.2	584.7	1190.9
1935-36	51.3	121.0	248.5	540.8	15.9	108.7	73.7	268.4	389.4	1038.9
1936-37	62.2	112.2	307.0	578.7	17.4	113.3	98.1	313.4	484.7	1117.6
1937-38	96.6	158.3	343.1	663.3	83.4	195.9	132.5	334.4	655.6	1361.9
1938-39	89.6	162.0	289.3	597.9	22.2	153.1	79.9	298.9	481.0	1211.9
1939-40	57.6	129.1	201.3	519.3	12.9	92.8	82.1	253.2	353.9	994.4
Average, 1931-1940	66.0	138.0	317.0	664.0	37.0	151.0	116.0	319.0	536.0	1272.0

a. Values of Wyoming Ex. 98 plus flow of Rawhide Creek, 1930-36.
b. Values of Wyoming Ex. 98, 1930-38.
c. Values of Wyoming Ex. 97, 1930-38.

Averages - Whalen to Bridgeport

	May-Sept.	Year
1931-1940	383.0	602.0

A-33

Gaging Station in Section 4 - 23 - 58 W.
at Wyoming-Nebraska Line

Data from Nebr. Reports

NORTH PLATTE RIVER
SPRING CREEK
Acre Feet

WYOMING EXHIBIT NO. 150

Elmer K. Nelson, C.E.
1941

Year	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Year	Oct-April	May-Sept.
1930															
1931															
1932	615	595	615	615	575	645	595	647	526	555	645	625	7253	4255	2998
1933	676	704	661	676	611	694	617	676	595	553	565	635	7663	4639	3024
1934	738	655	615	528	500	666	595	553	516	492	553	595	7006	4297	2709
1935	615	536	522	553	555	593	549	619	655	655	615	595	7062	3923	3139
1936	615	595	593	534	645	613	490	444	464	214	194	198	5599	4085	1514
1937	603	535	492	512	484	492	476	464	500	668	524	522	6272	3594	2678
1938	595	557	565	579	555	583	567	803	708	657	576	740	7484	4001	3483
1939	551	718	684	712	587	609	607	520	956	744	702	569	7959	4468	3491
1940	583	1061	492	492	460	522	516	603	573	508	468	506	6784	4126	2658
AVERAGE	621	662	582	578	552	602	557	592	610	561	538	554	7009	4154	2855

NOTE: Due to incomplete record this Return Flow stream, entering Nebraska from Wyoming a short distance north of the main gaging station on the North Platte River, was omitted from Wyoming Exs. 86 to 95 and from later exhibits. This run-off enters the river above the Tri-State Canal head gate. The amount of run-off is to be added to Return Flow between Whalen and the Nebraska Line. In the Return Flow between Nebr. Line and Bridgeport the amount of water would show up as a channel accretion in the flows in the exhibits and is not to be added thereto. The amount of run-off should also be added as the inflow from Wyoming to Nebraska at the State Line. It has not been added in the Exhibits.

WYOMING EXHIBIT NO. 170

NORTH PLATTE RIVER IN WYOMING

SECTION NET GAINS, HISTORICAL, AND RUN-OFF AT GAUGING STATIONS

YEARLY FLOWS AT GAUGING STATIONS; OCT. 1 — SEPT. 30

Thousand Acre Feet

1	2	3	4	5	6	7*
Year	Northgate	Gain, Net	Saratoga	Gain, Net	Seminoe	Gain, Net
1904	(c)410.0E	587.8	997.8	195.2	1,193.0A	****
1905	370.0E	539.9	909.9	180.1	1,090.0A	****
1906	420.0E	602.5	1,022.5	200.5	1,223.0A	****
1907	530.0E	768.0	1,298.0	396.0	1,694.0A	****
1908	270.0E	394.0	664.0	157.0	821.0A	****
1909	730.0E	1,040.4	1770.4	476.6	2,247.0A	****
1910	250.0E	359.0	609.0	241.0	850.0A	****
1911	360.0E	525.0	885.0	183.0	1,068.0A	****
1912	500.0E	718.1	1,218.1	364.9	1,583.0A	****
1913	360.0E	511.1	871.1	256.9	1,128.0A	****
1914	400.0E	716.9	1,206.9	228.8	1,435.7	****
1915	278.7	340.2	618.9	204.0	822.9	****
1916	375.2	512.1	887.3	163.0	1,050.3	****
1917	626.5	973.6	1,600.1	694.4	2,294.5	****
1918	454.6	638.5	1,093.1	275.1	1,368.2	****
1919	221.0	391.3	612.3	186.5	798.8	****
1920	484.0	761.5	1,245.5	445.9	1,691.1	****
1921	508.9	844.1	1,353.0	306.1	1,659.1	****
1922	275.9	484.4	760.3	270.0	1,030.3	****
1923	506.3	560.5	1,068.8	324.1	(g)1,392.9	****
1924	396.9	436.8	833.7	388.6	1,222.3	****
1925	319.4	518.4	837.8	303.4	1,141.2	****
1926	532.1	729.3	1,261.4	374.6	1,636.0A	****
1927	415.6	614.0	1,029.6	311.4	1,341.0A	****
1928	506.8	742.1	1,248.9	377.1	1,626.0A	****
1929	523.5	695.6	1,219.1	321.9	1,541.0A	****
1930	345.2	345.7	690.9	159.5	850.4	****
1931	182.4	297.8	480.2	108.1	588.3	****
1932	440.1	583.3	1,023.4	341.4	1,364.8	****
1933	258.8	473.1	731.9	307.9	1,039.8	****
1934	89.1	149.4	238.5	73.8	312.3	****
1935	200.6	328.1	528.7	120.9	649.6	****
1936	332.1	470.0	802.0	171.9	973.9	****
1937	215.0	430.7	645.7	257.4	903.1	****
1938	400.3	533.7	934.0	256.9	1,190.9	****
1939	204.7	351.4	556.1	83.9	(a) 640.0	****
1940	155.3	295.6	450.9	72.6	(b) 523.5	****
Means	376.8	547.7	924.5	264.5	1,189.0	****
Means, Present Conditions	370.0	(i)540.0	910.0	260.0	1,168.0	****

Based on Wyo. Ex. 100.

*Information not legible on microfiche copy.

(cont'd.)

1	8*	9	10	11	12	13	14
Year	****	Losses Net	Pathfinder Discharge	Gain, Net	Guernsey	Net, Gain L.R.	Net, Run-off (12)+(13)
1904	****	(d) .0	(e)1,276.4	295.3	1,571.7	135.0E	1,706.7
1905	****	.0	1,229.0	519.0	1,748.0	170.0E	1,918.0
1906	****	.0	1,386.0	387.0	1,773.0	173.0E	1,946.0
1907	****	.0	1,842.3	591.1	2,433.4	295.0E	2,728.4
1908	****	.0	918.6	603.2	1,521.8	125.0E	1,646.8
1909	****	19.8	2,231.3	275.5	2,506.8	305.0E	2,811.8
1910	****	19.0	1,008.6	176.6	1,185.2	65.0E	1,250.2
1911	****	23.9	1,098.4	92.2	1,190.6	65.0E	1,255.6
1912	****	45.7	1,470.0	274.5	1,744.5	170.0E	1,914.5
1913	****	41.1	1,310.5	236.3	1,546.8	130.0E	1,676.8
1914	****	68.2	1,312.5	178.5	1,491.0	120.0E	1,611.0
1915	****	41.7	945.1	349.0	1,294.1	91.4	1,385.5
1916	****	50.8	1,156.0	205.0	1,361.0	71.3	1,432.3
1917	****	71.0	1,994.1	580.7	2,574.8	397.4	2,972.2
1918	****	64.2	1,498.3	526.1	2,024.4	191.5	2,215.9
1919	****	62.8	1,116.6	115.2	1,231.8	70.4	1,302.2
1920	****	70.7	1,373.8	490.4	1,864.2	194.6	2,058.8
1921	****	67.1	1,791.7	163.8	1,955.5	167.1	2,122.6
1922	****	64.0	1,356.4	170.3	1,526.7	89.5	1,616.2
1923	****	56.2	1,087.3	389.2	1,476.5	131.7	1,606.2
1924	****	62.8	1,876.1	351.9	2,228.0	239.8	2,467.8
1925	****	38.2	1,285.5	265.8	1,551.3	72.8	1,624.1
1926	****	49.4	1,446.4	242.5	1,688.9	191.5	1,880.4
1927	****	66.7	1,278.8	332.7	1,611.5	183.4	1,794.9
1928	****	56.8	1,749.8	301.3	2,051.1	216.1	2,267.2
1929	****	95.2	1,719.9	387.3	2,107.2	275.0	2,382.2
1930	****	53.4	1,206.5	278.2	1,484.7	177.0	1,661.7
1931	****	36.0	1,004.0	242.0	1,246.0	99.8	1,345.8
1932	****	36.8	1,311.2	192.4	1,503.6	76.8	1,580.4
1933	****	39.3	1,147.3	368.2	1,515.5	73.2	1,589.1
1934	****	14.0	485.3	107.3	592.6	36.3	628.9
1935	****	16.1	677.6	169.5	847.1	67.0	914.1
1936	****	25.8	1,017.2	74.7	1,091.9	60.1	1,152.0
1937	****	26.6	1,049.4	229.3	1,278.7	72.6	1,351.3
1938	****	43.0	975.5	212.0	1,187.5	80.4	1,267.9
1939	****	38.6	991.5	153.7	1,145.2	54.6	1,199.8
1940	****	24.0	548.9	95.6	644.5	40.2	684.7
Means	****	45.5	1,275.0	287.0	1,562.0	(f)132.0	(h)1,694.0
Means, Present Conditions	****	45.0	1,248.0	277.0	1,525.0	90.0	1,615.0

Sheet 1

WYOMING EXHIBIT NO. 173*
Elmer K. Nelson, C.E.
1941

NORTH PLATTE RIVER
RECONSTRUCTED UPRIVER WATER AT WHALEN
AND OTHER NET ACCRETIONS ABOVE WYO.-NEBR. LINE

Notes on Sources of Data

Line 1. Colorado Exhibit 96 and Wyoming Reports.

Line 2. Previous Exhibit. See note Sheet 14. Annual value for Laramie River adopted, 85.0, for 1904-1930. For 1931-1940, historical. The value allows for correction of Laramie River and gains, Pathfinder to Guernsey, to present conditions.

Line 3. Previous Exhibit.

Line 4. Previous Exhibit. Average of 1931-1940 used for whole period as stabilized Return Flow of Section, Whalen to Nebraska Line.

Line 5. Total of Lines 1, 2, 3 and 4.

Line 6. Colorado Exhibits 93 and 96 and Wyoming Exhibits.

Line 7. Lines 5 minus Line 6. Historical gain plus values of Lines 2, 3 and 4.

Line 8. Wyoming Exhibit 100 adjusted to future conditions; data of previous exhibit.

Line 9. Line 7 plus Line 8.

Line 10. Values of Line 1 minus Line 6 shown for convenient reference.

*Excerpts [Sheets 2-13 yearly data omitted]

NORTH PLATTE RIVER
1904-1940
RECONSTRUCTED UPRIVER WATER AT WHALEN AND OTHER NET ACCRETIONS ABOVE WYO.NEBR. LINE
Thousands Acre Feet

	Oct.	Nov.	Dec.	Jan.	Feb.	March	April	May	June	July	Aug.	Sept.	Year	Oct-April	May-Sept.
						1940									
1. Run-off at Guernsey	17.3	13.8	10.7	9.0	10.5	13.4	16.2	93.3	150.1	136.2	151.1	22.9	644.5	90.9	533.6
2. Laramie River	3.0	3.5	4.5	4.4	5.1	4.6	4.4	3.3	3.9	1.5	0.9	1.2	40.2	29.3	10.9
3. Kendrick Project Return Flow	9.4	9.0	8.0	5.0	5.0	6.0	7.5	7.4	7.5	7.7	11.3	12.2	96.0	49.9	46.1
4. Net Return Flow	19.2	13.5	10.6	8.1	7.2	7.1	6.1	0.7	9.6	10.8	19.8	25.0	137.7	71.8	65.0
5. Total	48.9	39.8	33.8	26.5	27.8	31.1	34.2	104.7	171.1	156.2	183.1	61.3	918.4	241.9	676.5
6. Discharge Below Pathfinder	6.8	4.5	2.0	0.9	0.8	0.2	0.2	87.8	149.4	148.1	137.4	10.7	548.8	15.4	533.4
7. Net Gain, Reconstructed	42.1	35.3	31.8	25.6	27.0	30.9	34.0	16.9	21.7	8.1	45.7	50.6	369.6	226.5	143.1
8. Future Conditions, Inflow to Path.	27.0	25.3	23.0	19.3	23.6	46.0	73.9	150.3	101.8	15.0	15.0	19.7	539.9	238.1	301.8
9. Reconstructed Water Fund, Pathfinder - Neb. Line	69.1	60.6	54.8	44.9	50.6	76.9	107.9	167.2	123.5	23.1	60.7	70.3	909.5	464.6	444.9
10. Historical Gain, Path. to Whalen	10.5	9.3	8.7	8.1	9.7	13.2	16.0	5.5	0.7	-11.9	13.7	12.2	95.6	75.5	20.2
						MEANS -- 1904-1940									
1. Run-off at Guernsey	70.1	30.2	20.2	20.4	21.7	40.2	85.9	230.8	363.3	294.1	233.2	152.0	1562.1	288.7	1273.4
2. Laramie River (a)	5.0	5.9	6.3	6.2	6.3	7.2	11.1	12.8	7.1	4.0	2.6	5.6	79.9	47.8	32.1
3. Kendrick Project Return Flow	9.4	9.0	8.0	5.0	5.0	6.0	7.5	7.4	7.5	7.7	11.3	12.2	96.0	49.9	46.1

4. Net Return Flow	19.2	13.5	10.6	8.1	7.2	7.1	6.1	0.7	9.6	10.8	19.8	25.0	137.7	71.8	65.9
5. Total	103.7	58.6	45.1	39.7	40.2	60.5	110.6	251.7	387.5	316.6	266.9	194.8	1875.7	458.2	1417.5
6. Discharge Below Pathfinder	44.5	12.9	10.0	9.9	7.9	17.8	39.8	158.5	324.7	287.1	228.4	133.9	1275.0	142.4	1132.6
7. Net Gain, Reconstructed	59.2	45.7	35.1	29.8	32.3	42.7	71.2	93.2	62.8	29.5	38.5	60.9	600.7	315.8	284.9
8. Future Conditions, Inflow to Path.	47.6	41.0	33.0	27.5	28.4	65.9	164.9	296.8	361.0	81.8	38.0	38.7	1224.5	408.2	816.3
9. Reconstructed Water Fund, Pathfinder - Neb. Line	106.8	86.7	68.1	57.3	60.7	108.6	236.1	390.0	423.8	111.3	76.5	99.6	1825.2	724.0	1101.2
10. Historical Gain, Path. to Whalen	25.6	17.3	10.2	10.5	13.8	22.4	46.5	72.2	38.5	7.0	4.9	18.2	287.0	146.0	141.0
						MEANS - 1931-1940									
1. Run-off at Guernsey	34.1	17.0	13.5	12.8	13.0	18.8	40.0	147.1	212.3	260.7	233.9	102.0	1105.2	149.2	956.0
2. Laramie River (a)	4.9	5.6	5.6	6.1	5.7	6.4	8.5	9.4	7.5	2.7	1.6	1.9	66.1	42.9	23.2
3. Kendrick Project Return Flow	9.4	9.0	8.0	5.0	5.0	6.0	7.5	7.4	7.5	7.7	11.3	12.2	96.0	49.9	46.1
4. Net Return Flow	19.2	13.5	10.6	8.1	7.2	7.1	6.1	0.7	9.6	10.8	19.8	25.0	137.7	71.8	65.9
5. Total	67.6	45.1	37.7	32.0	30.9	38.3	62.1	164.6	236.9	281.9	266.6	141.1	1405.0	313.8	1091.2
6. Discharge Below Pathfinder	15.4	4.0	2.7	3.0	1.7	0.8	6.3	114.7	203.2	263.5	228.1	77.3	920.8	34.2	886.6
7. Net Gain, Reconstructed	52.2	41.1	35.0	29.0	29.2	37.5	55.8	49.9	33.7	18.4	38.5	63.8	484.2	279.6	204.6
8. Future Conditions, Inflow to Path.	35.4	33.2	28.1	24.1	24.1	54.7	135.8	222.3	237.5	36.9	17.6	27.2	876.9	335.4	541.5
9. Reconstructed Water Fund, Pathfinder - Neb. Line	87.6	74.3	63.1	53.1	53.3	92.2	191.6	272.2	271.2	55.3	56.1	91.0	1361.0	615.0	746.0
10. Historical Gain, Path. to Whalen	18.7	13.0	10.8	9.8	11.3	18.0	33.7	32.4	9.1	-2.8	5.8	24.7	184.5	115.2	69.3

(a) Line 2 approximately as of 1938. Actual mean of period 1920-1939, May-Sept. 66.0, year 127.0.

IN THE

Supreme Court of the United States

No. 6 Original

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING,
Defendant,

THE STATE OF COLORADO,
Impleaded Defendant,

UNITED STATES OF AMERICA,
Intervener.

BRIEF OF DEFENDANT, STATE OF WYOMING

LOUIS J. O'MARR,
Attorney General.

W. J. WEHRLI,
Special Counsel.

PRAIRIE PUBLISHING CO . CASPER

Kendrick Project. It is a net supply arriving at Whalen for use below. The Master's proposed decree restricts irrigation from the main stream, exclusive of the Kendrick Project, between Alcova and Whalen to present uses. Therefore, this accretion will be available in any similar future period.

In addition, there was available during the drouth decade, 1931 to 1940, an average May-September accretion of 63,220 acre feet between Whalen and the Wyoming-Nebraska State line, as disclosed by Table III, Page 67 of the Master's Report. This did not include the Laramie River which, according to the same Table, made an average May-September contribution for the same years of 23,230 acre feet. From examination of the Whalen state line accretion, and the Laramie River inflow for such years of more plentiful supply as 1933 and 1938, as reflected by Table III, page 67 of the Master's Report, it is obvious that in periods of more favorable conditions the accretion in this section and the contribution of the Laramie River will be substantially more than the 1931-1940 averages. However, using the drouth decade values for these sources of supply, and adding to them an accretion of 141,000 acre feet, such as occurred on the average, 1904 to 1940, in the section between Alcova and Whalen, we have a total supply of 227,450 acre feet originating between Alcova and the state line in the May-September period. One source of additional supply above the Whalen-Tri-State Dam section has not heretofore been considered, nor it is mentioned in the Master's Report. Spring Creek, a tributary of the North Platte, enters the stream below the Wyoming-Nebraska state line and above the Tri-State dam. Testimony concerning same appears at pages 27387 to 27389 of the Record. and is reflected by Wyoming Exhibit No. 150. Since the exhibit itself discloses all pertinent information, same is incorporated in the Appendix, page 77, without inclusion of the related testimany. From this exhibit it appears that the average May-September contribution of this stream was 2,855 acre feet. A number of unusually dry years are included in this period and we think it safe to use a round figure value of 2,900 acre feet. Taking this supply into account, together with the accretions between Alcova and the state line, there is a total of 230,350 acre feet which, for conveniences, we will assign as 230,000. Therefore, of the 1,027,000 acre feet required in the May-September period in the Whalen-Tri-State Dam section, 230,000 is available from sources below Alcova.

Consequently, under average conditions prevailing in the 1904 to 1940 period, excepting only that we have used for accretions below Whalen and contribution of the Laramie River drouth decade values of 1931 to 1940 as taken from Table III, page 67 of the Master's Report, 230,000 acre feet may be supplied below Alcova, leaving the required release at Alcova 797,000 acre feet. The average annual evaporation loss of Pathfinder Reservoir is 45,000 acre feet, as shown in Column 9 of W-170 (Appendix pp. 38-39). If this is added to the required release of 797,000 acre feet the total is 842,000. While Pathfinder Reservoir has a capacity of 1,045,000 (M.R. p. 30), it is necessary to have available only 842,000 acre feet during the May-September period each year to supply the Master's proposed requirements for the Whalen-Tri-State Dam section. No winter release at Alcova is allowed and consequently the entire demand upon Pathfinder Reservoir is 842,000 acre feet, under the Master's proposals. This is the amount of water which it is necessary to have available in order to provide the lands dependent upon Pathfinder supply with the supply to which they are entitled under the Reclamation Act, which makes beneficial use the basis, the measure and the limit of the right. (Section 8 of the Reclamation Act of June 17, 1902, 32 Stat. 390, 43 U.S.C.A. 372.)

Coming now to consideration of additional supply required for the Kendrick Project, in conjunction with the demand upon the Pathfinder supply, we find that we must add to the required Pathfinder supply a May-September net consumptive use of the Kendrick of 162,000 acre feet, making a total of 1,004,000 acre feet. This is to say, that if this amount of water is available at Pathfinder, and if accretions below are taken into account, the demands of the North Platte project and the Kendrick and other users can be supplied. The 1904-1940 average recorded run-off at Pathfinder was 1,315,900 acre feet (M.R. p. 24) and this run-off reduced to present conditions of development is 1,293,000 acre feet (Col. 8, W-170, Appendix pp. 38-39). There is a liberal excess of average run-off over requirement; the difference between 1,004,000 and 1,293,000 being 289,000 acre feet. These values demonstrate the lack of any necessity for taking into account the total average run-off as measured against the total demand, and we think permit an adequate consideration of low years of run-off. Especially is this true when account is taken of the carry-over capacity of the reservoirs, their ability to conserve

recognize the equal rights of both and at the same time establish justice between them." (206 U. S. 97).

We do not believe, therefore, that the recommendations of the Master can be considered as interdependnt, and a part of them adopted and others rejected. Furthermore, if all of the recommendations are adopted, they do not make out a complete equitable apportionment or division between the states, for the reason that, as to the Whalen-Tri-State Dam section and the Kendrick Project, a type of administration only is advocated instead of a division of the supply between Wyoming and Nebraska. The proposals of paragraphs 3 and 4 of the recommendations for decree (M. R. pp. 177, 179) do not comprise a division of the supply between the two states, defining and limiting the amount of water which each is entitled to use, but only that certain individual projects in relation to each other shall be operated on a priority basis, and that certain limitations shall apply to the Nebraska state line canals individually. Canals serving Nebraska lands, such as the Interstate, Fort Laramie and Northport, are not included in paragraphs 3 and 4, and of the total May-September supply for Nebraska which is recommended by the Master of 790,000 acre feet, the canals specifically mentioned represent only a demand of 259,787 acre feet.

Our conclusion is that the Court, in exercising jurisdiction for the making of an affirmative decree, should make a complete equitable apportionment between the three states. This can not be accomplished as simply as was done in Wyoming v. Colorado, 259 U. S. 419, where restricting the upper state to the use of a certain quantity of water served to fix the rights of both. Here there are three states; large supplies originate in Colorado and Wyoming; are impounded in Wyoming, and used in both Wyoming and Nebraska; and large storage reservoirs are located in Wyoming which can only be properly utilized by the conservation and carry over of water from year to year. Just recognition of the rights of each state makes imperative a decree defining completely the rights of each and imposing upon each the limitations necessary to prevent infringement of the rights of any other.

10. THE DECREE

We believe a decree should be entered in this cause as follows:

1. Enjoining Colorado (a) from the diversion of water for the irrigation in North Park of more than 135,000 acres of land, (b) from the accumulation in storage facilities in North Park of more than 17,000 acre feet of water between October 1 of any year and September 30 of the following year, and (c) from the transbasin diversion out of North Park of more than 6,000 acre feet of water between October 1 of any year and September 30 of the following year.

2. Enjoining Wyoming (a) from the diversion of water from the main river above Guernsey and from its tributaries above Pathfinder Reservoir for the irrigation of more than 168,000 acres of land, and (b) from the accumulation of storage water in reservoirs above Pathfinder Reservoir in excess of 18,000 acre feet of water between October 1 of any year and September 30 of the following year. This is exclusive of Seminoe Reservoir and the Kendrick Project, which are given consideration elsewhere.

3. Enjoining Wyoming from the diversion of water from the North Platte River for the irrigation of lands of the Kendrick Project and the Wyoming lands served by diversions at and below Whalen of more than 405,000 acre feet in each irrigation season, May to September inclusive, providing that until five years have elapsed immediately following the commencement of irrigation of lands of the Kendrick Project, the limitation shall be 342,000 acre feet, and further providing that irrigation under the Kendrick Project shall not be commenced until the first year in which storage in the upper storage reservoirs, Seminoe, Pathfinder and Alcova, plus anticipated in-flow equals 1,000,000 acre feet, and that until the year in which such irrigation is commenced, the Wyoming allotment shall be 237,000 acre feet.

4. Enjoining Nebraska from the diversion of water from the North Platte River in the Whalen-Tri-State Dam section for Nebraska lands of more than 705,000 acre feet in each irrigation season, May to September inclusive, and from obtaining the conveyance past the Tri-State Dam of any water originating above that point for diversion from the North Platte River below Tri-State Dam, and permitting diversion of 73,000 acre feet to the inland reservoirs of the Pathfinder Irrigation District, Lakes Alice and Minatare, during the winter months, October 1st to April 30th, inclusive.

5. Providing that the May-September supplies mentioned in the preceding paragraphs 3 and 4 shall be delivered in accordance

with the needs of the appropriators served thereby, and that as a guide to such deliveries, monthly distribution of such May-September supplies, unless otherwise requested, shall be made as follows: 11 per cent in May; 24 per cent in June; 26 per cent in July; 24 per cent in August, and 15 per cent in September.

6. Providing that in the event of shortage of the May-September supplies provided for in paragraphs 3 and 4, same shall be sustained by Wyoming and Nebraska in proportion to the respective allotments to each state, and providing that excesses comprising uncontrolled supplies from reservoir spills originating during the May-September months may be diverted by Wyoming and Nebraska in proportion to the respective allotments made in paragraphs 3 and 4 above.

7. Requiring such additional gauging station and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for effecting the apportionment decreed above, to be constructed and maintained at the joint and equal expense of Nebraska and Wyoming.

8. Providing that the injunctions herein contained shall not comprise any restriction upon the diversion from the North Platte River and tributaries in Colorado and Wyoming of water for ordinary and usual domestic, municipal and stock-watering purposes.

9. Permitting any of the parties to apply at the foot of the decree for its amendment or for further relief, and retaining jurisdiction of the suit for the purpose of any order, direction or modification of the decree or any supplementary decree that may at any time be deemed proper in relation to the subject matter in controversy, provided that any application for amendment, modification or further relief shall not be made within ten years from date of the decree.

Explanation of Paragraphs 1 and 2

Paragraph 1 is identical with the same numbered paragraph of the Master's recommendations (M.R. p. 177).

Paragraph 2 is identical with the corresponding paragraph of the Master's recommendations, except the last sentence which has been added for purposes of clarity. The 168,000 acres mentioned in paragraph 2 is comprised of 153,000 irrigated from the main stream and tributaries above Pathfinder, (M.R. p. 135) and 15,000 from the main stream between Pathfinder and

tion, reservoir spills occurred in 21 of the 37 years, comprising a total quantity of 9,721,000 acre feet. Under similar conditions of supply, which may be reasonably anticipated because of nature's tendency to repeat itself, there will be uncontrolled supplies, and in paragraph 6 we propose that these may be enjoyed by Wyoming and Nebraska in proportion to the respective allotments of paragraphs 3 and 4. This is not perhaps of great importance because when these spills occur, conditions are such there is not great need for the water. It is a matter upon which no difficulty need be anticipated.

Explanation of Paragraphs 7, 8 and 9

Paragraph 7 is identical with the same numbered paragraph of the Master's recommendations (M.R. p. 179). It may not be necessary but its insertion is not injurious, and we favor its retention.

Paragraph 8 brings into the decree matters mentioned in the third paragraph at page 180 of the Master's Report, which we think should be incorporated. The recommendation has been broadened by including water for stock-watering purposes, and clarified to include diversions from tributaries as well as from the main stream.

Paragraph 9 is the same as paragraph 8 of the Master's recommendations (M.R. p. 179), excepting that we have added a proviso that application for ammendment or modification of the decree shall not be made within ten years from date of same. Under the heading "A Complete Equitable Apportionment Should Be Made", we have endeavored to point out that any decree which is rendered should be complete in itself at the time of rendition, making an entire apportionment as between the litigant states. We do not, however, contend that a decree must necessarily be final, and therefore believe that paragraph 9 should be included. At least in one respect the decree should not have finality, and that is as to possible additional development above Whalen in Wyoming and Colorado. The Wyoming study comprised in Wyoming exhibits 170 to 176 inclusive, it will be recalled, discloses that after supplying all existing needs and the Kendrick Project over the 37 year period, 1904 to 1940, reservoir spills of 9,721,000 acre feet from the upper storage reservoirs occurred. This water in any similar future period of run-off might be put to beneficial use at some point above

IN THE

Supreme Court of the United States

No. 7 Original

THE STATE OF NEBRASKA,
Complainant,
vs.
THE STATE OF WYOMING,
Defendant,
THE STATE OF COLORADO,
Impleaded Defendant,
UNITED STATES OF AMERICA,
Intervener.

EXCEPTIONS OF DEFENDANT, THE STATE OF WYOMING, TO THE REPORT OF MICHAEL J. DOHERTY, SPECIAL MASTER.

In these Exceptions, reference is made to the Master's Report by designation "M.R." followed by the appropriate page numbers, and references to the Exhibits introduced by Nebraska, Wyoming, Colorado and the United States by the letters "N", "W", "C" and "U.S." followed by the number of the particular exhibit.

While the subject matter of the Exceptions can not be completely segregated under different topics, certain headings will be inserted which may be helpful in correlating the Exceptions with the Report.

the Whalen-Tri-State Dam section, such shortages being of common occurrence in most irrigation projects.

XXVIII

As to paragraph 5 of the recommendations for decree, Wyoming does not object to an injunction against diversions above Alcova in lieu of Kendrick return flow, but does except to any restriction upon use of Kendrick return flow by appropriators below Alcova, for the reason that said return flow will become a part of the natural flow of the stream subject to diversion and use by Wyoming appropriators, as well as by those of Nebraska, and for the further reason that Wyoming's use from the main stream between Alcova and Guernsey will be limited by the provisions of paragraph 2, and for the further reason that any apportionment of the supply in the Whalen-Tri-State Dam section must include all natural flow there available, and must inevitably include Kendrick return flow.

XXIX

Wyoming excepts to the provisions of paragraph 8 of the recommendations for decree, and urges the Court to make and enter such decree herein as will be a complete equitable apportionment between the litigant States, leaving open for future consideration only the question of additional development above Whalen in Wyoming and Colorado. Further in connection with the recommendations of paragraph 8, Wyoming proposes that no application for modification should be permitted within a period of less than five years, and preferably ten years, from entry of decree herein.

XXX

Wyoming urges that the recommendation of the Master as to the ues of water for domestic and other purposes contained at page 180, should be clarified and rewritten as follows:

> "The parties are agreed that there should be no restriction upon the diversion from the North Platte River and tributaries in Colorado or Wyoming of water for ordinary and usual domestic, municipal and stock-watering purposes and nothing in the decree is intended to, or will interfere with such diversions and uses."

In The

SUPREME COURT OF THE UNITED STATES

No. 6 Original. October Term, 1945.

THE STATE OF NEBRASKA, COMPLAINANT,

V.

THE STATE OF WYOMING, DEFENDANT,

AND

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

THE UTITED STATES OF AMERICA, INTERVENOR.

COMPLAINANT'S PROPOSED FORM OF DECREE AND REQUEST FOR PERMISSION TO OPPOSE PROPOSALS OF OTHER PARTIES.

WALTER R. JOHNSON,
Attorney General of Nebraska,
JOHN L. RIDDELL,
Assistant Attorney General of Nebraska.
PAUL F. GOOD,
Special Counsel,
For Complainant.

A.

INTRODUCTORY.

Pursuant to the permission granted by this court (Opinion, page 53) the complainant, State of Nebraska,

submits the following as its proposal for a form of decree to carry into effect the decision of this court as evidenced by its opinion filed June 11, 1945. Unfortunately, the parties, after a two day conference, were unable to agree upon a form to be submitted except in part. Upon certain particulars there was substantial agreement, and in the following proposal, the complainant has endeavored to follow the pattern which the other parties wish to follow, and where there was substantial agreement, has endeavored to follow the exact language proposed by the other parties.

In the following proposal reference is made in marginal notes to the court's opinion or the Master's Report in respect to particular items which the respective portions of the decree are intended to cover. Every effort has been made by complainant correctly to reflect the intention of the court as evidenced by the opinion and by the Master's Report where the opinion adopts that report.

B.

DECREE.

This cause having heretofore, on March 5, 6 and 7, 1945. been argued and submitted upon exceptions to the Special Master's Report, and an opinion having been rendered by this court on June 11, 1945.

Now, Therefore, pursuant to said opinion and in order to carry it into effect, the following decree is hereby entered:

It Is Ordered, Adjudged and Decreed:

I.

The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigaton of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;[1]

(b) From storing or permitting the storage of more than a total amount of 17,060 acre feet of water from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;[1]

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years from and after October 1, 1945, reckoned in continuing progressive series in such manner that during the ten year period ending September 30, 1955, and during each and every ten year period ending on each and every September 30th thereafter no more water may be exported, transbasin from Jackson County, Colorado, than will make up an aggregate of 60,000 acre feet.[2]

II.

Exclusive of the Kendrick Project and Seminoe Reservoir[3] the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

1. Opinion, page 24: Master's Report, p. 177.
2. Opinion, page 25.
3. Opinion, page 26.

(a) From diverting or permitting the diversion of water in Wyoming from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land during any one irrigation season.[4]

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.[4]

III.

The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights as among themselves of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electic power when and only when such storage or release will not materially interfere with the administra-

---

4. Opinion, page 26; Master's Report, p. 177.

may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.[9]

VIII.

The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.[10]

IX.

The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraph I and II hereof, and such records shall be available for inspection at all reasonable times.[11]

X.

This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and

---

9. Opinion, pp. 50-51; Master's Report, p. 178.
10. Opinion, pp. 34-35; Master's Report, pp. 178-179.
11. Opinion, pp. 52-53.

usual domestic municipal and stock watering purposes and consumption."[12]

XI.

For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30 inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;[13]

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;[14]

(d) Return flows of the Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.[15]

XII.

That the allotment of water for Northport Canal as recommended by the Special Master and incorporated in the opinion herein, — U. S. —, (Opinion, p. 47) be and the same hereby is revised to allow a maximum from all sources for the irrigation of 13,000 acres of

---

12. Opinion, page 52: Master's Report, p. 180.
13. Opinion, p. 32.
14. Opinion, pp. 48-50.
15. Opinion, pp. 34-35.

A-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 6 Original

THE STATE OF NEBRASKA, COMPLAINANT,

vs.

THE STATE OF WYOMING, DEFENDANT,

and

THE STATE OF COLORADO, IMPLEADED DEFENDANT,

THE UNITED STATES OF AMERICA, INTERVENOR.

FORM OF DECREE PROPOSED BY THE STATE OF WYOMING, DEFENDANT, THE STATE OF COLORADO, IMPLEADED DEFENDANT, AND THE UNITED STATES OF AMERICA, INTERVENOR.

I.

INTRODUCTION

The State of Wyoming, defendant, the State of Colorado, impleaded defendant, and the United States of America, intervenor, jointly submit herewith a proposed form of decree in the above case. This action is taken under the permission contained in the concluding paragraph of the opinion of the Court announced June 11, 1945.

The parties making this proposal have heretofore re-

ceived a copy of the form of decree proposed by the State of Nebraska, complainant. Conferences had previously indicated the impossibility of an agreement between these parties and Nebraska on certain decretal provisions. Following the proposed form of decree herein there appears an explanatory statement covering those matters of substance on which these parties have been unable to agree with Nebraska.

II.

PROPOSED FORM OF DECREE

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe

portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph XI hereof.

XI. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal, recreational and stock watering purposes and consumption.

XII. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of the Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XIII. This decree shall not affect:

(a) The relative rights of water users within the State of Colorado.

(b) Such claims as the United States has to storage water under Wyoming law nor in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

a typographical error. The correct figure which conforms to the opinion of the Court, p. 24, and the Master's Report, p. 177, is "17,000."

2. The Joint proposal includes, and the Nebraska proposal omits, in the forepart of this paragraph after the word "water" the phrase "for irrigation purposes." This phrase is appropriate and necessary for the following reasons:

(a) The issues made up by the pleadings in this case only involved water uses for irrigation purposes, and the Court specifically states (Opinion p. 1) that "the controversy pertains to the use for irrigation purposes of the water of the North Platte River, a non-navigable stream."

(b) If this phrase is omitted, Paragraph IX Nebraska Proposal—Paragraph X Joint proposal—would require records of storage in stock ponds, municipal water tanks, and fish ponds.

(c) If this phrase is omitted, there is an inconsistency with Nebraska Paragraph X — Joint Paragraph XI.

B.

NEBRASKA PARAGRAPH I (C)
JOINT PARAGRAPH I (C)

The Joint Proposal uses the language "any period of 10 consecutive years reckoned in continuing progressive series beginning with." This phrase is taken from the Colorado River Compact executed in 1922 and has well understood significance. The Nebraska proposal adds an explanatory provision which does not clarify and which may confuse.

be made relative to the claims of Nebraska users diverting below Tri-State for water from upstream areas. In other words, without a provision, such as Paragraph VI of the Joint proposal, there is nothing in the decree to prevent Nebraska, or one of its canals diverting below Tri-State, from demanding that upstream water be passed below Tri-State Dam.

I.

NEBRASKA PARAGRAPH VI
JOINT PARAGRAPH VII

This paragraph in each proposal deals with the proposition that the decree apportions only natural flow. The second sentence of the Nebraska paragraph is unnecessary.

Discussing apportionment of storage water, the Court, after reference to excessive diversions, said:

> "We can not assume that an apportionment of storage water is necessary to prevent a recurrence of those practices." (Opinion, p. 39)

The language employed in the concluding clause of paragraph VII of the Joint proposal is taken directly from the Court's opinion. Without giving the basis of the Court's conclusion, any statement that the decree apportions natural flow only is incomplete and can only lead to misunderstanding.

J.

NEBRASKA PARAGRAPH IX.
JOINT PARAGRAPH X

The difference between the parties here is that under the Joint proposal the provision suggested by Nebraska is followed by this proviso: "Provided, however, that such records shall not be kept in reference to water uses permitted by Paragraph XI hereof." Inasmuch as the Court

does not place any limitation on such uses (Opinion p. 52), there is no need for the keeping of records thereof.

K.

NEBRASKA PARAGRAPH X
JOINT PARAGRAPH XI

The Joint proposal differs from that of Nebraska in that after the word "municipal" near the end of Joint paragraph XI the word "recreational" in inserted. The portion of the North Platte Basin above Pathfinder Reservoir in both Wyoming and Colorado is a wild life area visited by many sportsmen and vacationists in the summer period. Numerous small ponds have been constructed to aid in the propagation and preservation of fish and wild life. It seems but right to exempt these from the provisions of the decree.

L.

NEBRASKA PARAGRAPH XII

The Joint proposal contains no counterpart to Nebraska Paragraph XII. The matter contained in the Nebraska proposal is a finding by the Court, and it is neither necessary nor appropriate to insert it in the decree.

M.

NEBRASKA PARAGRAPH XIII (A)
JOINT PARAGRAPH XIII (A)

The difference between the parties here is that the Joint proposal in this regard is restricted in its application to the State of Colorado, whereas Nebraska would extend the application to all three states.

In its opinion (p. 25) the Court said: "Nor will the decree interfere with relationships among Colorado's water

A-61

In The

SUPREME COURT OF THE UNITED STATES

No. 6 Original, October Term, 1945.

THE STATE OF NEBRASKA, COMPLAINANT,

V.

THE STATE OF WYOMING, DEFENDANT,

AND

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

THE UNITED STATES OF AMERICA, INTERVENOR.

OBJECTIONS OF STATE OF NEBRASKA TO JOINT PROPOSAL FOR DECREE FILED BY STATE OF WYOMING, DEFENDANT, STATE OF COLORADO, IMPLEADED DEFENDANT, AND UNITED STATES OF AMERICA, INTERVENOR.

WALTER R. JOHNSON,
Attorney General of Nebraska,
JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,
PAUL F. GOOD,
Special Counsel,
For Complainant.

I.

INTRODUCTORY.

As requested, pages 14 to 15, in the proposed form of decree, proposed by Nebraska, we hereby present our objections to the form of decree as proposed jointly by the other parties to this suit. Nearly half of the document filed as the form of decree jointly proposed consists of criticisms of the Nebraska proposal and of argument purporting to explain why the joint proposal is superior. We believe that the court will agree that fairness requires that Nebraska be permitted to present its reasons in support of its form of decree and to point out wherein the joint proposal departs from the opinion. Therefore, even though we have not received express permission, we present the following as our objections and criticisms of the joint proposal.

II.

OBJECTIONS AND CRITICISM OF JOINT PROPOSAL.

A.

Nebraska Paragraph I (B)
Joint Paragraph I (B)

1. The figure of "17,060" appearing in the second line of the paragraph as proposed by the State of Nebraska is a typographical error, and the joint proposal properly corrects it to conform to the opinion of the court page 24, and the Master's Report, page 177, so that it will read "17,000."

2. The joint proposal inserts in the fore part of this paragraph after the word "water" the phrase "for irriga-

tion puposes." This qualification does not appear either in the opinion, page 24, or the Master's Report, page 177, where this phase of the controversy is discussed. Complainant feels that the omission was deliberate and that both the Master's Report and the opinion means what it says in limiting the storage for all purposes. Our reasons are as follows:

(a) While the controversy primarily pertains to the use of water for irrigation purposes, uses and disposition of water upstream interfere with the availability of water for irrigation in Nebraska just as much where the uses are for one purpose as another. Nebraska sought protection of its irrigation rights. When Colorado stores water for any purpose, this storage is to that extent an interference with the irrigation rights of Nebraska water users.

(b) It is contended that if this phrase is omitted, there is an inconsistency with Nebraska Paragraph X - Joint Paragraph XI. We feel that this complaint is hypercritical. Nebraska Paragraph X makes a blanket exception from the decree for all purposes, of water for ordinary and usual domestic, municipal and stock watering purposes. This exception does not need to be repeated in each paragraph of the decree which controls the actions of the upper states.

B.

Nebraska Paragraph I (C)
Joint Paragraph I (C)

Complainant contends that the language included in Nebraska's Paragraph I (c) and in the last seven lines

since if this were done, the decree would be merely a repetition of the opinion.

J.

Nebraska Paragraph IX
Joint Paragraph X

The proviso eliminating the water uses excepted in the next succeeding paragraph, from the requirement as to measurements and records, we believe is unnecessary and is not included in the opinion, pages 52 to 53.

K.

Nebraska Paragraph X
Joint Paragraph XI

The opinion, page 52, Master's Report, page 180, excepts from the restrictions of the decree water for ordinary and usual domestic and municipal purposes and consumption. Now, as an afterthought, it is proposed that recreational uses should also be excepted. This term is of such broad import that we believe it should not be permitted. Under it, either Colorado or Wyoming might construct an artificial lake for boating purposes containing many thousands of acre-feet of water. While recreation has its place, we do not believe that recreational uses are in the same class as domestic, municipal and stock watering purposes, and we believe that they should not take precedence over irrigation. The exception as to recreational purposes is not found in either the opinion or the Master's Report.

NEBRASKA V. WYOMING;
COLORADO IMPLEADED/
UNITED STATES, INTERVENOR

MEMORANDUM REGARDING PROPOSED FINDINGS AND DECREE

In considering the problems presented by this case, and in the search of a solution, very little real guidance can be drawn from precedent, and conversely very little limitation is imposed by settled authority. There appears to be no more concrete controlling rule than is found in the general principle of "equitable distribution". As to the method of accomplishing equitable distribution, the field is open. It is true that in Wyoming v. Colorado the Supreme Court adopted for that case the principle of priority of appropriation as the basis of allocation of the water of an interstate river, and said that:

> "It furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is."

But there it was found possible to give the desired effect to the priority principle by a comparatively simple allocation en masse of the water of the Laramie. Here there is no such possibility. That is conceded. The impossibility is strongly emphasized by Nebraska's Exhibit 422, which shows that the priorities on the main river fall into one hundred thirteen (113) different brackets or strata alternating throughout between the three states and presenting insuperabledifficulties to any attempt to make corresponding mass allotments of water. On the other hand, there is admittedly no precedent for Nebraska's proposal of an administration of the river according to a complete interstate priority schedule. The nearest approach to it is the enforcement decreed in some cases of priorities as between individual appropriators in different states.

hardship of this is minimized by limitation of the required deliveries to the historical minimums, but this in turn is also open to the objection that it has the effect of awarding to the upper areas all water in excess of the historical minimums, which in all instances, except that of the fifteen-year average, would be dry cycle minimums. Unless the supplies of the future approach in the downward direction the historical minimums, the United States plan would not operate to place any restriction on the river sections above Guernsey, since the minimum run-offs were themselves not due to any limitation or regulation but to physical unavoidability. They represent water which the appropriators of the section in question either did not want or for some reason could not divert. The United States plan is carefully worked out and has much to recommend it. However, I hope that an adequate method of distribution can be devised less intricate and regimentary in character.

All parties are agreed that there are no key stations, so called, where distribution could be regulated to correspond automatically with variations in supply, a feature of many of the interstate compacts.

There remains as the means of obtaining some degree of flexibility the alternative, and perhaps only the alternative, of an "open" decree, that is, one avowedly subject to revision with the occurrence of well-defined changes in supply or with other demonstration by experience of the necessity for such revision. This would be far from an ideal solution of the problem, but it may be open to less serious objection than any form of closed decree which could be framed. Much better it would be if a decree could be drawn which would finally end permanently end the controversy with assurance of justice to all concerned. Such a decree, I am afraid, would only be possible, if at all, under

conditions more normal and stable than those under which the present suit must be decided.

A rule that would seem elementary to equitable distribution (even aside from rights based on priority statutes) is that present rightful uses should be provided for before consideration is given to further possible development. And in view of the possibility that the present demand may substantially exhaust or exceed the present resources of the river, I should say, generally speaking, that no reservation should be made for future development (assuming such reservation ever to be proper) unless and until it is demonstrated that the supply under future conditions shall be more than adequate to serve existing demands. A development actually in process of completion under a perfected right should probably be accorded the status of a present use in relation to enterprises projected but dormant and uncertain of completion.

PROPOSED SOLUTION

I have in mind a report conforming to the following general principles and including:

(a) Findings on all of the basic facts so far as the evidence will permit, and conclusions on all of the pertinent issues of law.

(b) A water distribution by means of the imposition of a minimum of restriction and by the simplest possible method that will serve present and near future purposes.

(c) Provision for the appointment of a water master to make observation, study, and reports. Possibly some other title would be more appropriate.

(d) Provision for retention by the Court of jurisdiction to amend the decree upon the reports of the water master, from which it shall appear that important changes in

conditions have occurred or that findings involving elements of assumption or forecast as to future developments or conditions, upon which the decree was based, have by subsequent experience proven erroneous, and that by reason of such change of conditions or error equity requires an amendment of the decree. Certain matters might be expressly reserved as possible subjects for future consideration on application for amendment of the decree. Also opportunity for showing in audition to or in opposition to the water master's reports might be allowed, although the report should largely control on all matters of fact. Applications for amendment should be limited to intervals of reasonable length, and the provision should be so safeguarded as not unduly to invite or encourage frequent or unjustifiable attacks on the decree.

More specifically I propose to:

(1) Limit Colorado to present uses.

(2) Limit Wyoming, in respect to the river section above Pathfinder, to present uses.

(3) Require observance by Pathfinder, Guernsey, Seminoe, and Alcova of priorities in relation to seniors below each reservoir respectively down to and including the Tri State Canal.

(4) Require similar observance of priorities by the Casper Canal.

(5) Impose on the Pathfinder-Guernsey section some simple form of limitation, if any suitable can be thought of or suggested which would not require regulation of a character unjustified by the very limited extent of any possible excess of diversions.

(6) Distribute on a priority basis the water

available within the Whalen-Tri-State Dam section to the projects diverting in that section any water in excess of the defined allotments to be either reapportioned in that section or passed across the state line.

With this preface I shall pass to consideration of the several sections of the river, the facts as I expect (more fully) to find them, and my conclusions.

COLORADO

The area in Colorado with which we are concerned is North Park, substantially coincident with Jackson County. It is the source of the North Platte River. The drainage area on the river and its tributaries in the Park is about 1650 square miles. The altitude ranges from 7,800 feet to 9,000 feet above sea level. The climate is arid, the average precipitation in the

seniors below were short. Of the total out-of-priority diversions for the 1931-1936 period claimed by Nebraska against Wyoming's private canals, which according to my footing is 284,804 acre feet, 87,112 acre feet,or 29 per cent, are charged to the Pathfinder-Guernsey section, and 71 per cent to the Guernsey-State Line section. This would be an average of 14,518 acre feet for the year. Of the out-of-priority diversions attributed to the Pathfinder-Guernsey section (omitting 1935, for which I find no figures for the individual canals), 42 per cent is laid to the Douglas Canal alone and over 60 per cent to the Douglas, Running Dutchman, and Platte Valley Ranch projects. The Nebraska figures, of course, include diversions claimed to be out of priority in relation to canals below the Tri-State Dam, and would be much lower if related only to the project and State Line Canals.

(Note: The out-of-priority figures appearing above apparently do not take into account all of the corrections in original Nebraska exhibits. Nebraska's total for the six years is 12,442 acre feet above the figure of 284,804. However, the proportion will probably not differ materially.)

On the tributary streams the run-offs are of shorter duration even than those above Pathfinder. The flows reach their peak in May, fall off rapidly during June, and usually run dry by the first of July. Except for the LaPerle project (irrigating about 11,000 acres) the diversions are small. How many there are does not appear. Evidently there are at least several hundred. Perhaps the number could be spelled out from Nebraska's Exhibit 93, which lists all the Wyoming rights except those on the Laramie River and Horse Creek. The total number of rights listed is 4,654. The tributary streams are usually dry before there is any serious shortage of water in the river, and no regulation of the diversion would be of any material benefit to users below. There

appears to be no demand for any limitation upon them. On the oral argument it was suggested that further construction of storage facilities should be restricted, since the result of such construction might be to reduce the outflow from the tributaries now available for storage in the off-channel reservoirs of the Interstate Canal. However, there is no showing as to what contribution, if any, these tributaries now make to the supply for the reservoirs or what additional storage projects may be feasible or what the effect of their construction and use might be on the supply otherwise available for Alice and Minatare. There is little basis for assuming that there is any threat from this source requiring a prohibition in the decree.

What should be done about this section? The main river diversions are within close enough proximity to the Guernsey-State Line section to have an appreciable effect on the supply in the latter section. It seems but fair and equitable that it should share with the lower section both shortages and abundances of water. On the other hand, the effect of any reasonable regulation would be relatively small. The benefit to the project canals particularly would be slight. The total consumption by the rights junior to the project, under conditions of adequate supply, would not exceed 10,000 acre feet annually. According to Nebraska's out-of-priority study, the worst offenders in the section were the Douglas, Running Dutchman, and Platte Valley Ranch ditches. The Douglas is senior to the North Platte project. The Running Dutchman is about 70 per cent, and the Platte Valley Ranch about 33 per cent senior. To put under regulation all the little diversions from Pathfinder to Guernsey, ranging in size from 10 acres up, would seem to involve a burden and effort rather disproportionate to the realizable result.

Wyoming suggests allotment to the Pathfinder-Guernsey

Supreme Court, U.S.
FILED
JUL 01 1992
OFFICE OF THE CLERK

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

EXCEPTIONS OF BASIN ELECTRIC POWER COOPERATIVE TO SECOND INTERIM REPORT OF SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

July 1, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
EXCEPTIONS	1
BRIEF ON EXCEPTIONS	
Introduction	3
Argument	
An action to enforce a decree involves only previously established rights, not "equities," and construction of the rights of the parties is a matter of law, not of fact	6
Points on Exceptions	
1. Wyoming is entitled to summary judgment dismissing Nebraska's claim that the operation of Grayrocks Reservoir violates her rights under the decree	12
2. Wyoming is entitled to summary judgement dismissing Nebraska's claim that the proposed Corn Creek project violates her rights under the decree	17
3. Wyoming and Colorado are entitled to summary judgment that the water of the Laramie River is wholly apportioned between them and that Nebraska has no entitlement to such water	20
4. Wyoming and Colorado are entitled to summary judgment that Nebraska has no right to natural flows of the North Platte above Tri-State, except such as she is entitled to divert at or above Tri-State in accordance with paragraph V of the decree into the canals listed in paragraph IV for the irrigation of land thereunder	27
Conclusion	29

TABLE OF AUTHORITIES

CASES:	Page
Alabama v. Arizona, 291 U.S. 286 (1934)	9
Arizona v. California, 460 U.S. 605 (1983)	8
Colorado v. Kansas, 320 U.S. 383 (1943)	9
Colorado v. New Mexico, 459 U.S. 176 (1982)	9
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	9
Idaho v. Oregon, 462 U.S. 1017 (1983)	9
Missouri v. Illinois, 200 U.S. 496 (1906)	9
Nebraska v. REA, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *vacated and remanded*, 594 F.2d 870 (8th Cir. 1979)	12
Nebraska v. Wyoming, 325 U.S. 589 (1945), *decree modified*, 345 U.S.981 (1953)	*passim*
Orders	
January 20, 1987, 479 U.S. 1051	11
June 22, 1987, 483 U.S. 1002	11
March 7, 1988, 485 U.S. 931	4
New York v. New Jersey, 256 U.S. 296 (1921)	9
North Dakota v. Minnesota, 263 U.S. 365 (1923)	9
Ohio v. Kentucky, 410 U.S. 641 (1973)	6,9
Oklahoma v. New Mexico, 115 L. Ed. 2d 207, 111 S. Ct. 2281 (1991)	26,28
Virginia v. West Virginia, 246 U.S. 565 (1918)	7
Washington v. Oregon, 297 U.S. 517 (1936)	9
Wyoming v. Colorado, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957)	*passim*
Wyoming v. Colorado, 298 U.S. 573 (1936)	23
Wyoming v. Colorado, 309 U.S. 572 (1940)	8,10,12

Table of Authorities Continued

Page

STATUTES:

Neb. Rev. Stat. § 46-2,107 et seq. 16

MISCELLANEOUS:

Tarlock, *Law of Water Rights and Resources*, § 9.06[4][c] at 9-36 (Clark Boardman Co. [rel #3] 1991) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

EXCEPTIONS OF BASIN ELECTRIC POWER COOPERATIVE TO SECOND INTERIM REPORT OF SPECIAL MASTER AND BRIEF IN SUPPORT OF EXCEPTIONS

EXCEPTIONS

1. Basin Electric Power Cooperative (Basin)[1] excepts to the failure of the special master to recom-

---

[1] Basin is the operator and, with five other consumer owned electric utilities, the owner of the Missouri Basin Power Project (MBPP), the facilities of which include the Grayrocks Dam and Reservoir located on the Laramie River in Wyoming about 10 miles above its confluence with the North Platte River. The other participants in the MBPP are Tri-State Generation and Transmission Cooperative; the Lincoln Electric System, owned and operated by the City of Lincoln, Nebraska; the Western Minnesota Municipal Power Agency; Heartland Consumer Power District; and the Wyoming Municipal Power Agency. The MBPP

mend that Wyoming be granted summary judgment dismissing Nebraska's claim that Wyoming is violating her rights under the decree by "[d]epleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River."

2. Basin excepts to the failure of the special master to recommend that Wyoming be granted summary judgment dismissing Nebraska's claim that Wyoming is violating her rights under the decree by "[d]epleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers."

3. Basin excepts to the failure of the special master to recommend that Wyoming and Colorado be granted summary judgment that all of the waters of the Laramie River are apportioned between them by the decree in *Wyoming v. Colorado*[2] and that Nebraska has no right to Laramie water under the decree in this case, except such as actually reaches the North Platte.

4. Basin excepts to the failure of the special master to recommend that Wyoming and Colorado be granted

---

participants and their member distribution systems serve more than 1,200,000 people in Colorado, Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wyoming. Grayrocks Dam and Reservoir provide cooling water for MBPP's Laramie River Station, a 1500 megawatt thermal electric generating plant. The MBPP is one of the major power suppliers in the region of the northern and central great plains and its transmission system is interconnected with all the major utility systems, public and private, that serve or connect in the eight state area served by MBPP's member systems.

[2] 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957).

summary judgment that Nebraska has no right under the decree in this case to any of the natural flow of the North Platte above Tri-State Dam, except such as she is entitled to divert in accordance with paragraph V of the decree into the canals named in paragraph IV for the irrigation of lands in Nebraska thereunder.

BRIEF IN SUPPORT OF EXCEPTIONS

Introduction

This is a simple case involving a straightforward decree that has taken on a patina of complexity because of the efforts of Nebraska to transform it from an enforcement action into an apportionment action and of the failure of the special master to observe the distinction between such actions and to confine the case to the issues presented by the claims actually pleaded by Nebraska.

Nebraska asked and was granted leave by the Court to file the petition herein on the strength of her assurance that she sought only to enforce the decree as it stands and not to modify it in any way. Wyoming opposed Nebraska's motion for leave to file on the ground that Nebraska had made no such showing of injury as the Court requires to exercise its original jurisdiction to entertain an action between states. Nebraska responded by saying:

> Each of Nebraska's allegations involves present or threatened interference with its apportionment established by the court in this case. Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation

> of the need to do so. We do not propose to litigate anything new, but simply to protect what the Court has already decided.[3]

In paragraph 3 of her petition, Nebraska alleges that Wyoming is violating her rights under the decree by:

> a. Depleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River, a tributary of the North Platte River;
>
> b. Depleting the flows of the North Platte River by the proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte Rivers;
>
> c. Depleting the natural flows of the North Platte River by the proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir; and
>
> d. Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate canal for

---

[3] Neb's Reply to Wyo's Brief in Opposition 2 (Jan. 15, 1987), Master's Docket Document No. (Doc. No.) 4. Notwithstanding this representation, Nebraska subsequently attempted to amend her petition so as to seek amendment of the decree to increase her apportionment. The Court denied her motion for leave to amend by order of March 7, 1988, 485 U.S. 931, Doc. No. 59. On October 10, 1991, Nebraska filed a second motion for leave to file an amended petition to seek a new apportionment, Doc. No. 407, which is now pending.

> storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.[4]

Thus the case the Court granted Nebraska leave to file and referred to the special master is limited to enforcement the existing decree and is founded on four specific allegations of violations of her rights under the decree.

Saying that "[s]ince 1986, the parties' positions have evolved," the special master suggests that Nebraska's claims are now "somewhat different from the literal claims of the initial pleadings." Second Int. Rep. 5; *see also id.* at 17 ("During the years since 1986, Nebraska's stance has evolved, and she now claims that Grayrocks operations will not harm her apportionment if Wyoming allows them to proceed in accordance with a 1978 Settlement Agreement . . ."). Since the Court has authorized no amendment of Nebraska's petition, Basin submits that judgment must be rendered on the claims she pleaded, not on supposed "evolutions" thereof. That Nebraska has changed positions in these proceedings as frequently as a weather vane in an errant wind, *see, e.g.,* Second Int. Rep. 17, 37, 80-81, does not entitle her to consideration of claims different from those the Court authorized her to file.

There would be little left of the rule that leave of the Court is required to file or amend a complaint in

---

[4] Neb's Petition for Order Enforcing Decree 2 (Oct. 7, 1986), Doc. No. 1. Basin is not involved in the allegations of subparagraphs c and d or in the issues arising thereunder and treated under the headings "Deer Creek Project" and "Inland Lakes," and takes no position with respect to them.

a case within the Court's original and exclusive jurisdiction, *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973), if the claims in a complaint the Court once authorized to be filed could thereafter "evolve," without the Court's supervision, into different claims. Because leave of the Court would be required to amend the petition here, Rule 15, Fed. R. Civ. P., is not applicable. Even if it were, Wyoming certainly has not consented, expressly or impliedly, to the trial of any claims not contained in Nebraska's petition. To the contrary, she has insisted that the parties be confined to the claims made in their pleadings. *See, e.g.*, Transcript of October 1, 1987 Hearing 38 (Oct. 8, 1987), Doc. No. 29.

Argument

An action to enforce a decree involves only previously established rights, not "equities," and construction of the rights of the parties is a matter of law, not of fact.

When it was shown early on without dispute that Nebraska is a party to an agreement with Basin and others providing for the operation of the Missouri Basin Power Project, including Grayrocks, and for the operation of the Corn Creek project, should it ever be built, the special master should have recommended that summary judgment be granted forthwith to Wyoming on Nebraska's claims 3.a and 3.b. Nebraska simply cannot be heard to say that operations she agreed to by contract with Basin constitute violations by Wyoming of her rights under the decree.

An action to enforce an existing decree is fundamentally different from an action to obtain an apportionment in the first instance or to alter an apportionment previously made. That the Court re-

tains jurisdiction under paragraph XIII to amend the decree *in an action authorized for that purpose* is undisputed. But it authorized no such action here. If by the statement that "[t]he current proceedings are before the Court pursuant to the 'changed conditions' or 'reopener' provision of the Decree under which the Court retained jurisdiction for the purpose of any 'order, direction, or modification of the Decree,' " Second Int. Rep. 4, the special master means to imply that the decree has been opened to modification in this proceeding, he is mistaken. Paragraph XIII is not even necessarily implicated in this action. While the inclusion of such a provision may be required to retain jurisdiction to modify a decree, to obviate what would otherwise be its effect as *res judicata*, it is not essential to the retention of jurisdiction to enforce a decree, which is an inherent concomitant of judicial power and requires no specific articulation to persist.

In *Virginia v. West Virginia*, 246 U.S. 565 (1918), the Court says:

> That judicial power essentially involves the right to enforce the results of its exertion is elementary. And that this applies to the exertion of such power in controversies between states as the result of the exercise of original jurisdiction conferred upon this court by the Constitution is therefore certain.

Id. at 591 (citations omitted). Thus, paragraph XIII of the decree is not essential to the Court's jurisdiction here.[5]

---

[5] Where the Court has retained jurisdiction to modify a decree, as it has here by paragraph XIII, it is reluctant to do so except

The special master steps off on the wrong foot by suggesting that "equitable principles" and "the body of equitable apportionment jurisprudence set forth in the opinions of the Court dealing with other interstate water disputes," Second Int. Rep. 15, are of central importance in a case for enforcement of an existing decree. His report is heavy with references to the supposed "equities" of Nebraska, *see, e.g., id.* at 18, 37, 38, 64, 86, 87 n.100 and text above, 88, 91, notwithstanding that this case is concerned only with her rights.

There is a qualitative difference in the showing a state is required to make to be permitted, on the one hand, to seek simply enforcement of a decree as it stands and, on the other, to seek an apportionment in the first instance or the alteration of an existing apportionment. And the issues in a case to apportion or reapportion interstate waters are essentially different from those in a case to enforce a decree.

Where a state shows that a sister state is violating the provisions of an existing decree, she is entitled to enforcement whether or not she is otherwise injured. *Wyoming v. Colorado*, 309 U.S. 572, 580-81 (1940). But, both as a matter of pleading and proof, the showing a state is required to make to invoke

---

for the most compelling reasons. Rights settled by a decree, even if not strictly *res judicata*, are ordinarily entitled to repose. *Arizona v. California*, 460 U.S. 605, 618-626 (1983). Claims for reapportionment on the basis of changed conditions and new equities can be heard only in an action authorized by the Court for that purpose and are without the ambit of a proceeding, such as the instant, authorized solely for the purpose of allowing the plaintiff to enforce a decree.

the Court's original jurisdiction to obtain or alter an apportionment is much greater.[6]

The issues in an action to enforce a decree are essentially different from those in action to apportion the waters of an interstate stream in the first instance or to reapportion waters previously apportioned. The ascertainment and balancing of equities is the heart of a case to apportion or reapportion interstate waters. But the entry of the decree in such a case transforms what the Court determines to be the prevalent equities into legal rights which, thereafter, are enforceable as any other rights. The decree moots further consideration of equities until such time, at least, as the Court grants leave to one of the parties to seek its modification. *Cf. Colorado v. Kansas*, 320 U.S. at 393-94. The issue in an enforcement

---

[6] *Colorado v. Kansas*, 320 U.S. 383, 393 (1943). The plaintiff "must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor," *Alabama v. Arizona*, 291 U.S. 286, 291-92 (1934), and "must prove by clear and convincing evidence some real and substantial injury or damage." *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983). "Before the court will intervene the case must be of serious magnitude and clearly proved." *Colorado v. Kansas*, 320 U.S. at 393. *See also Colorado v. New Mexico*, 459 U.S. 176, 187 n.13 (1982); *Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660, 669, 672 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 520 (1906). The same standards apply to a state seeking leave to amend. *Ohio v. Kentucky*, 410 U.S. at 644.

The special master's refusal to apply these standards to Nebraska, Second Int. Rep. 13, reflects his failure to grasp that, as to the Laramie and below Tri-State issues, Nebraska is seeking, in the guise of enforcement, to reopen the decree to secure a reapportionment.

action is whether the defendant state is violating the rights of the plaintiff defined in the decree, and the construction of such rights is a matter of law. *Wyoming v. Colorado*, 309 U.S. at 581-82.

Stripped of the veneer of complexity with which it has been overlaid in the proceedings before the special master, the decree in this case is a simple structure. Its aim, in so far as Nebraska is concerned, is to provide her with sufficient water from the natural flow of the North Platte River during the irrigation season (May 1 to September 30, inclusive, of each year) to irrigate specified quantities of land under specified canals headed in the stretch of the river between Guernsey (or Whalen) and Tri-State Dams. To accomplish this, it apportions the natural flow in this section during the irrigation season 75% to Nebraska and 25% to Wyoming. To secure flows into this section, it places restrictions on upstream diversion and storage by Colorado and Wyoming.

Regardless of the refusal of Nebraska and the special master to face up to the fact, *see* Second Int. Rep. 94-95, Wyoming and Colorado cannot be found to have violated Nebraska's rights under the decree unless it be shown that they have done something they are forbidden to do, or have failed to do something they are required to do by the decree. The special master acknowledges that Nebraska has made no such showing. *Id.* at 94-95, 100.

The essential error that has infected the special master's approach to this case from the beginning, and that permeates his current report, is his failure to appreciate the distinction between a proceeding to enforce an existing decree and a proceeding to secure an apportionment. He has failed to come to grips with

the fact that *the case* the Court granted Nebraska leave to file[7] and referred to him[8] is to permit Nebraska to enforce the decree, if she shows it is being violated, not to permit her to present "equities" in aid of modifying it. He has failed also to recognize that construction of Nebraska's rights under the decree is a matter of law.

In his letter of April 9, 1992, to Justice White, p. 6, Doc. No. 464, Special Master Olpin recommends against the Court's granting Nebraska's motion of October 10, 1991, Doc. No. 407, for leave to amend her petition to seek a further apportionment because she "has not yet shown threatened injury that is of serious magnitude and imminent." He variously makes the same point in his current report. *See* Second Int. Rep. 64 ("the record is at this juncture 'inconclusive in showing the existence or extent of actual damage to Nebraska.' "), 94 ("Nebraska's as yet unseen evidence of injury or threatened injury to her interests"), 100 ("Nebraska . . . thus far has not pointed to evidence of specific harms or specific actions by Wyoming that are alleged to have caused or that threaten such harms."). Even if this were a case for reapportionment where equities of Nebraska in the Laramie and return flows below Tri-State not previously recognized by the Court might be considered, rather than a case for enforcement, the failure of Nebraska at this late stage yet to have shown a threat of serious injury would entitle Wyoming and Colorado to summary judgment in relation to Nebraska's Laramie and east-of-Tri-State claims.[9]

---

[7] Order of January 20, 1987, 479 U.S. 1051, Doc. No. 4a.

[8] Order of June 22, 1987, 483 U.S. 1002, Doc. No. 20a.

[9] Nebraska has stated that only she can define the injuries

Points on Exceptions

1. Wyoming is entitled to summary judgment dismissing Nebraska's claim that the operation of Grayrocks Reservoir violates her rights under the decree.

When construction of the Missouri Basin Power Project (MBPP) was well advanced, Nebraska joined on two actions against agencies of the United States in the federal district court in Lincoln, Nebraska. The first was filed in November, 1976, against the Rural Electrification Administration, which had agreed to guarantee loans for the project. This action challenged the sufficiency of REA's final environmental impact statement and sought issuance of an injunction prohibiting REA from assisting the MBPP until the alleged deficiencies were cured. The second challenged the issuance by the Corps of Engineers of a 404 permit for Grayrocks Dam and sought to invalidate the permit on the grounds of alleged violations of the National Environmental Policy Act, the Federal Endangered Species Act, and the Corps' regulations. The two actions were consolidated and included several environmental organizations as additional plaintiffs, and Basin as an additional defendant. *Nebraska v.*

---

she apprehends below Tri-State from "proposed development in Wyoming to equities that rely on the apportionment at Tri-State," and acknowledged that she bears the burden of establishing her below-Tri-State "equities" and the substantial nature and serious magnitude of the injuries she fears. Transcript of May 12, 1989 Status Conference 96-98, Doc. No. 136. Implicit in this is recognition by Nebraska that by her east-of-Tri-State claims she seeks not enforcement of the decree but a new apportionment, since no showing of injury is required simply to enforce a decree, *Wyoming v. Colorado*, 309 U.S. at 380-81, and the standard of proof she admits she must meet is that applicable to apportionment actions.

REA, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *vacated and remanded,* 594 F.2d 870 (8th Cir.1979).

After intensive negotiations spanning a period of 30 months, the last twelve of which were devoted almost entirely to reaching agreement on how the burden of Corn Creek's draft on the Laramie will be shared between Basin and Nebraska if the project is built, a settlement agreement was executed on December 4, 1978.[10]

The settlement agreement places limitations on the amounts of water the MBPP may consume and store and obligates the project to release specified amounts of water from Grayrocks Reservoir year round for the benefit of Nebraska. *See* Second Int. Rep. 65-69 & n.87. Basin acknowledges that it is obligated to assure delivery into the North Platte of the quantities of water called for by the settlement agreement regardless of anything Wyoming might do in the future (such as permitting additional diversions between Grayrocks Dam and the mouth of the Laramie). Basin's Memo. in Support of Wyo's Second Mot. for

---

[10] The settlement agreement, the stipulation of counsel for dismissal of the litigation, and the orders of the court of appeals and the district court effecting dismissal and reserving jurisdiction, are set forth in the Appendix to Wyoming's Brief in Opposition to Nebraska's Motion for Leave to File Petition A-20 thru A-36 (Dec. 18, 1986), Doc. No. 2. The concurrence of the Secretary of the Interior and the formal decision of the Endangered Species Act Committee exempting Grayrocks from the Endangered Species Act are set forth in the Appendix to Basin's Motion for Leave to Intervene A-1, A-4 (April 13, 1987), Doc. No. 14.

Summ. Judg., App. D (McPhail affidavit ¶ 7) (Feb. 28, 1991), Doc. No. 293.[11]

Nebraska makes no bones that her decision to go after Laramie water by holding the MBPP hostage under the federal environmental laws, rather than by seeking to reopen the decree in this case against Wyoming, was carefully calculated.

> At the time, consideration was given by Nebraska officials to reopening the Court's retained jurisdiction under Paragraph XIII of the Decree. Instead of petitioning the Court to reopen, however, the State of Nebraska sought to protect its apportionment by joining the Fish and Wildlife Service [sic][12] and the National Wildlife Federation in a suit under Section 7 of the National Environmental Protection Act, 16 U.S.C. Section 1536, to enjoin the construction of Grayrocks because it would cause a reduction in North Platte flows and would have adversely affected the critical habitat of whooping cranes 300 miles

---

[11] On the basis of his conclusion that Nebraska has "equities" in Laramie water, Second Int. Rep. 64, the special master recommends that the Court make relief available to Nebraska "to prevent any injuries that could attend Basin's inability to comply with flow releases under the 1978 Settlement Agreement by reason of Wyoming's administration of her water laws." *Id.* at 69. This, of course, assumes that Nebraska has rights to Laramie water as against Wyoming, one of the principal issues in the case.

[12] The Fish and Wildlife Service was not a party to the litigation. The federal parties were the Corps of Engineers and the Rural Electrification Administration, who were parties defendant and were represented by the Department of Justice.

> downstream in Nebraska. Nebraska reasoned that if the North Platte flows were maintained to protect the whooping cranes, the Central Nebraska [Public] Power and Irrigation District's interests in the apportionment established in this case would also be protected.[13]

Professor Tarlock observes that Nebraska pursued this course because she "discovered that downstream irrigators on the Platte River could be better protected under the wing of the endangered whooping crane than by litigating the allocation of the river under . . . the doctrine of equitable apportionment." Tarlock, *Law of Water Rights and Resources*, § 9.06[4][c] at 9-36 (Clark Boardman Co. [rel #3] 1991).[14]

---

[13] Neb's Reply to Wyo's Br. in Opposition 3 (Jan. 15, 1987), Doc. No. 4. In the same pleading, she stated that the settlement provided for minimum instream flows and "collaterally" protected "Nebraska's apportionment." *Id.* at 4. Augmentation of the water supply for the Central Nebraska Public Power and Irrigation District continues to be Nebraska's real aim. She anticipates that, as a condition of relicensing by the Federal Energy Regulatory Commission of the Kingsley Dam project located in Nebraska about 200 miles downstream from Wyoming, the district is going to be required to release more water for the benefit of the wildlife habitat in the Big Bend reach of the Platte River below its confluence with the North Platte and about 300 miles downstream from Wyoming. She covets Wyoming's water to slake the thirst the district apprehends. *See* Basin's Memo. in Opposition to Neb's Mot. for Leave to File Amended Pet. 8-9 (Nov. 12, 1991), Doc. No. 412.

[14] Given that, by her own admission, Nebraska made a calculated decision to secure Laramie water by using the federal environmental laws to hold up the MBPP, rather than by at-

Until 1984 Nebraska did not permit water to be appropriated for instream uses. Legislation adopted that year allows appropriations for two specific instream uses, recreation and fish and wildlife, but only on application by the Game and Parks Commission or a natural resource district and the protection afforded these uses is circumscribed. *See* Neb. Rev. Stat. § 46-2,107 et seq. Since enactment of this legislation, Nebraska has done nothing to secure the water Basin is required to release under the settlement agreement for the benefit of the whooping crane habitat in the Big Bend area of the Platte River.[15]

Nebraska acknowledges that the MBPP is the only significant development on the Laramie River since the decree was entered, Neb's Br. in Support of Mot. for Summ. Judg. 109-110 (March 4, 1991), Doc. No. 296, and that it has been operated in accordance with the settlement agreement. *Id.* at 112. It is undisputed that Wyoming has done nothing to interfere with the passage into the North Platte of the water Basin is obligated to release from Grayrocks under the agreement. Second Int. Rep. 65-67 & n.88. All that Ne-

---

tempting to reopen the decree in this case, the undertaking of the special master to award her "equitable" points on the basis of "[Wyoming's] lack of participation in the Grayrocks proceedings," Second Int. Rep. 68-69, is surely to stand equity on its head.

[15] This, of course, was not Nebraska's purpose in taking hostage the MBPP and extracting the settlement agreement from Basin. The whooping crane habitat is in the Big Bend area of the Platte River some 300 miles downstream from Tri-State on the North Platte. Between Tri-State and the Big Bend are the intended beneficiaries of Nebraska's attack on the MBPP, Kingsley Dam and Lake McConaughy, whose operations completely alter the character of the river below.

braska now charges against Wyoming is that Wyoming continues to adhere to the legal position that Nebraska has no claim on the waters of the Laramie above its mouth.

Most importantly, Nebraska has abandoned her contention that the operation of Grayrocks constitutes a violation of the decree. She now says that her claim is not that the operation of Grayrocks in compliance with the settlement agreement violates her rights under the decree but, rather, that the refusal of Wyoming to recognize that she has any rights to Laramie water does. *Id. But this is not the claim set forth in her petition* and Wyoming is clearly entitled to summary judgment dismissing the claim that is in fact set forth in Nebraska's petition, namely, that Wyoming is violating her rights under the decree by "[d]epleting the flows of the North Platte River by the operation of Greyrocks [sic] Reservoir on the Laramie River."[16]

2. Wyoming is entitled to summary judgement dismissing Nebraska's claim that the proposed Corn Creek project violates her rights under the decree.

The subject of paragraph 3.b of Nebraska's petition is the Corn Creek project. As the special master states: "The 1978 Settlement Agreement also sets

---

[16] Neb's Petition ¶ 3.a. The special master's statement is in error that, "[i]n her petition, Nebraska alleges that Wyoming unlawfully is depleting and threatening to deplete the flows of the North Platte River *by her intended administration of Grayrocks Reservoir's operation and releases on the Laramie River.*" Second Int. Rep. 5 (emphasis supplied); *see also id.* at 17. Nebraska alleges no such thing and the special master is wrong to indulge her undertaking to alter this claim from that the Court granted her leave to file.

forth a method for handling future depletions caused by the operation of Corn Creek, with Basin and Nebraska agreeing to bear the burden of the depletions evenly." Second Int. Rep. 69 & n.93. It being undisputed that the settlement agreement makes provision for the diversion and use of Laramie water by the Corn Creek project, should it ever by built, Wyoming is entitled to summary judgment dismissing Nebraska's claim that Wyoming is violating Nebraska's rights under the decree by "[d]epleting the natural flows of the North Platte River by the proposed construction [of the project]."

The need lately perceived by the special master to consider whether the parties were laboring under a mutual mistake of fact about return flows when they entered into the settlement agreement, and whether the operation of the project would "disturb the delicate balance of the North Platte River," Second Int. Rep. 71, simply does not exist.

The special master's conjecture that, in negotiating the settlement agreement, the parties may have proceeded under some mutual misunderstanding about return flows, is founded on an eavesdropper's construction of a second party's conversation with a third party who was relaying hearsay. Second Int. Rep. 70-71 & nn.94, 95. Previously, no party to the settlement agreement had ever suggested, in these proceedings or elsewhere, that there might have been such a misunderstanding. This "issue" is a phantom conjured by Nebraska's counsel after the strike of the eleventh hour to which the special master would now give substance. The record is clear that, in formulating the settlement agreement, the parties assumed that the diversions for the Corn Creek project for which

it provides would be totally lost to the river (*i.e.*, that there would be no return flows from the diversions).[17]

In any event, the settlement agreement could not be reformed nor the effectiveness of its provisions altered in this proceeding, even if it were shown that a misunderstanding existed. This could be done only in the proceeding in which the settlement was entered. By direction of the court of appeals, the settlement court expressly retains jurisdiction over the agreement. *See supra* note 11, orders of court of appeals and district court, Appendix to Wyo's Br. in Opposition at A-33, A-35, Doc. No. 2.

It has been shown and is undisputed that the Corn Creek project has no Wyoming water rights, no contract with the Bureau of Reclamation for water from the Glendo reservoir (which would be essential), no 404 permit from the Corps of Engineers, and no arrangements for financing. Wyo's First Mot. for

---

[17] Following execution of the settlement agreement, John W. Neuberger, Nebraska's then Director of Natural Resources and one of her negotiators, prepared an analysis of its effects on Laramie flows. This analysis demonstrates that the settlement agreement was concluded with the understanding that all of the diversions it provides for the MBPP and the Corn Creek project would be totally consumed. Basin's Memo. in Support of Wyo's Second Mot. for Summ. Judg., App. A (Grahl affidavit), Exh. 13 (Neuberger analysis 4-6) (Feb. 28, 1991), Doc. No. 293.

The special master's statement that "the issue of return flows was apparently not expressly addressed during the [settlement] negotiations," Second Int. Rep. 71 n.95, is disingenuous. He cites in support the transcript of the hearing held on March 9, 1992, pp. 100-101, Doc. Nos. 435, 442, 445. But the transcript is clear, pp. 97-101, that the reason return flows were not "expressly addressed" is because the parties to the settlement proceeded on the assumption that there wouldn't be any.

Summ. Judg. 7 (affidavit of Gordon W. Fassett ¶¶ 7-8), 31 (affidavit of Stanley Hathaway ¶ 7) (Sept. 11, 1987), Doc. No. 23; Wyo's Second Mot. for Summ. Judg. (second affidavit of Gordon W. Fassett ¶ 6) (March 1, 1991), Doc. No. 294; Wyo's Br. in Support of Second Mot. for Summ. Judg. 51, n.17 (March 1, 1991), Doc. No. 294. Nevertheless, on the basis of a statement made in argument by Wyoming's attorney (which the special master characterizes as "testimony," Second Int. Rep. 70), by request of former Governor Hathaway of Wyoming, the principal proponent of the project, the special master appears to have concluded that "the likelihood the Corn Creek project will be developed" has been established. *Id.* To be sure, the project remains alive in the hopes of its promoters, but their hankering can hardly be taken as indicative of its vitality, much less of its imminence, in the face of the undisputed evidence that it has never got off the drawing board.

At the more fundamental level, however, given that Nebraska is party to an agreement making provision for the operation of the Corn Creek project, should it materialize, it is wholly immaterial whether development of the project is imminent or improbable. Wyoming is entitled to summary judgment dismissing this claim whether Corn Creek is far fetched or far along.

3. Wyoming and Colorado are entitled to summary judgment that the water of the Laramie River is wholly apportioned between them and that Nebraska has no entitlement to such water.

Whether the Laramie is completely apportioned between Colorado and Wyoming by the decree in *Wy-*

oming v. Colorado[18] and whether Nebraska has any claim to Laramie water under the decree in the instant case[19] are issues strictly of law. They do not involve any facts and must be determined in reference to the decrees and opinions of the Court.[20] Clearly, the Court and Special Master Doherty deemed all of the waters of the Laramie to have been previously apportioned in *Wyoming v. Colorado* and, necessarily, to have been excluded from consideration in this case. Thus, the toing-and-froing of Special Master Olpin about Special Master Doherty's assumption that there would be some inflows into the North Platte from the Laramie and about the failure of the Court and Special Master Doherty, as Special Master Olpin sees it, "to have delved into the fate of [Laramie] waters

---

[18] 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957).

[19] It is undisputed that Laramie water that actually reaches the North Platte is subject to division as provided in paragraphs IV and V of the decree. It is also undisputed that Nebraska is entitled to return flows below Tri-State from the diversions she is entitled to make above Tri-State.

[20] The special master's characterization of the record in the proceedings before Special Master Doherty as "material facts" in this proceeding, Second Int. Rep. 11, though curious, would probably be innocuous so long as it were understood that material below the level of that authored by the Court cannot be employed to impeach the plain language of the Court or to create ambiguity where the Court is clear. But the special master acknowledges that he "probe[d] beyond," *id.* at 14, the plain language of the Court's opinions and decrees (which he discounts as "facially persuasive," *id.* at 39, and "superficial[ly] plain-meaning," *id.* at 44) in reaching his conclusions that the Laramie is not completely apportioned between Colorado and Wyoming by the decree in *Wyoming v. Colorado* and that Nebraska has "equities" in the Laramie under the decree here.

in excess of dependable flows," Second Int. Rep. 64, is immaterial. The facts, which Special Master Olpin acknowledges, that no Laramie water was apportioned in this case, that no restrictions were placed on Wyoming's use of such water, that Nebraska was accorded no rights to such water, *see, e.g.*, Second Int. Rep. 40, 46, 59, 60-61, are not attributable to any failure on the part of the Court or Special Master Doherty "to have delved into the [subject of Laramie waters]," but to their conviction that all of the waters of the Laramie had been apportioned previously between Colorado and Wyoming.[21]

The decree in *Wyoming v. Colorado*, 353 U.S. 953 (1957), provides:

> The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie river and its tributaries after such diversion and use [as the decree provides for] in Colorado.

As it stands, this decree is definitive and controlling of the rights of Colorado and Wyoming. The special master's disregard of it, Second Int. Rep. 39, n.58, is impermissible. His cavalier treatment of it stems

---

[21] Notwithstanding the special master's fondness for characterizing Wyoming's position as being that she has the right to "dewater the Laramie" at its mouth, Second Int. Rep. 17; *see also id.* at 36 & n.55, 39, 40, 64, there is no real issue underlying this hyperbole. It is established that, except for the MBPP (Grayrocks), there have been no significant developments on the Laramie since the decree was entered in 1945. The operations of both the MBPP and Corn Creek, should the latter materialize, are covered by the settlement agreement and Wyoming has done nothing to interfere with its execution.

from his erroneous theses that Nebraska is entitled to contributions from the Laramie under the decree here and that the Court overlooked this.[22]

Early in the opinion in *Nebraska v. Wyoming* the Court notes that Colorado "prayed for an equitable apportionment [of the waters of the North Platte] between the three states, *excluding only the tributary waters of the South Platte and Laramie rivers.*" 325 U.S. at 592 (emphasis supplied). The Court then says:

> The waters of the South Platte and the Laramie were previously apportioned—the former between Colorado and Nebraska by compact . . . , the latter between Colorado and Wyoming by decree. *Wyoming v. Colorado*, 259 U.S. 496. Those apportionments are in no way affected by the decree in this case.

Id. n.1.

Both the context and the use of the definite article "the" before "waters" make clear that the Court

---

[22] There is absolutely no basis for the special master's supposition that the Court was ignorant of the decree in this case when it entered the decree in *Wyoming v. Colorado* in 1957. Side-by-side examination at that time of the 1922 decree in *Wyoming v. Colorado* and of the 1945 decree in this case (as modified in 1953) would have satisfied the reviewer that the Laramie was completely apportioned between Colorado and Wyoming in 1922 and that Nebraska obtained no entitlement to Laramie water under the decree here. In 1936, the Court, after specifying Colorado's rights in the Laramie, stated that the 1922 decree "confirms and establishes the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries." *Wyoming v. Colorado*, 298 U.S. 573, 578 (1936).

means "all of the waters" of the South Platte and the Laramie Rivers. The Court's treatment in tandem of the effects of the decree in *Wyoming v. Colorado* and of the compact between Colorado and Nebraska demonstrates that the Court regarded the former as having apportioned the waters of the Laramie between Colorado and Wyoming as completely as the latter apportioned the waters of the South Platte between Colorado and Nebraska. This is confirmed by paragraph XII of the decree:

> This decree shall not affect:
>
> * * *
>
> (d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of *the waters* of the Laramie River, a tributary of the North Platte;
>
> (e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning *the water* of the South Platte River.

325 U.S. at 671 (emphasis supplied).

After observing that "*the water* of the Laramie River was equitably distributed by the decision of this Court in the case of *Wyoming v. Colorado*, . . . and that the South Platte River was equitably distributed by compact between Nebraska ratified by the Congress in 1926," Special Master Doherty stated: "This conclusion takes into account the interests of all parties and *no redistribution of the waters of those rivers should be undertaken in this suit.*" Report of Special Master Doherty 8 (emphasis supplied). He began his recommendations for the decree by stating that they

embraced the "water of the North Platte River and its tributaries, *except the Laramie River*." *Id.* at 177 (emphasis supplied).[23]

With all due respect, Special Master Olpin's speculations that, in formulating the decree here, the Court and Special Master Doherty proceeded "on a supposition that ultimately was not carefully examined" and "failed to examine the Laramie Decree exhaustively," Second Int. Rep. 59-60, so that their intention "remains murky," *id.* at 39, and a "crisp resolution" of the status of the waters of the Laramie eluded them, *id.* at 38, are an overlong fetch. The Court and Special Master Doherty could hardly have made more plain that they regarded "*the waters*" of the Laramie as having been apportioned previously between Colorado and Wyoming, that the Laramie was excluded from this case, and that the decree here was not to affect in any way the division previously made of all of the waters of the Laramie between Colorado and Wyoming.

---

[23] Special Master Olpin's suggestion that the Court's failure to repeat Special Master Doherty's introductory language verbatim may signal that it was reluctant to wholly exclude the Laramie from the decree, Second Int. Rep. 49, is beyond credulity's pale. Not only did the Court use equivalent language in its opinion and the decree but, in adopting the substance of Special Master Doherty's recommendations, the Court surely would have said something had it not agreed with the exclusion of the Laramie. Also bereft of persuasive force is the special master's undertaking to explain away the fact that Special Master Doherty, Doherty Report 20, and the Court, 325 U.S. at 592, n.2, excluded the entire Laramie River basin from the portion of the North Platte River basin they deemed involved in the case. Second Int. Rep. at 46 & n.66.

The special master predicates his refusal to give effect to the plain language of the Court in the two cases, and his proposition that Nebraska has "equities" in Laramie water, *id.* at 64, solely on the circumstances that Special Master Doherty, in estimating the quantity of natural flow water that would be available in the Whalen to Tri-State section of the North Platte, assumed that there would be some inflows from the Laramie, and that there have been such inflows since the decree was entered. *See, e.g., id.* at 48, 59, 63. But, in the face of the plain language of the decrees and opinions of the Court to the contrary, it is a jump too far from Special Master Doherty's assumption that there would be some inflows into the North Platte from the Laramie to Special Master Olpin's conclusion that Nebraska therefore has rights or equities in the waters of the Laramie.[24]

Wyoming and Colorado are entitled to summary judgment, as a matter of law, that all of the waters of the Laramie River are apportioned between them.

---

[24] *Cf. Oklahoma v. New Mexico*, 115 L. Ed. 2d 207, 111 S. Ct. 2281 (1991), involving the issue of whether, under the Canadian River Compact, New Mexico's unrestricted right to use water originating above Conchas Dam continued to apply to upriver water that passed the dam into the river below. New Mexico's right to use water originating below the dam was subject to restrictions. Although the Court held that upriver water passing Conchas should be treated as water originating below the dam, it observed that the fact that flows past Conchas of some water entering the river above had been assumed in determining the supplies that would be available for downstream projects in Texas and Oklahoma, would not "prevent New Mexico from simply enlarging Conchas Reservoir to capture all the waters flowing into the river above Conchas Dam." 115 L. Ed. 2d at 226.

4. Wyoming and Colorado are entitled to summary judgment that Nebraska has no right to natural flows of the North Platte above Tri-State, except such as she is entitled to divert at or above Tri-State in accordance with paragraph V of the decree into the canals listed in paragraph IV for the irrigation of land thereunder.

The issue of Nebraska's rights to natural flows of the river above Tri-State Dam, like the issue of her rights to waters of the Laramie, is an issue strictly of law that must be determined in reference to the decree and opinion of the Court. Wyoming and Colorado are entitled to have Nebraska's rights defined before being required to proceed further. They seek determination that Nebraska has no entitlement to natural flows of the river above Tri-State for use below, except such as she is entitled to divert under paragraph V of the decree into the canals specified in paragraph IV for the irrigation of lands thereunder. Her entitlement to divert and use water in accordance with these provisions of the decree is undisputed, as is her entitlement to return flows below Tri-State from the water she is entitled to divert above.

Nebraska contends that she has "equities," which she variously bases on the "regimen of the river" and the "predicate of the decree", that entitle her to use natural flows of the river above Tri-State for purposes other than those specified in the decree. The special master refuses to decide whether she has any such entitlement because he sees "reason to proceed cautiously until Nebraska has developed her factual case." Second Int. Rep. 94.

The issue, however, is not of fact but of law. No facts that might now be shown can define or affect

whatever rights Nebraska has under the existing decree. Whatever they are, they are, and there is nothing that can be looked to now to determine what they are that is not in the record of the original proceedings, which has been before the special master for many months. Wyoming and Colorado are entitled to a decision. *Oklahoma v. New Mexico*, 115 L. Ed. 2d at 228-29.

Given that Nebraska's case is essentially based on the proposition that she has rights, in addition to those specified in paragraphs IV and V of the decree, to natural flows of the North Platte in the river above Tri-State for diversion and use below, the special master's suggestion that, to rule on the issue now, "would be to issue an advisory opinion," Second Int. Rep. 94, is inexplicable.

At some point, the plain language of the decrees and opinions of the Court in *Wyoming v. Colorado* and this case must be honored and given effect. The decisions of the Court are clear that Nebraska has no claim on Laramie water and that, except as provided by paragraphs IV and V of the decree, she has no entitlement to natural flow water from above Tri-State for use below, *see* 325 U.S. at 607, 654-55. Wyoming and Colorado are entitled to summary judgment to that effect.

CONCLUSION

Basin requests that its exceptions be granted and judgment entered accordingly.

Respectfully submitted,

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

July 1, 1992

Supreme Court, U.S.
FILED
JUL 1 1992
OFFICE OF THE CLERK

41

No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF NEBRASKA,
Plaintiff,
vs.
STATE OF WYOMING, *et al.*,
Defendants.

COLORADO'S EXCEPTION TO SPECIAL MASTER'S FIRST AND SECOND INTERIM REPORTS

GALE A. NORTON
Attorney General
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
WENDY C. WEISS*
First Assistant Attorney General
Natural Resources Section
Attorneys for Defendant
State of Colorado
110 Sixteenth St., 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4730
***Counsel of Record**

TABLE OF CONTENTS

PAGE

EXCEPTION 1

BRIEF IN SUPPORT OF EXCEPTION 1

INTRODUCTION 1

ARGUMENT 3

I. THE DECREE DOES NOT PROTECT USES BELOW TRI-STATE DAM. 3

II. NEBRASKA HAS FAILED TO ARTICULATE A VIOLATION OF THE DECREE AS TO USES BELOW TRI-STATE DAM. 10

CONCLUSION 13

TABLE OF AUTHORITIES

CASES **PAGE**

Arizona v. California, 460 U.S. 605 (1983) 8, 10

Nebraska v. Wyoming, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953) . . . . . passim

Nebraska v. Wyoming, 485 U.S. 931 (1988) 4

Ohio v. Kentucky, 410 U.S. 641 (1973) 7

RULES

Supreme Court Rule 9.3 7

No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF NEBRASKA,
Plaintiff,
vs.
STATE OF WYOMING, *et al.*,
Defendants.

COLORADO'S EXCEPTION TO SPECIAL MASTER'S FIRST AND SECOND INTERIM REPORTS

EXCEPTION

1. The State of Colorado excepts to the Special Master's recommendation not to grant summary judgment in favor of Colorado and Wyoming on Nebraska's claims for the continuation of flows in excess of Nebraska's decreed apportionment to serve uses that do not divert at or above Tri-State Dam.

BRIEF IN SUPPORT OF EXCEPTION

INTRODUCTION

The States of Colorado and Wyoming have during the course of these proceedings filed several motions for partial summary judgment to dispose of Nebraska's claim that the decree in this case, *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953) (the Decree), creates rights downstream of Tri-State Dam independent of her apportionment for lands served by canals that

divert at or above Tri-State. Wyoming Motion for Summary Judgment (Sept. 11, 1987) (Docket No. 23); Colorado's Motion for Partial Summary Judgment (Feb. 25, 1991) (Docket No. 292); Wyoming Second Motion for Summary Judgment (Mar. 1, 1991) (Docket No. 294). Both the first and second interim reports of the Special Master declined to recommend the entry of partial summary judgment against Nebraska on this issue. First Interim Report (June 14, 1989) (Docket No. 140); Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention (Apr. 9, 1992) (Second Interim Report) (Docket No. 463). Colorado's exception goes to that single issue, as treated in both reports.

The Special Master acknowledged that "no river sections east of the Tri-State Dam were included in the equitable apportionment," Second Interim Report at 90, and that "Nebraska did not receive an apportionment of downstream of Tri-State natural flows," *id.* at 91.[1] Despite this, he believed it would be "premature" to grant the Wyoming and Colorado motions at this time:

> To rule on such questions now would be to issue an advisory opinion that Wyoming and Colorado cannot unlawfully injure Nebraska's downstream of Tri-State interests except by actions that will violate the Decree with respect to her upstream of Tri-State apportionment.[2]

---

[1]Similarly, in his First Interim Report, the Special Master stated, "Nebraska acknowledges, as she must, that the section of the North Platte below Tri-State Dam was not included in the 1945 apportionment." First Interim Report at 33. He went on to say, "Nebraska also admits, as she must, that the apportionment itself does not extend below Tri-State Dam." *Id.*

[2]The Special Master recognized that Colorado and Wyoming do not dispute that if a violation were established above Tri-State, downstream injuries caused by diminished return flows would be compensable. Second Interim Report at 92, 93.

Id. at 94.

The Special Master erred in declining to recommend the entry of summary judgment on that issue for two reasons: first and foremost, the question of whether Nebraska's apportionment is limited to the uses that divert at or above Tri-State is purely one of law, to be decided based on the opinion and decree previously entered in this case, which requires no factual development; and, second, even assuming a violation of Nebraska's decreed apportionment could be established based on injury to uses below Tri-State, Nebraska has failed to articulate any factual basis for claiming such injury.

ARGUMENT

I. THE DECREE DOES NOT PROTECT USES BELOW TRI-STATE DAM.

This is an action to enforce the existing Decree against Wyoming. That is the only relief sought in Nebraska's petition and the only basis for this Court's assumption of jurisdiction.[3] Subsequently, and consistent with her prior characterization of the case as solely an enforcement action, Nebraska requested leave to amend her petition to seek modification of the Decree to, *inter alia*, protect uses below Tri-State and enjoin future development by Colorado. Motion to Amend Petition for an Order Enforcing Decree

---

[3]In her reply to Wyoming's brief opposing the motion for leave to file the petition, Nebraska emphatically assured the Court: "Each of Nebraska's allegations involves present or threatened interference with its apportionment established by the Court in this case. **Nebraska does not seek to modify the Decree in any respect, but only to enforce it pursuant to the Court's express anticipation of the need to do so.**" Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition (Jan. 15, 1987) at 2 (emphasis added) (Docket No. 4).

and for Injunctive Relief and Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of Decree (Jan. 12, 1988) (Docket No. 47). The Court denied Nebraska's motion.[4] *Nebraska v. Wyoming*, 485 U.S. 931 (1988) (Docket No. 59).

Nebraska's claims to enforce the existing Decree must, therefore, stand or fall based solely on the terms of the Decree itself. Fortunately, as it relates to uses below Tri-State that are not served by canals diverting at or above Tri-State, the Decree could hardly be plainer or less ambiguous.

In the original action, Nebraska sought an apportionment extending to all irrigated lands as far east as Grand Island, Nebraska. *Nebraska v. Wyoming*, 325 U.S. 589, 607 (1945). By the end of the case, Nebraska conceded that the lands east of Bridgeport, Nebraska, some sixty miles from the Wyoming-Nebraska state line, could be reasonably satisfied out of local supplies. *Id.* Thus, Special Master Doherty and the Court were not concerned with the section between Bridgeport and Grand Island. *Id.*

As to the section between Tri-State Dam and Bridgeport, the Special Master concluded that local supplies even during the drought period were adequate to satisfy the needs of the canals in that reach without calling upon water from above Tri-State. *Id.* at 607. The Court agreed, saying, "[T]he record sustains the conclusion that equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Id.* at 628.

---

[4]Nebraska has since moved yet again to amend her petition to include below Tri-State uses not covered by the Decree, this time as a request for an apportionment of non-irrigation season flows. Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Oct. 10, 1991) (Docket No. 407). Nebraska's motion is presently pending before the Court. *See* Order of May 18, 1992 (Docket No. 477).

When the United States voiced the concern that Nebraska would try to "circumvent" the Decree by permitting water to pass Tri-State Dam for downstream uses, the Court responded, "If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree." *Id.* at 628-629.

Later in the opinion, discussing the section from Tri-State Dam to Bridgeport, Nebraska, the Court amplified on and reaffirmed its conclusion:

> The Special Master excluded this section of the river from the apportionment on the grounds that its canals are adequately supplied from return flows and other local sources. Nebraska takes exception to that exclusion. . . . [T]he record supports the conclusion of the Special Master that seasonal supplies are adequate. . . .
>
> This section will accordingly not be included in the apportionment.

Id. at 654-655.

The Decree itself conformed to the Court's opinion by apportioning the natural flow of the North Platte River as far east as Tri-State Dam and no further.

Given the plain language of the opinion and Decree, one may well ask how Nebraska's claims to protect uses below Tri-State have survived this long. The credit must go to creative advocacy. Faced with the Court's justifiable refusal to expand a straightforward enforcement action against Wyoming, alleging discrete violations of

the Decree, into a full-fledged equitable apportionment action,[5] Nebraska attempted to recast the present action as one to modify the Decree. Thus, the "downstream of Tri-State issues [were] newly defined by Nebraska during oral argument [on November 18, 1988]." Tenth Memorandum of Special Master (Mar. 2, 1989) at 69 (Docket No. 119).

First, Nebraska redefines "enforce" to mean "modify." Her reasoning seems to be that because she invoked the Court's retained jurisdiction to enforce the Decree under Article XIII, and because Article XIII also retained jurisdiction to modify the Decree, then the Court's accepting jurisdiction over the enforcement action was tantamount to accepting jurisdiction to modify the Decree. This reasoning is expressed in Nebraska's answers to Colorado's requests for admission, where she asserts:

> While Nebraska's Petition is premised on violations or prospective violations of the Decree by Wyoming, Nebraska will not preclude its right under Article XIII of the Decree to seek relief based on changed needs as well as threatened injuries that could result from the actions of any party.

---

[5]What Nebraska and *amici curiae* Audubon and Platte River Trust seek is nothing less than a long, complex trial on the highly technical issues surrounding the habitat needs of wildlife, and particularly endangered species, on the mainstem of the Platte River some 250 miles east of the Wyoming-Nebraska state line, in the section between Bridgeport and Grand Island. Not only is such a trial far beyond the scope of the present case, it is wholly unnecessary, since wildlife interests have been and are presently being protected under the Endangered Species Act in more appropriate forums. *See* Colorado and Wyoming Response to Brief of Amicus Curiae National Audubon Society on the Extent to which Fish and Wildlife Interests Downstream from the Tri-State Dam Must Be Protected in this Proceeding (Apr. 26, 1991) at 5-10 (Docket No. 333); Second Interim Report at 105-107.

Nebraska's Answers to Colorado's First Set of Requests for Admission (Below Tri-State Dam Issue) (Oct. 10, 1989) No. 6 (Docket No. 162). (These are reproduced in their entirety as Appendix No. 1 and will hereafter be cited as "Nebraska Ans. No. __.")[6]

This argument has at least three obvious flaws. First, it would virtually eviscerate *Supreme Court Rule 9.3*, requiring that leave be sought and granted before the Court's original jurisdiction is invoked, since the Court's decision to hear a particular claim would open the door to additional claims without further scrutiny. *See Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (motion for leave to amend denied based on the same considerations that govern the decision whether to exercise original jurisdiction in the first place). Second, the argument blithely disregards Nebraska's prior representations to the Court about the scope of this case. *See supra* note 3. Finally,

---

[6]Similarly, Nebraska Ans. No. 10 states:

> "The petition requests an order construing or clarifying the Decree, modifying it if necessary, and enforcing the Decree by enjoining Wyoming from increasing current depletions of the 'natural flow' of the North Platte River . . . ." Nebraska's Response to Wyoming's Motion for Summary Judgment at 4. Special Master Olpin has confirmed that the Decree can be modified or expanded in this proceeding. See First Interim Report at 5-6.

Nebraska misstates her own petition, which requests an order "**requiring the State of Wyoming to comply with the provisions of the Decree and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.**" Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) at 3-4 (citation omitted) (emphasis added) (Docket No. 1). The language on "construing or clarifying . . . modifying it if necessary" appears to be a paraphrase of the petition's quotation from Article XIII of the Decree. *See also* Nebraska Ans. No. 5.

the argument is inconsistent with Nebraska's previous motion for leave to amend her petition to request modification of the Decree and the Court's denial of that motion. Not only is an action to enforce an existing decree far simpler than one to modify it, it also does not involve the strong considerations of certainty and finality that militate against relitigating a long-standing apportionment. *See Arizona v. California*, 460 U.S. 605 (1983). The Court was presumably cognizant of this when it denied Nebraska's motion to amend.

Nebraska's second approach to transforming this into a proceeding to modify the Decree is to redefine what constitutes a violation of the Decree. Without reference to a specific requirement of the Decree, Nebraska instead alleges violations of the "regimen of the river" and, even more cryptically, the "predicate" of the apportionment. *See, e.g.*, Nebraska Ans. Nos. 1, 2, 5, and 6; Nebraska Response to Wyoming's and Colorado's Motions for Summary Judgment (Apr. 26, 1991) at 42, 46, 52 (Docket No. 335); First Interim Report at 34, quoting from transcript of May 12, 1989 hearing; Second Interim Report at 91.

Ultimately, Nebraska combines both arguments, confusing the Court's undisputed **power** to exercise jurisdiction to modify the Decree with the **acceptance** of jurisdiction to do so to protect the "regimen of the river." Nebraska's semantic gyrations to recast this enforcement action as an action to modify the Decree are apparent in the following discovery response:

> Explicit in Article XIII of the Decree is the right of any party to petition the Court for appropriate relief as material changes in conditions on the North Platte River affect water uses maintained or developed since 1945. Article XIII protects equities that have come to rely on the regimen of the river. Changes in the regimen of the North Platte River which adversely affect historical flows are thus cognizable under the Decree.

> Even though the Decree does not apportion a direct natural flow right to uses below Tri-State, the apportionment is expressly predicated on the fact that continued return flows from uses above Tri-State were required to satisfy demands below Tri-State. Special Master Doherty expressly considered the return flows below Tri-State as an independent entitlement in formulating the apportionment, recognizing the return flows as necessary. Maintenance of return flows is not incidental to the apportionment of uses above Tri-State.

Nebraska Ans. No. 1. With equally twisted logic, Nebraska in one breath concedes that the Decree does not provide an apportionment for fish and wildlife habitat and in the next breath asserts a right to the maintenance of flows for fish and wildlife uses:

> The Decree as written in 1945 does not provide for an independent apportionment for fish and wildlife habitat, and in particular endangered species. Article XIII does provide the power to protect such equities that have come to rely on the regimen of the river. See Answer to Requests for Admission No. 1. Nebraska has a right to maintain certain flows that have been recognized by the apportionment. Nebraska may not seek a separate apportionment for fish and wildlife uses in this proceeding, but it will ask the Special Master to consider such equities when formulating his decision of whether to modify, expand or enforce the Decree.

Nebraska Ans. No. 5.

Although Nebraska's argument is convoluted, its refutation is remarkably simple. The Decree takes the form of injunctions against

certain specific future conduct by Colorado and Wyoming. Nebraska cannot, in the guise of an action to enforce the Decree, rewrite that Decree to enjoin not only those actions expressly prohibited, but also hitherto permissible actions that she contends run afoul of an undefined "regimen" or indeterminate "predicates." Such a vague expansion of the specific injunctions of the Decree is simply untenable in the context of water rights in the arid western states, where this Court has recognized that "[c]ertainty of rights is particularly important." *Arizona v. California* at 620.

The Special Master has fallen into Nebraska's snare, confusing this action to enforce the existing Decree with one before the Court under the "changed conditions" or "reopener" provision of the Decree. Second Interim Report at 4. When one bears in mind that the Court denied Nebraska's motion to amend, so that this remains an enforcement action, pure and simple, it becomes clear that Nebraska's below Tri-State claims must stand or fall based on the language of the Decree. And since it is undisputed that the Decree does not give Nebraska the right to demand flows for uses diverting below Tri-State, First Interim Report at 33; Second Interim Report at 90, 91, no amount of "factual development" or "unseen evidence," *id.* at 94, can conceivably establish a violation of the Decree based on the diminution of flows for such uses.

II. NEBRASKA HAS FAILED TO ARTICULATE A VIOLATION OF THE DECREE AS TO USES BELOW TRI-STATE DAM.

Assuming *arguendo* that Colorado or Wyoming could conceivably violate the Decree by reducing flows below Tri-State independent of any violation above Tri-State, Nebraska must provide

some factual basis for asserting such a claim.[7] More than five years after the filing of this case, and after extensive discovery, briefing, and argument, Nebraska still has not articulated any such basis.

In 1989, the Special Master observed, "Nebraska has yet to specify exactly what injuries she apprehends . . . . " First Interim Report at 34. Almost three years later, the Special Master, like the parties, was no better informed as to Nebraska's supposed claim:

---

[7] Nebraska has conceded that she has the burden of proving substantial injury of serious magnitude below Tri-State:

> The resolution of the Tri-State issue will depend in large part upon Nebraska's own definition or own assertion of the injury that would be caused by proposed developments in Wyoming to equities in Nebraska that rely on the apportionment at Tri-State. That is the issue as we see it.
>
> . . . .
>
> Our position, I think, derives from two lines of cases that perhaps are really one in original actions. One line says that for the Court to exercise its jurisdiction, the case must be a serious magnitude. The other line says the party claiming to be injured must be able to prove substantial injury. That goes all the way back to the first one of these actions, Kansas versus Colorado.
>
> We have to be able to present to the Court the injury to all equities that rely on the apportionment, and many of those equities have developed as a result of the regimen of the river created by the apportionment.

Transcript of May 12, 1989, Status Conference at 96-98 (Docket No. 136). Interestingly, Nebraska's articulation of what she believes she must prove further demonstrates that Nebraska is really seeking a new apportionment, rather than the enforcement of existing rights.

> The specific issue to be addressed at this point is the appropriateness of ruling on whether Nebraska's as yet unseen evidence of injury or threatened injury to her interests downstream of Tri-State will be material to whether Wyoming or Colorado has violated Nebraska's decreed apportionment. At this stage, however, it is premature to enter an order advising Nebraska on how she may develop her case and the propositions for which her evidence will be deemed material.

Second Interim Report at 94. With all due respect, Colorado submits that not only is it appropriate to interpret the Decree as a matter of law prior to trial, it also is not premature to dismiss a claim that the plaintiff refuses to define more than five years after the case was filed.

Colorado is especially prejudiced by Nebraska's refusal to clarify her claim. Since Nebraska's petition does not allege that Colorado has violated or threatens to violate the Decree, Colorado should not have to actively participate in these proceedings. However, so long as Nebraska's nebulous claims on behalf of below Tri-State uses remain inchoate in this case, Colorado is at serious risk if she neglects to participate.[8] Colorado should not be forced to

---

[8]The Special Master recognized the legitimacy of Colorado's concerns, even while failing to allay them:

> Colorado expresses justifiable concern over Nebraska's suggestion of claims respecting "collective equities equaling historical averages." Sustaining that position would, indeed, cause anxiety in Colorado over potential prejudice for not having fully used the share allocated to her in paragraph I of the Decree. As she argued on summary judgment, Colorado "should not be placed in a 'use it or lose it' situation with regard to her apportionment." June 1991 Transcript at 156-57.

guess at the scope of the issues remaining for trial.

CONCLUSION

Colorado requests that her exception be granted and partial summary judgment be entered accordingly.

Respectfully submitted this ____ day of July, 1992.

GALE A. NORTON
Attorney General

RAYMOND T. SLAUGHTER
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

WENDY C. WEISS*
First Assistant Attorney General
Natural Resources Section
Attorneys for Defendant
State of Colorado

110 Sixteenth Street, 10th Floor
Denver, Colorado 80202
Telephone: (303) 620-4730
*Counsel of Record

Second Interim Report at 91-92 n. 108.

APPENDIX A

No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

BEFORE THE HONORABLE OWEN OLPIN
SPECIAL MASTER

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

NEBRASKA'S ANSWERS TO COLORADO'S FIRST SET OF REQUESTS FOR ADMISSION (BELOW TRI-STATE DAM ISSUE)

COMES NOW the Plaintiff State of Nebraska and hereby responds to Colorado's First Set of Requests for Admission to the State of Nebraska (Below Tri-State Dam Issue).

GENERAL OBJECTIONS

The State of Nebraska objects to Colorado's First Set of Requests for Admission to the State of Nebraska (Below Tri-State Dam Issue) insofar as the definitions and instructions of those

Admissions purport to create any duty to respond which exceeds or is different from the duties imposed by Rules 26 and 33 of the Federal Rules of Civil Procedure.

The State of Nebraska further generally objects to Colorado's Request for Admission insofar as they seek to discover any privileged matter, including but not limited to the attorney client privilege and the attorney work product privilege.

ANSWERS TO REQUESTS

1. So long as Nebraska receives its Decree apportionment for uses above Tri-State Dam, the Decree affords Nebraska no right to any additional water for uses below Tri-State Dam.

Answer: Denied. Explicit in Article XIII of the Decree is the right of any party to petition the Court for appropriate relief as material changes in conditions on the North Platte River affect water uses maintained or developed since 1945. Article XIII protects equities that have come to rely on the regimen of the river. Changes in the regimen of the North Platte River which adversely affect historical flows are thus cognizable under the Decree.

Even though the Decree does not apportion a direct natural flow right to uses below Tri-State, the apportionment is expressly predicated on the fact that continued return flows from uses above Tri-State were required to satisfy demands below Tri-State. Special Master Doherty expressly considered the return flows below Tri-State as an independent entitlement in formulating the apportionment, recognizing the return flows as necessary.

Maintenance of return flows is not incidental to the apportionment of uses above Tri-State.

2. So long as Nebraska receives its Decree apportionment for uses above Tri-State Dam, Nebraska will suffer no injury that is cognizable under the Decree.

Answer: Denied. Development of additional uses of North Platte River supplies may reduce the natural flows which are subject to apportionment between Wyoming and Nebraska such that cognizable injuries are suffered. In addition, changes in the operations and regimen of the North Platte River which adversely affect historical return flows relied upon by equities below Tri-State can result in cognizable injury. See Answer to Request for Admission No. 1.

3. Counsel for Nebraska has stated:

> We have to be able to present to the Court the injury to all equities that rely on the apportionment, and many of those equities have developed as a result of the regimen of the river created by the apportionment.

First Interim Report at 34, quoting from Pasadena Transcript (May 12, 1989) at 98. Admit that the "equities" that Nebraska contends "have developed as a result of the regimen of the river created by the apportionment" do not entitle Nebraska to any natural flow water in addition to its Decree apportionment for uses above Tri-State Dam.

Answer: Denied. See Answer to Request for Admission No. 1.

4. If Nebraska has at times received flows in excess of its Decree apportionment for uses above Tri-State Dam, such excess flows have not enhanced Nebraska's apportionment under the Decree or created "equities" which would entitle Nebraska to the continued delivery of such excess water.

Answer: Denied. Nebraska denies that it has received flows in excess of its Decree apportionment. See also, Answer to Requests for Admission No. 1.

5. The Decree apportionment to Nebraska is limited in amount and timing to natural flow water reasonably required for uses above Tri-State Dam and, therefore, uses below Tri-State Dam, including the maintenance of migratory bird habitat in the "Big Bend" reach of the Platte River, which may be supplied by return flows from the apportionment have no independent entitlement to water under the Decree.

Answer: The Decree as written in 1945 does not provide for an independent apportionment for fish and wildlife habitat, and in particular endangered species. Article XIII does provide the power to protect such equities that have come to rely on the regimen of the river. See Answer to Requests for Admission No. 1. Nebraska has a right to maintain certain flows that have been recognized by the apportionment. Nebraska may not seek a separate apportionment for fish and wildlife uses in this proceeding, but it will ask the Special Master to consider such equities when formulating his decision of whether to modify, expand or enforce the Decree.

6. Nebraska's assertion of injury or prospective injury to uses below Tri-State Dam is based solely upon Wyoming's alleged violation(s) or prospective violation(s) of the Decree apportionment for uses above Tri-State Dam.

Answer: Denied. Nebraska asserts that equities below Tri-State may be injured by actions of any party which threaten the regimen of the river created by the apportionment under the Decree. While Nebraska's Petition is premised on violations or prospective violations of the Decree by Wyoming, Nebraska will not preclude its right under Article XIII of the Decree to seek relief based on changed needs as well as threatened injuries that could result from the actions of any party.

7. To the extent that uses below Tri-State Dam have benefited from return flows resulting from the Decree apportionment, Nebraska has no right under the Decree to the maintenance of such return flows except as they may incidentally result from the apportionment to uses above Tri-State Dam.

Answer: Denied. See Requests for Admission No. 1.

8. To the extent that uses below Tri-State Dam have benefited from surplus waters flowing past Tri-State Dam or from excessive diversions or bypasses by the Nebraska canals, Nebraska has no right under the Decree to the maintenance of such flows.

Answer: Denied. Nebraska does not admit that there have been excessive diversions or bypasses by the Nebraska canals. See also, Answer to Requests for Admission No. 1.

9. Under the Decree, Nebraska is not entitled to assert injury to uses below Tri-State Dam caused by changes in the regimen of the river, including reduced return flows, unless such changes result from violation of the Decree apportionment to uses above Tri-State Dam.

Answer: Denied. See Answer to Request for Admission No.

10. If Nebraska asserts that there are "equities" which entitle it to flows in excess of the requirements for uses above Tri-State Dam recognized in the Decree, Nebraska's petition in this proceeding does not request the Court to expand or modify the Decree to protect such equities.

Answer: Denied. "The petition requests an order construing or clarifying the Decree, modifying it if necessary, and enforcing the Decree by enjoining Wyoming from increasing current depletions of the 'natural flow' of the North Platte River . . .." Nebraska's Response to Wyoming's Motion for Summary Judgment at 4. Special Master Olpin has confirmed that the Decree can be modified or expanded in this proceeding. See First Interim Report at 5-6.

Dated this 7th day of October, 1989.

ROBERT M. SPIRE
Attorney General

LEROY W. STEVERS
Assistant Attorney General

RICHARD A. SIMMS
Counsel of Record
Simms & Stein
First Northern Plaza
121 Sandoval Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF NEBRASKA,
Plaintiff,
vs.
STATE OF WYOMING, *et al.*,
Defendants.

PROOF OF SERVICE

I, Wendy Weiss, a member of the Bar of the Court, hereby certify that on the 1st day of July, 1992, three copies of the Brief in Opposition in the above-entitled case were sent in the U.S. mail to:

Honorable Owen Olpin
O'Melveny & Myers
400 South Hope Street
Los Angeles, CA 90071-2899

Nancy E. McFadden
O'Melveny & Myers
555 13th Street, N.W.
Washington, D.C. 20004-1109

Saone Crocker
Beveridge & Diamond, P.C.
Suite 700
1350 I Street, N.W.
Washington, D.C. 20005

Richard A. Simms
Simms & Stein, P.A.
P.O. Box 280
Santa Fe, NM 87504

Hon. Don Stenberg
Attorney General of Nebraska
Marie C. Pawol
Assistant Attorney General
Department of Justice
State Capitol
Lincoln, NE 68509-8920

Hon. Roy Romer
Governor
State of Colorado
136 State Capitol Building
Denver, CO 80203

Edward Weinberg
Duncan, Weinberg & Miller
1615 M Street, N.W.
Suite 800
Washington, D.C. 20036

Andrew F. Walch
U.S. Department of Justice
Environment & Natural
Resources Division
999 18th Street, Suite 945
Denver, CO 80202

William Madden
Winston & Strawn
1400 L. Street, N.W.
Washington, D.C. 20005-3502

Hon. E. Benjamin Nelson
c/o J. Michael Jess, Director
Department of Water Resources
P.O. Box 94676
301 Centennial Mall South
Lincoln, NE 68509

Raphael J. Moses
Charles N. Woodruff
James R. Montgomery
Moses, Wittemyer, Harrison
& Woodruff, P.C.
P.O. Box 1440
Boulder, CO 80306-1440

Hon. Kenneth W. Starr
United States Solicitor General
Jeffrey P. Minear
Office of Solicitor General
Constitution Ave. & 10th Street,
N.W.
Washington, D.C. 20530

Hon. Michael J. Sullivan
Governor of Wyoming
State Capitol
Cheyenne, WY 82002

Hon. Joseph B. Meyer
Attorney General of Wyoming
Dennis C. Cook
123 State Capitol
Cheyenne, WY 82002

Frank Dragoun
Central Nebraska Public Power
and Irrigation District
415 Lincoln Street
P.O. Box 740
Holdredge, NE 68949-0740

Gary Bachman
Van Ness, Feldman, Sutcliff
& Curtis
1050 Thomas Jefferson St., N.W.
Washington, D.C. 20017

Michael C. Klein
Anderson, Klein, Peterson
& Swan
P.O. Box 133
Holdrege, NE 68949

Hope Babcock
Georgetown Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Abbe David Lowell
Brand & Lowell
923 Fifteenth Street, N.W.
Washington, D.C. 20005

William E. Holland
Chadbourne & Parke
30 Rockefeller Plaza
New York, NY 10112

Michael J. Hinman
Claire Olson
Basin Electric Power
Cooperative
1717 East Interstate Avenue
Bismarck, ND 58501

Melinda E. Taylor
Henry, Kelly & Lowerre
2103 Rio Grande
Austin, TX 78705

Patricia L. Weiss
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 663
Washington, D.C. 20044-0663

John Echeverria
National Audubon Society
666 Pennsylvania Ave., S.E.
Washington, D.C. 20003

Peter A.A. Berle
National Audubon Society
950 Third Avenue
New York, NY 10022

I further certify that all parties required to be served have been served.

WENDY WEISS
Counsel for Defendants

SUPREME COURT OF THE UNITED STATES

STATE OF NEBRASKA *v.* STATES OF WYOMING AND COLORADO

ON MOTION OF THE SPECIAL MASTER FOR COMPENSATION AND REIMBURSEMENT OF EXPENSES

No. 108, Orig. Decided June 15, 1992

The Court by order dated April 20, 1992, awarded the Special Master interim compensation and reimbursement of expenses. The Court also allowed the parties and the proposed intervenors/*amici* to comment further on the Special Master's suggestion of a one-time Special Assessment of costs to the intervenors/*amici*.

Although different arguments have been advanced as to the appropriate amounts to be assessed, no party or proposed intervenor/*amicus* has objected to the propriety of including non-objecting *amici* in the assessment. We therefore do not reach the issue, deeming the parties to have agreed with the procedure. The Special Master found that the proceedings were expanded and made more costly by reason of *amici* participation, and the *amici* presumably acknowledge this to be the case. In light of these considerations, the interim award to the Special Master shall be paid as follows:

(1) the State of Colorado, a party to this original action, is assessed the amount of $25,000.00, the amount recommended by the Special Master;

(2) the four proposed intervenors/*amici*, Basin Electric Power Cooperative, Central Nebraska Public Power and Irrigation District, the National Audubon Society, and the Platte River Whooping Crane Critical Habitat Maintenance Trust, are each assessed $5,000.00, an amount to which none have objected; and

(3) the remaining award is to be paid 40% by Nebraska, 40% by Wyoming, and 20% by the United States.

JUSTICE WHITE would adopt the recommendation of the Special Master respecting the allocation of his fees and expense among the parties and the *amici*.

JUSTICE STEVENS, dissenting.

Because I do not believe that the Court has authority to assess costs against nonparties, I respectfully dissent from the order to the extent it provides for an assessment against *amici curiae*.[1] I do not think that it is proper for the Court to justify its exercise of this authority on the basis of the *amici*'s failure to object, especially when the assessment is for an interim payment to the Special Master in the course of an ongoing proceeding.[2]

---

[1]Cf. Comment, Protecting Defendant-Intervenors from Attorneys' Fee Liability in Civil Rights Cases, 23 Harv. J. Legis. 579, 588 (1986) ("Courts have consistently assumed that an amicus curiae is exempt from attorneys' fee liability"); *Chance* v. *Board of Examiners*, 70 F.R.D. 334, 340 (SDNY 1976).

[2]Cf. 2 Administrative Office of the United States Courts, Guide to Judiciary Policies and Procedures, Judicial Code of Conduct, Canon 3(C)(1)(a)-(e) and 3(D), pp. I–7, I–9 (1990) (limiting circumstances in which parties may waive judicial disqualification).

Supreme Court, U.S.
FILED
AUG 17 1992
OFFICE OF THE CLERK

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S RESPONSE TO WYOMING'S, COLORADO'S, AND BASIN ELECTRIC'S EXCEPTIONS TO THE SPECIAL MASTER'S FIRST AND SECOND INTERIM REPORTS AND BRIEFS IN SUPPORT OF EXCEPTIONS

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

August 17, 1992

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

NEBRASKA'S RESPONSE TO WYOMING'S, COLORADO'S, AND BASIN ELECTRIC'S EXCEPTIONS TO THE SPECIAL MASTER'S FIRST AND SECOND INTERIM REPORTS AND BRIEFS IN SUPPORT OF EXCEPTIONS

QUESTIONS PRESENTED

Pursuant to Supreme Court Rules 24.1(a) and 14, the questions presented should include all questions raised, be short and concise, avoid argument and repetition, and be expressed in the terms and circumstances of the case. Rule 24.2 provides that an additional listing of the questions presented need not be provided unless the respondent is dissatisfied with the questions presented by the other side.

Three questions stated either directly or rhetorically by Wyoming, Colorado, and Basin Electric do not reflect the circumstances of this case. These issues properly framed are:

1. Whether the use of the Inland Lakes was apportioned to the State of Nebraska with a priority of December 6, 1904?

2. Whether the State of Wyoming is threatening to deplete the flows of the North Platte River by her administration of the operation of Grayrocks Reservoir and the construction of the Corn Creek Project?

3. Whether subsequent users of apportioned waters diverted at or above Tri-State Dam are among the Nebraska users that the State of Nebraska may protect *parens patriae*?

In addition, each of the questions presented in Nebraska's Exceptions to the First and Second Interim Reports of the Special Master and Brief in Support of Exceptions is implicated in this response to the exceptions filed by Wyoming, Colorado, and Basin Electric.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Inaccuracies in Wyoming's Statement	2
B. Facts Material to the Consideration of the Questions Presented	6
1. Inland Lakes	7
a. Pre-litigation Period: 1904-1934	7
b. Litigation Period: 1934-1945	11
c. Post-litigation Period: 1945-1984	14
d. Deer Creek Period: 1984-Present	16
2. The Nature and Scope of the Proposed Deer Creek Project	18
3. Return Flows Below Tri-State Dam	23
4. Canal "Limitations"	29
SUMMARY OF ARGUMENT	31
A. Enforcement/Modification	31
B. The Inland Lakes	34
C. The Laramie River Inflows	35
D. The Proposed Deer Creek Project	36
E. The Tri-State Issues	38
ARGUMENT	
I. NEBRASKA SEEKS CLARIFICATION AND ENFORCEMENT — NOT MODIFICATION — OF THE 1945 APPORTIONMENT	39
A. The "Argument" that Nebraska is Seeking to Enlarge her Apportionment through her Original Petition and Allegedly Excessive Diversions at and above Tri-State Dam is Specious	41

Table of Contents (continued)

	Page
B. Enforcement of a Decree Necessitates Construction and Clarification by a Review of the Record	45
C. The Attempt by Wyoming, Colorado, and Basin Electric to Redefine Enforcement or Clarification is Designed to Evade the Substantive Issues to be Resolved by the Court	50
1. Inland Lakes	50
2. Laramie River Inflows	51
3. Proposed Deer Creek Project	54
D. Nebraska Seeks No New Rights Below Tri-State Dam	55
II. THE RECORD DEMONSTRATES THAT THE USE OF THE INLAND LAKES WAS APPORTIONED TO NEBRASKA WITH A PRIORITY OF DECEMBER 6, 1904	57
A. The Use, Requirement, and Priority of the Inland Lakes were Litigated and Determined by the Court in the Original Proceedings	59
B. The Court has Determined that the United States had Complied with Wyoming State Law in Obtaining Permits for the North Platte Project, Including the Inland Lakes	63
C. Wyoming is Equitably Estopped from Attempting to Change the Historical Use and Operation of the Inland Lakes with a Priority of December 6, 1904	65

Table of Contents (continued)

		Page
III.	THE RECORD ESTABLISHES THAT THE COURT ADOPTED WYOMING'S EVIDENCE IN 1945 WHICH SHOWED THAT THE LARAMIE RIVER WOULD CONTINUE TO CONTRIBUTE TO THE COURT'S APPORTIONMENT OF 75% OF THE NATURAL FLOWS IN THE WHALEN/TRI-STATE REACH TO NEBRASKA	69
	A. Laramie Inflows Were Included in the Apportionment	70
	B. The Allegation that the Court "Failed" to Limit or Enjoin Future Uses of the Laramie is Insignificant	73
	C. That Master Doherty and the Court Rejected Wyoming's Method of Apportionment Does Not Reflect a Rejection of the Facts Found	74
	D. Special Master Olpin's Recommended Remedies Regarding the Laramie Inflows are Appropriate and Correct	75
	1. Paragraph XIII(g)	77
	2. Corn Creek Status Conference	77
IV.	THE RECORD DEMONSTRATES THAT GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING INJURY TO NEBRASKA'S APPORTIONMENT RESULTING FROM THE PROPOSED CONSTRUCTION OF THE DEER CREEK PROJECT	78
	A. Wyoming's First Motion for Summary Judgment	79

Table of Contents (continued)

	Page
B. Wyoming's Second Motion for Summary Judgment	82
C. Paragraphs X and XIII(c)	86
D. Wyoming's "Undisputed" Facts	87
V. NEBRASKA IS ENTITLED TO 75% OF THE NATURAL FLOW IN THE WHALEN TO TRI-STATE REACH WITH THE RIGHT TO ADMINISTER HER EQUITABLE APPORTIONMENT AMONG HER CANALS ACCORDING TO NEBRASKA STATE LAW	90
A. Wyoming's Alleged Effort to Simplify the Case is an Attempt to Retain Water in Upstream Storage for Use in Wyoming	91
B. Nebraska has Neither "Demanded" Nor Claimed Continuing Flows Passing Tri-State Dam	95
C. "Requirements" are not "Limitations"	96
CONCLUSION	104
APPENDIX	

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona v. California, 460 U.S. 605 (1983) 66

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 58, 59, 63, 70

Colorado v. New Mexico, 459 U.S. 176 (1982) 45, 89, 91, 92

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 88

Lucas v. South Carolina Coastal Council, ___ U.S. ___, 112 S. Ct. 2886 (1992) 43

Lujan v. National Wildlife Federation, ___ U.S. ___, 110 S. Ct. 3177 (1990) 58

Nebraska v. Basin Electric Cooperative, No. 78-1775 (D. Neb. 1978) 76

Nebraska v. Wyoming, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953) ... 1, 2, 8, 10, 13, 14, 23, 24, 26, 28, 29, 30, 31, 52, 54, 55, 60, 62, 64, 65, 71, 75, 76, 81, 87, 96, 99, 100, 101, 102

Nebraska v. Wyoming, 479 U.S. 1051 (1987) ... 4, 39

Nebraska v. Wyoming, 485 U.S. 931 (1988) 42

Nevada v. United States, 463 U.S. 110 (1983) 66

Oklahoma v. Texas, 272 U.S. 21 (1926) 46

United Shoe Mach. Co. v. United States, 258 U.S. 451 (1922) 46

United States v. California, 332 U.S. 804 (1947) 48

United States v. California, 382 U.S. 448 (1966) 48

United States v. California, 432 U.S. 40 (1977) 48

United States v. California, 436 U.S. 32 (1978) 48, 49

United States v. Tilley, 124 F.2d 850 (8th Cir. 1942) 94

Vicksburg v. Henson, 231 U.S. 259 (1913) 46

Table of Authorities (continued)

	Page
Washington v. Oregon, 297 U.S. 517 (1936) ...	67
Wisconsin v. Illinois, 278 U.S. 367 (1929)	49
Wisconsin v. Illinois, 352 U.S. 945 (1956)	49
Wisconsin v. Illinois, 352 U.S. 983 (1957)	49
Wisconsin v. Illinois, 388 U.S. 426 (1967)	49
Wyoming ex rel. Christopulos v. United States, No. 23-13, Wyo. 8th Dist. Ct. (Oct. 3, 1986), *removed*, No. C86-0370-B, D. Wyo. (Mar. 27, 1987) (*dismissed sua sponte* without prejudice on Aug. 31, 1990)	17, 51, 58, 66
Wyoming v. Colorado, 259 U.S. 419 (1922)	46, 48
Wyoming v. Colorado, 260 U.S. 1 (1922)	48
Wyoming v. Colorado, 286 U.S. 494 (1932)	47
Wyoming v. Colorado, 309 U.S. 572 (1940)	47, 48
Wyoming v. Colorado, 353 U.S. 953 (1957)	70
Wyoming v. Oklahoma, ___ U.S. ___, 112 S. Ct. 789 (1992)	65, 66

STATE CASES

Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 276 P. 1017 (1929)	58

STATUTES

South Platte Compact, Act of March 8, 1926, 44 Stat. 195	71
Clean Water Act, 33 U.S.C. § 1251 (1988) ...	20
Electric Consumers Protection Act of 1986, 16 U.S.C. § 797 (1988)	43
Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988)	20, 43

Table of Authorities (continued)

	Page
Fish and Wildlife Conservation Act of 1980, 16 U.S.C. §§ 2901-2912 (1988)	43
Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668 (1988)	43
National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1988)	43
NEB. REV. STAT. §§ 46-229, 46-231 (1988 Reissue)	45
MISCELLANEOUS	
R. STERN, E. GRESSMAN, S. SHAPIRO, SUPREME COURT PRACTICE (6th ed. 1986)	2
1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES (1971)	57, 58
S. CT. R. 24	1, 2

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

NEBRASKA'S RESPONSE TO WYOMING'S, COLORADO'S, AND BASIN ELECTRIC'S EXCEPTIONS TO THE SPECIAL MASTER'S FIRST AND SECOND INTERIM REPORTS AND BRIEFS IN SUPPORT OF EXCEPTIONS

STATEMENT OF THE CASE

The Supreme Court Rules require a "concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to . . . the record."[1] In this case the record is voluminous, consisting principally of the record of the original proceedings, Special Master Doherty's Report, the Court's opinion in 1945, and the Decree effectuating the apportionment.[2] The record also consists of the affidavits of present-day

[1]S. CT. R. 24.1(g).

[2]The terms "original proceedings," "original litigation," and "*Nebraska v. Wyoming*" as used throughout this brief refer to the record and opinion in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Record citations are to the original transcript, *i.e.*, Transcript, Record of Proceedings Before the Honorable Michael J. Doherty, Special Master, *Nebraska v. Wyoming*, No. 8, Original ("Record"). The Report of Michael J. Doherty, Special Master is cited as the "Doherty Report." As used throughout this

(cont'd.)

administrators from Nebraska and Wyoming, as well as various United States Bureau of Reclamation personnel associated with the operation and administration of the North Platte River projects pursuant to the Decree, and documents showing how the Decree has been administered since 1945.

Rule 24.2 provides that "no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side."[3] In their briefs on exceptions, neither Colorado nor Basin has provided a statement of the case.[4]

Numerous inaccuracies are present in Wyoming's statement of the case.[5] More importantly, Wyoming omits most of the facts material to the Court's consideration of the questions presented.[6] Accordingly, Nebraska will correct the more egregious inaccuracies and provide a statement of the omitted facts requisite to an understanding of the questions presented to the Court.

A. Inaccuracies in Wyoming's Statement

1. Wyoming states that one of the issues presented in Nebraska's petition is whether the Inland Lakes enjoy a priority date of December 6, 1904, under Wyoming state

---

brief, the terms "Decree" and "North Platte Decree" refer to *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953).

[3]S. CT. R. 24.2.

[4]*See* Colorado's Exceptions to Special Master's First and Second Interim Reports (July 2, 1992) ("Colorado's Brief on Exceptions"); Exceptions of Basin Electric Power Cooperative to Second Interim Report of Special Master and Brief in Support of Exceptions (July 1, 1992) ("Basin's Brief on Exceptions").

[5]*See* Exceptions of the State of Wyoming to the First and Second Interim Reports of the Special Master and Brief in Support at 3-18 (July 2, 1992) ("Wyoming's Brief on Exceptions").

[6]*See* R. STERN, E. GRESSMAN, S. SHAPIRO, SUPREME COURT PRACTICE § 6.30 (6th ed. 1986).

law.[7] Following discovery, according to Wyoming, "[t]he United States and Nebraska . . . filed motions for summary judgment in which they sought a ruling that the Inland Lakes enjoy a 1904 priority under the Decree. . . ."[8] Next, Wyoming states that "Nebraska's and the United States' focus ha[s] shifted from claims that the Inland Lakes enjoy a water right under state law to claims that the Decree is the basis of the right."[9]

Nebraska has never asserted that the Inland Lakes' priority raises a question of compliance with state law, but has always maintained that the issue is whether the use of the Inland Lakes with a 1904 priority was apportioned to Nebraska.[10] Nebraska's petition in regard to the operation and priority of the Inland Lakes is based solely on Wyoming's threatened violation of "the State of Nebraska's equitable apportionment established in the Decree. . . ."[11]

2. Wyoming states that "[¶ 3(a)] of Nebraska's petition . . . allege[s] that the existing Grayrocks Reservoir . . . violate[s] Nebraska's apportionment under the Decree."[12]

---

[7]Wyoming's Brief on Exceptions at 16 (July 2, 1992).

[8]*Id.*

[9]*Id.*

[10]Elsewhere in her brief, Wyoming states that the "only issue raised in the pleadings" is whether Wyoming's actions in regard to the Inland Lakes "violate the Decree." *Id.* at 50 n.20. The Decree effectuates Nebraska's apportionment and is the basis of Nebraska's petition. The state law question was addressed in relation to the United States' intervention in the original proceedings and resolved in favor of Nebraska and the United States. *See infra* p. 63-65.

[11]Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief at 2 (¶ 3(d)) (Oct. 6, 1986) (Docket No. 1) ("Nebraska's Petition").

[12]Wyoming's Brief on Exceptions at 17 (July 2, 1992).

The suggestion is that Nebraska complains that **Basin's** operation of Grayrocks violates the Decree. The petition, however, does not allege that Grayrocks Reservoir as operated by Basin violates the Decree. The petition alleges that **Wyoming's** operation of Grayrocks Reservoir threatens to violate the Decree, *i.e.*, that Wyoming neither can nor intends under state law to administer Grayrocks as Basin is, but threatens to violate the Decree by depleting the flows of the North Platte River through the depletion of Laramie River inflows.[13]

The meaning of ¶ 3(a) was arguably ambiguous in Nebraska's petition. While the petition expressly complained of Wyoming's operation of Grayrocks Reservoir, it did not use the phrase "Wyoming's *administration of* the operation of Grayrocks Reservoir." The intended meaning of ¶ 3(a) was debated by the parties in the briefs on the motion for leave to file, assuring that the intention of ¶ 3(a) was understood by the parties and the Court.[14] Nebraska repeatedly stated that ¶ 3(a) of her petition was meant to address the fact that "Wyoming threatens to violate the North Platte Decree by depleting releases from Grayrocks Reservoir," *i.e.*, by the administration of its principal operational component.[15] After reviewing the positions of the parties with respect to ¶ 3(a) of the petition, the Court granted Nebraska's motion for leave to file her petition.[16]

3. Wyoming states that "[s]ince entry of the Decree in 1945, Nebraska's diversions in the Guernsey to Tri-State Dam section have far exceeded the water requirements

---

[13]*See* Nebraska's Petition at 2 (¶ 3(a)) (Oct. 6, 1986) (Docket No. 1).

[14]*See* Wyoming Brief in Opposition to Motion for Leave to File Petition at 6-7 (Nov. 17, 1986) (Docket No. 2).

[15]Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 11 (Jan. 14, 1987) (Docket No. 4); *see also id.* at 1, 4, 11-12.

[16]*Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a).

found by Special Master Doherty for those canals."[17] Nebraska canals have not "far exceeded" the water "requirements" determined by Master Doherty. Some Nebraska canals have diverted less than they diverted in 1945 and some canals have diverted more.[18] Cumulatively, the average total canal diversions are within three to five percent of the diversions in 1945 as determined by Master Doherty.[19] Like the Nebraska canals diverting in the Whalen to Tri-State reach, some Wyoming canals have diverted more than their 1945 average and some have diverted less.[20]

4. Wyoming states that she "has never irrigated more than 25,000 acres nor diverted more than 90,000 acre-feet in one year under the Kendrick Project even though Special Master Doherty had determined a water requirement of 168,000 acre-feet per year for 60,000 acres."[21] The Kendrick Project was built in the 1930s. The Project's reservoirs were originally built to store water for the irrigation of 60,000 acres, with an annual net depletion of 72,000 acre feet.[22] Since the Project's initiation 50 years ago, only

---

[17]Wyoming's Brief on Exceptions at 8 n.6 (July 2, 1992).

[18][Second] Affidavit of Ann S. Bleed at 28 (¶3), 31 (Table 1), Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ("Second Affidavit of Ann S. Bleed"); [Second] Affidavit of J. Michael Jess at 10-12 (¶¶2 & 3), Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ("Second Affidavit of J. Michael Jess"); [First] Affidavit of Bern S. Hinckley, Figures 1A-1G, Table 1, Wyoming Second Motion for Summary Judgment and Brief in Support (Feb. 22, 1991) (Docket No. 294) ("First Affidavit of Bern S. Hinckley").

[19]Changes in cropping patterns, farming practices, and annual precipitation necessarily result in variable diversions of natural flow.

[20]First Affidavit of Bern S. Hinckley, Figures 2A-2M, Table 2 (Feb. 22, 1991) (Docket No. 294).

[21]Wyoming's Brief on Exceptions at 8 n.6 (July 2, 1992).

[22]Doherty Report at 138.

24,000 acres have been developed.[23] The unused water, however, does not run down the river to Nebraska, as Wyoming implies. Instead, the Kendrick Project retains the water in its reservoirs, resulting in an average annual loss to the river system through reservoir evaporation alone of 60,000 acre feet or 2½ acre feet per irrigated acre. In many years the Project's annual evaporation losses exceed the maximum annual consumption originally contemplated by Master Doherty. In some years evaporation rates exceed the maximum diversions claimed by Wyoming.

B. Facts Material to the Consideration of the Questions Presented

Wyoming has presented questions relating to the history, treatment in the record, and the administration of the Inland Lakes, to the scope and purpose of the proposed Deer Creek Project, to the subsequent use of waters diverted at or above Tri-State Dam, and to the alleged "limitations" on individual Nebraska canals. The facts material to the Court's consideration of these issues are found in the record of the original proceedings, in the affidavits appended to the motions for summary judgment, and in the documents contained in the appendices to the pleadings relating to the cross-motions for summary judgment. The record information material to the apportionment of the Laramie River inflows in ¶ V of the Decree is set forth in Nebraska's statement of the case in her brief in support of her exceptions.[24] The dispute over the meaning of ¶¶ X and XIII(c) is essentially legal in nature.

---

[23]First Affidavit of Bern S. Hinckley at 8 (Feb. 22, 1991) (Docket No. 294).

[24]Nebraska's Exceptions to the First and Second Interim Report of the Special Master and Brief in Support of Exceptions (July 1, 1992) ("Nebraska's Brief on Exceptions").

1. Inland Lakes

The history of the Inland Lakes falls into four distinct periods: 1) The pre-litigation period between 1904 and 1934; 2) 1934 to 1945, when *Nebraska v. Wyoming* was litigated and decided; 3) 1945 to 1984, the post-litigation period prior to the formal proposal of the Deer Creek Project; and 4) 1984 to the present. The facts demonstrate that while Wyoming raised objections to the Inland Lakes in the early part of the century, she did not raise those objections during the original litigation. Instead, Wyoming advocated the use of the Inland Lakes to increase her irrigation season apportionment. Thereafter, Wyoming accepted Nebraska's use of the Inland Lakes until she contemplated the development of the proposed Deer Creek Project.

a. Pre-litigation Period: 1904-1934

The North Platte Project was one of the first Bureau of Reclamation irrigation projects constructed under the Reclamation Act of 1902. It supplies water to 226,000 acres of land in Nebraska and Wyoming, and provides a supplemental supply to about 107,000 acres.[25]

There are several components of the North Platte Project. The initial components included: 1) The Pathfinder Reservoir, which has a present capacity of 1,016,507 acre feet with a priority date of December 6, 1904; 2) two main supply canals which divert at the Whalen Diversion Dam near Whalen, Wyoming for use in Nebraska and Wyoming, *i.e.*, the Interstate Canal which diverts on the north side of the North Platte River, and the Fort Laramie Canal which diverts on the south, both having a priority date of December 6, 1904; 3) the Inland Lakes, four off-stream reservoirs located in Nebraska, consisting of Lake Alice, Lake

---

[25] [First] Affidavit of David G. Wilde at 3 (¶ 6), Response of the United States to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 83) ("First Affidavit of David G. Wilde").

Minatare, Little Lake Alice, and Lake Winter's Creek, which collectively have a storage capacity of 75,000 acre feet and are supplied by the Interstate Canal; and 4) the continuation of the non-federal Tri-State Canal which by agreement serves the Northport Irrigation District.[26] *See* Appendix at A-1. The Inland Lakes were designed as an integral part of the Interstate Canal in order to reduce the necessary carrying capacity of the canal.[27] Over 23,500 acres of land depend entirely on the lakes to meet their peak irrigation requirements.[28] Guernsey Reservoir was a component of the North Platte Project which was added later in time. Guernsey has a present capacity of 45,612 acre feet with a priority of April 20, 1923.[29] Glendo Reservoir, which has a capacity of 789,402 acre feet with a priority of August 30, 1951, was part of the Pick-Sloan Program and is operated in conjunction with the North Platte Project.[30]

On December 6, 1904, the Bureau of Reclamation acquired permits in Wyoming and Nebraska to construct the North Platte Project. The Project included Pathfinder Res-

---

[26]*See Id.* at 3-4, 6 (¶¶ 7, 8, 15, Exhibit 1); [First] Affidavit of Stanley M. Christensen at 14-15 (¶¶ 3 & 4), Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ("First Affidavit of Stanley M. Christensen"); *see also* 325 U.S. at 594-95, 602, 649; Doherty Report at 30-31, 34, 86-87, 196, 204, 231-33.

[27]First Affidavit of David G. Wilde at 6-7 (¶ 15) (Aug. 22, 1988) (Docket No. 83). While the Inland Lakes are situated along the Interstate Canal in Nebraska, the canal headgate is located in Wyoming. Wyoming based her pre-litigation complaints about the use of the Inland Lakes on the fact that the Interstate Canal diverts in Wyoming, allegedly without appropriate Wyoming storage permits.

[28]*Id.* at 39 (¶ 74).

[29]*Id.* at 3-4, (¶ 7, Exhibit 1); First Affidavit of Stanley M. Christensen at 14 (¶ 3) (Mar. 1, 1991); *see also* 325 U.S. at 595, 602; Doherty Report at 30, 136.

[30]First Affidavit of David G. Wilde at 6 (¶ 13, Exhibit 1) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 14-15 (¶¶ 5 & 8) (Mar. 1, 1991) (Docket No. 296).

ervoir, the Northport Irrigation District, the Ft. Laramie Canal, and the Interstate Canal, which in turn included the Inland Lakes. The lakes were structurally integrated into the Interstate Canal system for the distribution of natural flow to Nebraska lands and were encompassed within these permits.[31] *See* Appendix at A-1. Since 1913, as part of the engineering design and operation of the Interstate Canal, the Inland Lakes have been storing natural flow during the non-irrigation season.[32]

Beginning in 1911 and continuing until 1934, Wyoming asserted that the United States had not complied with Wyoming state law by obtaining individual state storage permits for the Inland Lakes.[33] Wyoming did not, however, seek judicial or administrative recourse to prevent the inte-

---

[31]*See* First Affidavit of David G. Wilde at 6-7, (¶¶ 15 & 16) (Aug. 22, 1988) (Docket No. 83); Nebraska North Platte Project Permit No. A-768, Appendices to Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at A-27-28 (Mar. 1, 1991) (Docket No. 296) ("Nebraska's Appendices"); Application for a Permit to Divert and Appropriate the Water of the State of Wyoming, Permit No. 1398, Enl., Supplemental Appendices to Nebraska's Reply to Wyoming's, Colorado's, the United States' and Basin Electric's Responses to Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at Appendix No. 2 (May 23, 1991) (Docket No. 353) ("Nebraska's Supplemental Appendices"); General Statement, Nebraska's Supplemental Appendices at Appendix No. 3 (May 23, 1991) (Docket No. 353).

[32]First Affidavit of David G. Wilde at 7 (¶ 19) (Aug. 22, 1988) (Docket No. 83).

[33]*See, e.g.*, Eleventh Biennial Report of the State Engineer to the Governor of Wyoming (1911-1912), Nebraska's Appendices at A-29-36 (Mar. 1, 1991) (Docket No. 296); letter from A. Parshall to A. Weiss (May 2, 1914), Nebraska's Appendices at A-37-39 (Mar. 1, 1991) (Docket No. 296); Minutes of the North Platte River Commission, Second Session (July 17, 1924), Nebraska's Appendices at A-43-49, (Mar. 1, 1991) (Docket No. 296); Report of G. S. Hopkins, Interstate Stream Commissioner to the Governor of Wyoming, Appendix to Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at C-82-83, (Apr. 26, 1991) (Docket No. 334).

grated use of the Nebraska reservoirs in the Interstate Canal distribution system. Instead, Wyoming issued "certificates of appropriation" encompassing the entire Pathfinder Irrigation District which is served by the Interstate Canal. The certificates state that water had been appropriated and placed to beneficial use in compliance with Wyoming state law.[34]

Twenty years after the North Platte Project was initiated, Guernsey Reservoir was designed and constructed as a component of the project.[35] Shortly thereafter, Guernsey began temporarily storing Inland Lakes water during the non-irrigation season for later transfer to the lakes.[36] The practice of storing non-irrigation season water in Guernsey Reservoir for the Inland Lakes and transferring the water to the Inland Lakes in the spring continued without interruption through the original litigation.

---

[34]*See* 325 U.S. at 613; Doherty Report at 173; Nebraska Exhibit No. 572, Nebraska's Appendices at A-74 (Mar. 1, 1991) (Docket No. 296); Miscellaneous Wyoming proofs of appropriation to Nebraska irrigators, Nebraska's Appendices at A-79-90 (Mar. 1, 1991) (Docket No. 296); First Affidavit of David G. Wilde at 8 (¶¶ 20 & 21) (Aug. 22, 1988) (Docket No. 83).

[35]325 U.S. 594-95; Doherty Report at 30; First Affidavit of David G. Wilde at 7, (¶ 18) (Aug. 22, 1988) (Docket No. 83).

[36]*See* First Affidavit of David G. Wilde at 9 (¶ 25) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 14-15 (¶¶ 6-7) (Mar. 1, 1991) (Docket No. 296); Third Affidavit of David G. Wilde (p. 23-24 of the Glendo Definite Plan Report — Tables 4 & 5), United States Motion for Partial Summary Judgment on the Inland Lakes (Mar. 1, 1991) (Docket No. 297) ("Third Affidavit of David G. Wilde") (The Inland Lakes water is included within the Guernsey Reservoir category. Columns 45-51 for Lakes Alice and Minatare are included in the overall heading of "Guernsey Reservoir").

b. Litigation Period: 1934-1945

Immediately after the original litigation began, Edwin Burritt, the Wyoming State Engineer, published a summary of the status of the operation of the Interstate Canal system. Burritt repeated Wyoming's position regarding the alleged lack of individual permits for the Inland Lakes, but stated that if the Inland Lakes could be shown to be "an integral part of the original plan filed December 6, 1904," they would have to be accorded a 1904 priority date.[37]

In the original proceedings, Wyoming conceded that the Inland Lakes were functionally integrated into the North Platte Project and the Interstate Canal distribution system and advocated the right of the Inland Lakes to store natural flow during the non-irrigation season.[38] All parties agreed that the Inland Lakes historically accrued natural flow from the North Platte River below Pathfinder as a component of the Interstate Canal.[39] In discussing the historical and continuing integral role of the Inland Lakes in operating the North Platte Project, none of the parties, including Wyoming, took the position that the Inland Lakes could not store natural flow because of an alleged non-compliance with Wyoming law.[40] The only matter affecting the Inland Lakes that the parties did not agree to was the quantity of

---

[37]E. Burritt, Water Supply Report, Casper-Alcova Project, Wyo. (Dec. 31, 1934), Nebraska's Appendices at A-62-65 (Mar. 1, 1991) (Docket No. 296).

[38]Answer of the State of Wyoming to Cross-Bill of Colorado at 7 (July, 1936); Brief of State of Wyoming, Defendant at 370, 397 (Sept. 5, 1942).

[39]*See, e.g.*, Record at 480-81, 1182, 14967, 14986-88, 14994-95, 24865, 25209, 26150, 28707, 28783-84; *see also* Nebraska Exhibit Nos. 611, 612, Nebraska's Appendices at A-66-67 (Mar. 1, 1991) (Docket No. 296); United States Exhibit No. 132, Nebraska's Appendices at A-68, (Mar. 1, 1991) (Docket No. 296).

[40]*Cf.* Record at 20417-23, 21345-47, 21475, 26228-30, 27846-47, 28598-99, 29414, 29447-48; *see also* United States Exhibit No. 132, *(cont'd.)*

water that the Interstate Canal should have deducted from its annual irrigation season requirement as a result of the storage of natural flow in the Inland Lakes during the non-irrigation season.[41]

In his report to the Court, Special Master Doherty explicitly found that the Inland Lakes were part of the North Platte Project, *i.e.*, functionally integrated units of the Interstate Canal distribution system.[42] Accordingly, he found that a certain quantity of natural flow could be stored in the Inland Lakes in the non-irrigation season to reduce Nebraska's apportionment of natural flow during the irrigation season.[43] Master Doherty also found that the Pathfinder Reservoir, the Interstate Canal, and the natural flow appropriation for the North Platte Project, had a priority of December 6, 1904.[44]

Wyoming addressed the use and operation of the Inland Lakes and Master Doherty's recommendations regarding their storage right in her brief before the Court on exceptions to Doherty's Report. Wyoming acknowledged that the Inland Lakes were an integral component of the Interstate Canal and the North Platte Project.[45] Wyoming also recognized that the natural flow stored by the Inland Lakes

---

Nebraska's Appendices at A-68 (Mar. 1, 1991) (Docket No. 296); Wyoming Exhibit No. 160, Nebraska's Appendices at A-70-71 (Mar 1, 1991) (Docket No. 296).

[41]*See generally* Record at 26266-67, 26764-65, 26769-70, 26781-82, 27703, 27890-92, 28616, 28697-99, 29038, 29077, 29453-54, 29457-58; *see also* Nebraska Exhibit No. 630, Nebraska's Appendices at A-69 (Mar. 1, 1991) (Docket No. 296); Wyoming Exhibit No. 160, Nebraska's Appendices at A-70-71 (Mar. 1, 1991) (Docket No. 296).

[42]Doherty Report at 30.

[43]*Id.* at 60-61, 86-87 n.2 (Table XVII).

[44]*Id.* at 34, 204.

[45]Brief of Defendant, State of Wyoming at 18 (Jan. 29, 1945) (Appendix at A-4).

constituted part of the total water supply to be considered for apportionment.[46] In determining the water requirements of the Interstate Canal with respect to lands in Nebraska, Wyoming advocated the use of the Inland Lakes: "One of the elements which must be considered in determining the May-September requirement of the Pathfinder Irrigation District, under the Interstate canal, is the amount of water which can be diverted to the inland reservoirs serving the Pathfinder District lands, Lakes Alice and Minatare."[47]

Wyoming believed that Master Doherty did not allow a sufficient quantity of storage in the Inland Lakes — 46,000 acre feet — and continued to advocate the storage of larger amounts.[48] Nonetheless, Wyoming expressly accepted Master Doherty's recommendation with respect to the concept of storage in the Inland Lakes.[49] Finally, Wyoming suggested that a decree should be entered apportioning flows in the Whalen/Tri-State reach during the irrigation season "and permitting diversion of 73,000 acre feet to the inland reservoirs of the Pathfinder Irrigation District, Lakes Alice and Minatare, during the winter months, October 1st to April 30th, inclusive."[50]

In its opinion, the Court made several determinations regarding the Inland Lakes. It found that the Inland Lakes were an integral part of the North Platte Project and that the entire North Platte Project had a priority of December 6, 1904.[51] The Court agreed with Special Master Doherty that natural flow diversions into the Inland Lakes

---

[46] *Id.* at 20 (Appendix at A-5).

[47] *Id.* at 69 (Appendix at A-8).

[48] *Id.* at 69-70 (Appendix at A-8-9).

[49] *Id.* at 36-37 (Appendix at A-6-7).

[50] *Id.* at 83 (Appendix at A-10).

[51] 325 U.S. at 595, 613.

during the non-irrigation season should be deducted from Nebraska's irrigation season natural flow apportionment.[52] The Court limited the equitable apportionment to natural flow, rejecting Wyoming's proposed integration of storage water with natural flow, thereby affirming that the Inland Lakes were an integrated part of the Interstate Canal natural flow distribution system.[53]

c. Post-litigation Period: 1945-1984

Since the Decree was entered in 1945 and continuing until the present, accretions to the North Platte River below Alcova Dam during the months of October, November, and April, have accrued to the Inland Lakes up to a total of 46,000 acre feet annually with a priority of December 6, 1904.[54] This operating procedure was established by representatives from Nebraska, Wyoming, and the United States, based on pages 60-61 of Doherty's Report.[55] Each published

---

[52]*Id.* at 646.

[53]*Id.* at 621.

[54]First Affidavit of David G. Wilde at 8-9, 13 (¶¶ 24 & 35) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 14 (¶ 6) (Mar. 1, 1991) (Docket No. 296); *see also, e.g.*, letter from J. Ogilvie to E. Lloyd and D. Jones, with attachment: North Platte Storage Ownership Accounting Statement for 1960 (Apr. 22, 1960), Nebraska's Appendices at A-105-110 (Mar. 1, 1991) (Docket No. 296); Letter from F. Murphy to F. Bishop (Mar. 31, 1965), Nebraska's Appendices at A-134 (Mar. 1, 1991) (Docket No. 296).

River gains above Alcova accrue to the Pathfinder ownership account with an equal priority date of December 6, 1904. Because of their physical location in relation to one another, no gains accrue between Pathfinder Reservoir and Alcova Reservoir.

[55]First Affidavit of David G. Wilde at 8-9 (¶ 24) (Aug. 22, 1988) (Docket No. 83); memorandum of D. Jones (Apr. 7, 1960), Nebraska's Appendices at A-128 (Mar. 1, 1991) (Docket No. 296); letter from F. Murphy to F. Bishop (Mar. 31, 1965), Nebraska's Appendices at A-134 (Mar. 1, 1991) (Docket No. 296).

report of North Platte River Ownership and Natural Flow Accounting Procedures, until Wyoming challenged the accounting procedure in 1984, shows that the operations of the Inland Lakes occurred as prescribed by Master Doherty in his Report.[56]

The storage of 46,000 acre feet of natural flow which the Inland Lakes are entitled to accrue has not, as a matter of practical operation, always occurred in the Inland Lakes.[57] Because of icing conditions, it is not practical to physically transfer the Inland Lakes' accrued water through the Interstate Canal to the storage reservoirs in October, November, and April. Historically, 46,000 acre feet has accrued to the Inland Lakes' ownership account, but the water has been physically stored in Guernsey or Glendo. The Inland Lakes' water has then been moved to the Inland Lakes in March, April, or May.[58] The transfer is usually completed by May 15 of each year. The Inland Lakes' ownership account has always been allowed to accrue gains of the natural flow

---

[56]*See, e.g.*, First Affidavit of David G. Wilde at 10 (¶ 29, Exhibit 1) (Aug. 22, 1988) (Docket No. 83); North Platte Storage Ownership Accounting Statement (Oct. 1, 1970), Nebraska's Appendices at A-196-99 (Mar. 1, 1991) (Docket No. 296) ("It is assumed that the river gains below Alcova during the months of October, November, and April will accrue to Lakes Alice and Minatare, up to a total of 46,000 acre-feet and at a rate not to exceed 910 second-feet").

[57]During the non-irrigation season, each storage reservoir on the North Platte River is allowed to capture natural flow upstream of its location. Regardless of location, this water is accrued to different project accounts. Thus, one reservoir's ownership is often physically located in another reservoir in order of priority. This "ownership" accounting is the linchpin for the successful administration of the North Platte River system because it conserves the water supply within the system.

[58]First Affidavit of David G. Wilde at 10, 13 (¶¶ 28 & 35) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 14-15 (¶ 6) (Mar. 1, 1991) (Docket No. 296).

below Alcova, when available, in first priority up to 46,000 acre feet in October, November, and April.[59]

After the Decree was entered in 1945, the proposed construction of Glendo Reservoir threatened to upset the equitable apportionment determined by the Court. The parties entered into a stipulation agreeing to the construction of Glendo and agreeing that Glendo Reservoir must be operated according to the Glendo Definite Plan Report (Dec. 1952). A primary purpose of the report was to assure that pre-existing rights were protected, including the storage of 46,000 acre feet in the Inland Lakes during the non-irrigation season and the temporary storage of Inland Lakes water in Guernsey or Glendo Reservoirs.[60] Based upon the plan of operation set forth in the Glendo Definite Plan Report, the parties stipulated to the construction of Glendo and to a related amendment of the Decree. After the Decree and the amended Decree were entered, the Inland Lakes continued to utilize Guernsey and Glendo reservoirs for the temporary storage of their natural flow during the non-irrigation season.

d. Deer Creek Period: 1984-Present

During Wyoming's planning for the proposed Deer Creek Project, Wyoming asserted that the historical operation of the Inland Lakes should be changed, with the Inland Lakes being placed last in priority on the river, behind the

---

[59]First Affidavit of Stanley M. Christensen at 14 (¶ 6) (Mar. 1, 1991) (Docket No. 296); First Affidavit of David G. Wilde at 10, 13 (¶¶ 28 & 35) (Aug. 22, 1988) (Docket No. 83).

[60]First Affidavit of David G. Wilde at 9 (¶ 26) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 15 (¶ 8) (Mar. 1, 1991) (Docket No. 296).

proposed Deer Creek Project.[61] Wyoming's engineering studies of the Deer Creek Project established a major benefit to the yield of the project if the Inland Lakes were reassigned a junior priority.[62] In 1984, at the annual river operations meeting, Wyoming insisted that the Inland Lakes be moved to the most junior priority.[63]

On October 3, 1986, seventy-five years after the Inland Lakes' operations began and forty years after the original proceedings were completed, Wyoming filed a suit in Wyoming state court seeking to terminate the historical use of the Inland Lakes on the grounds that the United States had not complied with Wyoming law in 1904 by obtaining Wyoming state permits to store water in the Inland Lakes.[64] Nebraska was not a party to *Christopulos.* Partly in response to *Christopulos,* Nebraska filed her petition to reopen this case on October 6, 1986, to protect her apportionment of the Inland Lakes.

---

[61]*See, e.g.*, attachment to letter from E. Michael to M. Jess (Jan. 11, 1984), Nebraska's Appendices at A-139-43; memorandum of S. Zvejnieks (undated), Nebraska's Appendices at A-144-46; memorandum of C. Goodwin (Feb. 10, 1984), Nebraska's Appendices at A-147-51; letter from F. A. Bishop to M. K. Purcell (July 23, 1984), Nebraska's Appendices at A-152-58; file notes on Discussion of the North Platte Hydrologist's Duties with Regard to Monitoring the Bureau's Accounting and River Operations (July 10, 1985), Nebraska's Appendices at A-159-65; letter and enclosure from J. E. Alverson to J. W. Wade (Jan. 25, 1984), Nebraska's Appendices at A-166-84; Wolfe Memorandum, Nebraska's Appendices at A-23-26 (Mar. 1, 1991) (Docket No. 296).

[62]U.S. Army Corp of Engineers, Final Environmental Impact Statement for Regulatory Permits, Deer Creek Dam and Reservoir, Wyoming at vi-vii (Sept. 1987) ("FEIS").

[63]Minutes of Natural Flow and Ownership Meeting (Apr. 9, 1985), Nebraska's Appendices at A-188-90 (Mar. 1, 1991) (Docket No. 296).

[64]*Wyoming ex rel. Christopulos v. United States,* No. 23-13, Wyo. 8th Dist. Ct. (Oct. 3, 1986), *removed,* No. C86-0370-B, D. Wyo. (Mar. 27, 1987) (*dismissed sua sponte* without prejudice on Aug. 31, 1990) ("*Christopulos*").

2. The Nature and Scope of the Proposed Deer Creek Project

The State of Wyoming, through the Wyoming Water Development Commission, proposes to construct a dam and reservoir on Deer Creek, a tributary entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. *See* Appendix at A-1. The design and operation of the new project require state and federal permits.[65]

The Deer Creek Project was initially conceived as a multi-purpose project, principally as an industrial water supply project, by Wyoming Water, Inc., a private entity. The first water rights application filed for the project in 1973 sought storage rights for these purposes:

Dead Storage	622 Acre Feet
Irrigation	1,362 Acre Feet
Recreation	1,717 Acre Feet
Municipal	2,000 Acre Feet
Industrial	60,084 Acre Feet
Total Available Capacity	65,785 Acre Feet[66]

In December, 1978, the City of Casper filed its "Application for a Water Supply Project on Deer Creek, Tributary of the North Platte River, for Municipal and Multi-Purpose Water Development." In the application, Casper urged that the State of Wyoming become involved with tributary storage projects and that this particular project "be multi-purpose in nature."[67]

---

[65]FEIS at i (Sept. 1987).

[66]Application for Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 21 6/198, Dist. No. 15-5, Water Division No. 1 (Feb. 9, 1973) (Appendix at A-11-12).

[67]Application for a Water Supply Project on Deer Creek, Tributary of the North Platte River, for Municipal and Multi-Purpose Water Development at 2 (Dec. 1978) (Appendix at A-13-18).

The next water rights application for the Deer Creek Project was filed by the State of Wyoming on February 10, 1983, for four purposes:

Municipal	16,700 Acre Feet
Irrigation	7,600 Acre Feet
Recreation & Dead Storage	5,000 Acre Feet
Industrial	36,485 Acre Feet
	65,785 Acre Feet[68]

Municipal use constituted one-fourth of the project.

Finally, aware of interstate ramifications, one of Wyoming's officials advised the project's promoters to "[b]uild Deer Creek for municipal supply."[69] He continued: "[I]f we use it for agricultural purposes, then [Nebraska] may have recourse against us in the courts."[70] Accordingly, Wyoming filed a "Substitute Application" on June 25, 1986.[71] The substitute application stated that the purpose of the proposed project was "municipal, irrigation, industrial, recreation, and fisheries," but it did not designate quantities of water for each specific use. Rather, it stated that the "primary purpose" of the project was municipal use, but "until municipal demands reach their ultimate demands, some of the water could be made available on a temporary basis for other uses such as industrial supplies and supplemental irrigation water."[72]

---

[68]Application for a Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 24 6/356, Dist. No. 15-5, Water Division No. 1 (Feb. 10, 1983) (Appendix at A-19-20).

[69]Memorandum of C. Goodwin (Feb. 10, 1984), Nebraska's Appendices at A-148 (Mar. 1, 1991) (Docket No. 296).

[70]*Id.*

[71]Substitute Application for Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 24 6/356, Dist. No. 15-5, Water Division No. 1 (June 25, 1986) (Appendix at A-21-22).

[72]*Id.*

The permit ultimately issued by the State of Wyoming to the Wyoming Water Development Commission for the proposed Deer Creek Reservoir, Permit No. 9248, dated March 13, 1987, is for municipal, recreation, fisheries, industrial, and irrigation purposes.[73] There is no restriction on the scope or number of non-municipal uses or the length of time that such uses might be "temporarily" made.

On January 25, 1985, the Wyoming Water Development Commission applied to the U.S. Corps of Engineers for a dredge and fill permit for Deer Creek Reservoir pursuant to § 404 of the Clean Water Act.[74] Pursuant to the Endangered Species Act ("ESA"), the U.S. Fish and Wildlife Service ("FWS") was required to evaluate the impacts of the proposed Deer Creek Project on threatened and endangered species before a § 404 permit could be issued.[75] Because there are several threatened and endangered species that utilize the habitat of the river below Tri-State Dam, depletions to flows below that point were critical to the success of Wyoming's federal permit applications. If there were unavoidable adverse impacts on threatened or endangered species below Tri-State, the FWS would issue a "jeopardy opinion," and the § 404 permit would not be issued. However, if the depletions were minimal, the FWS would more likely issue a "non-jeopardy opinion," and Wyoming would likely be able to obtain the § 404 permit needed for the proposed project.[76]

The North Platte River Simulation Model ("NPRSM") was the computer program created by Wyoming to obtain a

---

[73]*Id.* (Appendix at A-23-24).

[74]Clean Water Act, 33 U.S.C. § 1251 (1988).

[75]Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).

[76][Fourth] Affidavit of H. Lee Becker at 8-9 (¶¶ 2 & 3) Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment and to Basin Electric's Memorandum in Support Thereof (Apr. 25, 1991) (Docket No. 335) ("Fourth Affidavit of H. Lee Becker").

§ 404 permit for the proposed Deer Creek Project.[77] In an attempt to avoid a jeopardy opinion under the ESA, the program was structured to minimize the impacts of the proposed project on flows below Tri-State Dam.[78] The NPRSM used what normally would be simulated output, *i.e.*, flows passing Tri-State Dam, as one of the program's fundamental input parameters. The computer program was designed to hold the reductions in flows passing Tri-State Dam to 1,050 to 1,300 acre feet per year.[79]

In reducing depletions below Tri-State Dam to avoid a jeopardy opinion under the ESA, the NPRSM shows that significant depletions would result upstream in the federal storage reservoirs if the proposed Deer Creek Project were constructed. Under the NPRSM, the resulting depletion of end-of-year carryover storage for the Pathfinder and Kendrick ownerships would be as high as 9,400 acre feet and 77,000 acre feet annually.[80]

In conjunction with the present litigation, Nebraska developed a computer program which simulates the actual reservoir operating rules and administration of the North

---

[77]*See generally id.* at 8-9 (¶ 2); [First] Affidavit of H. Lee Becker at 21-23 (¶¶ 2-8) Nebraska's Response to Wyoming's Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 81) ("First Affidavit of H. Lee Becker").

[78]Fourth Affidavit of H. Lee Becker at 9 (¶ 2) (Apr. 25, 1991) (Docket No. 335).

[79]*Id.*

[80]First Affidavit of H. Lee Becker at 22 (¶¶ 5 & 6), (Aug. 12, 1988) (Docket No. 81); *see also* First Affidavit of David G. Wilde at 33 (¶ 64), 37 (¶¶ 67 & 68), 38 (¶ 71), 42 (Table 12), 42-51 (¶¶ 79-89) (Aug. 22, 1988) (Docket No. 83).

Platte River.[81] In Nebraska's program, the impacts of the proposed Deer Creek Project on flows below Tri-State were part of the simulated output. Nebraska's program indicates that the depletions caused by the proposed project would be less on the upstream federal storage reservoirs than indicated by the NPRSM — though still significant — but much greater on flows below Tri-State Dam.[82]

Depending on which computer program is used to evaluate the effects of the proposed project, the impacts can be "transferred" either upstream to the federal reservoirs or downstream to flows passing Tri-State Dam, but they cannot be diminished.[83] Through the NPRSM, Wyoming chose to increase the depletions upstream in order to avoid the adverse effects of diminished water supplies below Tri-State Dam on threatened and endangered species.[84] Pursuant to her § 404 permit, Wyoming would be obligated to operate the proposed Deer Creek Project pursuant to the NPRSM, thus impacting storage in upstream reservoirs.[85]

The potential yield of the proposed Deer Creek Project directly relates to the priority of the Inland Lakes. According to the FEIS, if Deer Creek were operated junior to the Inland Lakes, the estimated firm annual yield for the pro-

---

[81][Third] Affidavit of H. Lee Becker at 45-47 (¶¶ 9-10), Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ("Third Affidavit of H. Lee Becker"); Fourth Affidavit of H. Lee Becker at 9 (¶ 3) (Apr. 25, 1991) (Docket No. 335).

[82]Fourth Affidavit of H. Lee Becker at 9 (¶ 3) (Apr. 25, 1991) (Docket No. 335).

[83]*Id.* at 9-10 (¶ 4).

[84]*Id.* at 9 (¶ 2).

[85]Wyoming's state and federal permits for Deer Creek were obtained on the basis of the NPRSM, and Wyoming has stated that Deer Creek will be operated according to the NPRSM.

ject would be 6,400 acre feet.[86] If the project were operated with a priority senior to the Inland Lakes, the firm annual yield would be increased to 9,600 acre feet.[87]

3. Return Flows Below Tri-State Dam

The original proceedings involved the entire North Platte River and the Platte River to Grand Island, Nebraska.[88] Evidence regarding canal uses extended down to Kearney, Nebraska, some 300 miles below Tri-State Dam.[89] After the close of the evidence, Nebraska agreed that it would not demand natural flow from the North Platte River in Wyoming to satisfy irrigation demands east of Bridgeport, Nebraska.[90] *See* Appendix at A-1. Accordingly, Special Master Doherty removed the lands east of Bridgeport from any "direct involvement in the case."[91] There remained a dispute, however, whether the lands between Tri-State Dam and Bridgeport should receive natural flow directly from Wyoming.[92]

In evaluating how to accomplish an equitable apportionment, the parties focused on the section between Whalen, Wyoming, and Bridgeport, Nebraska, where most of the irrigated acreage is located. Extensive evidence was intro-

---

[86]FEIS at vi-vii (Sept. 1987).

[87]*Id.*

[88]Doherty Report at 20, 92; *see also* 325 U.S. at 593.

[89]Doherty Report at 96-99.

[90]*Id.* at 92. The commencement of operations at Kingsley Dam in 1941 enhanced the available water supply east of Kingsley, thereby diminishing the need for upstream natural flow during the irrigation season. *Id.* at 92. Largely because of Kingsley Dam, Nebraska was persuaded that the lands east of Bridgeport could safely be removed from consideration of an equitable apportionment of direct natural flow by the Special Master.

[91]*Id.*

[92]*Id.*

duced relating to the total water supply in this reach.[93] *See* Appendix at A-1. The available supply consisted of "original" upstream flows passing Whalen Dam, accretions to the system from tributaries, return flows, and other local sources. Primary sources included North Platte River flows from above Guernsey Reservoir, inflows from the Laramie River and Horse Creek, storage water from Pathfinder Reservoir, and return flows below the state line.[94]

The evidence adduced at trial established a direct relationship between upstream diversions and downstream return flows in the Whalen Dam to Bridgeport reach of the river. Approximately 60 percent of the diversions at or above Tri-State Dam was not consumed, returning to the river as return flows for reuse downstream.[95] Return flows below the state line were dependent on and considered the

---

[93]The Special Master divided this reach into two sections, Whalen Dam to Tri-State Dam and Tri-State to Bridgeport. In the former reach, referred to as the "pivotal section of the entire river" or the "critical section," he analyzed long-time means of water supplies and means for the drought period of 1931-1940. *Id.* at 53, 146; *see also* 325 U.S. at 604. The long-time means for the Whalen Dam to Tri-State Dam reach advocated by the parties were 1,352,000 acre feet according to Nebraska, 1,321,700 acre feet according to Wyoming, and 1,308,700 according to Colorado. Doherty Report at 64. The Special Master determined, however, that the drought period was most indicative of a dependable supply, concluding that the seasonal average supply between 1931-1940, was 1,058,645 acre feet. *Id.* at 67 (Table III).

In assessing the water supply in the Tri-State Dam to Bridgeport reach, the Special Master relied on Wyoming Exhibit Nos. 177 and 178 to determine that local supplies were adequate to meet the needs of canals in this section. *Id.* at 94-95. Wyoming Exhibit No. 177, Nebraska's Appendices at A-329-31, Wyoming Exhibit No. 178, Nebraska's Appendices at A-332-33 (Mar. 1, 1991) (Docket No. 296).

[94]*See, e.g.*, Record at 1864.

[95]*Id.* at 12890-91. Along the Interstate Canal, for example, one of Nebraska's witnesses estimated that about 65 percent of diversions returned for reuse downstream through various means. Record at 128. The evidence presented by Wyoming differed by ten percent. Wyoming *(cont'd.)*

inevitable result of diversions in the Whalen Dam to Tri-State Dam reach.[96]

Return flows varied directly with the quantity of water diverted upstream.[97] Therefore, changes in diversions in the Whalen/Tri-State reach affected both the available supply and the administration of the river in Nebraska.[98] An increase in upstream headgate deliveries would result in increased return flows.[99] Similarly, reduced upstream diversions resulted in reduced return flows.[100]

Exhibit No. 160-A, Nebraska's Appendices at A-70-71 (Mar. 1, 1991) (Docket No. 296) (55 percent of headgate diversions lost under the Interstate Canal). Of the return flows in the Whalen Dam to Bridgeport reach, the Interstate and Ft. Laramie canals contributed over 60 percent of the total return flows. Record at 26833.

[96]Record at 27811.

[97]*Id.* at 24461-62, 26822; 28712; United States Exhibit No. 271, Nebraska's Appendices at A-263-75 (Mar. 1, 1991) (Docket No. 296).

[98]Record at 26842-45; *see* Wyoming Exhibit No. 148, Nebraska's Appendices at A-334, Wyoming Exhibit No. 149, Nebraska's Appendices at 335-36, Nebraska Exhibit No. 631, Nebraska's Appendices at A-252-53 (Mar. 1, 1991) (Docket No. 296). In their pre-Decree administration of the North Platte River, Nebraska officials first calculated the quantity of all local supplies below the state line, including return flows, and deducted that amount from irrigation demands in the Whalen Dam to the Stateline reach, before requesting direct flow water from Wyoming. Record at 3813-14.

[99]Record at 14788, 26842. With approximately two-thirds of upstream diversions applied to lands between the state line and Bridgeport reentering the stream as return flow, the return flows were described as "replacement water." *Id.* at 175-76. Accordingly, the utilization of return flows reduced the demand on upstream water supplies. As stated by Nebraska's State Engineer: "[T]his practice reduces the demand upriver, substituting drain water for the original water coming from upriver; in other words, there is that much original water up the river that is unencumbered to that extent." *Id.* at 12958.

[100]*Id.* at 26843-45.

The Special Master emphasized the importance of return flows below Tri-State Dam:

> Nor are the benefits of the storage water limited to the land to which it is directly applied. Only a portion of water used for irrigation is thereby consumed. Water remaining after evaporation and transpiration first saturates the subsoil, forming ground storage. When that process is completed and the water tables have risen to the necessary levels, all additional water applied in excess of consumption returns to the stream either in the form of visible surface flows or invisible ground percolation. This return flow water becomes available for rediversion and irrigation use. The development of return flows in Nebraska following the completion and operation of the North Platte Project is graphically shown on Nebraska's Exhibit 411, from which it appears that in the section between its western border and Bridgeport, a distance of sixty miles, the annual visible return flows rose from a negligible quantity in 1911 to approximately 700,000 acre feet in 1927, an increase attributable in the main to the direct and indirect influence of the North Platte Project and the application of project storage water to lands in eastern Wyoming and western Nebraska.[101]

Because Nebraska's equitable interests below Tri-State were being satisfied by return flows, Special Master Doherty able to conclude that Nebraska lands below that point had no equitable claim for direct flow originating in Wyoming or Colorado.[102] Because of the hydrological balance in the Tri-State to Bridgeport section, Special Master Doherty recognized that a sufficient quantity of return flows could be

---

[101]Doherty Report at 32-33 (footnote omitted); *see also* 325 U.S. at 596.

[102]Doherty Report at 9; *see also id.* at 92-96.

maintained only if upstream diversions remained the same. This has in fact happened since the Decree was entered.

Special Master Doherty determined that for the Interstate, Fort Laramie, Northport, Gering, Mitchell, and Tri-State canals, the irrigation requirement at the time was 874,750 acre feet per year.[103] The average post-Decree diversions for those canals has actually been 915,809 acre feet per year, a change of less than five percent.[104] The Special Master determined that on the average, 243,933 acres would be irrigated by the same canals.[105] In fact, approximately 250,775 acres have been irrigated by these canals in the average year, a change of three percent.[106] After 1945, the largest diverter, Pathfinder Irrigation District, averaged the same headgate diversion rate as determined by Special Master Doherty, 4.28 acre feet per acre.[107] The consistency of the irrigated acreage and the upstream diversions has been essential to the maintenance of adequate return flows below Tri-State Dam.

---

[103]Doherty Report at 59 (Table II), 86-87 (Table XVII).

[104]Second Affidavit of Ann S. Bleed at 28 (¶ 3), 31 (Table 1) (Mar. 1, 1991) (Docket No. 296).

[105]Doherty Report at 59 (Table II), 86-87 (Table XVII).

[106]Second Affidavit of Ann S. Bleed at 28 (¶ 3), 31 (Table 1) (Mar. 1, 1991) (Docket No. 296).

[107]*Id.* Doherty Report at 59 (Table II). The post-Decree records are U.S. Bureau of Reclamation reports. An actual field survey was also done in 1978 by the Nebraska Department of Water Resources and it generally confirms Master Doherty's acreage determinations. According to Special Master Doherty, 245,652 acres were irrigated from the Interstate, Fort Laramie, Northport, Gering, Mitchell, French, and Ramshorn canals in Nebraska. Doherty Report at 59 (Table II), 86-87 (Table XVII). In 1978, the field survey indicated that 241,025 acres were actually irrigated by those same canals, a two percent change. Second Affidavit of J. Michael Jess at 10-12 (¶¶ 2 & 3) (Mar. 1, 1991) (Docket No. 296).

Because of the continuity of upstream diversions since 1945, return flows below the state line have been maintained. From 1949 to 1987, accretions between Tri-State Dam and Bridgeport averaged 736,000 acre feet per year.[108] The May to September irrigation season accretions in this reach which were available for immediate reuse by irrigators averaged 393,600 acre feet annually.[109] While most of the irrigation season accretions below the state line are diverted and utilized by irrigators, only a portion of this water is consumed. There are return flows from the use of return flows. An elaborate system of use and reuse has developed downstream since 1914. Recognizing the significant accretions below the state line due to return flows, Lake McConaughy was designed and began operation in 1941 to capture and once again reuse these waters. Once captured in Lake McConaughy, these waters are utilized for irrigation, hydropower, recreation, and fish and wildlife, including threatened and endangered species.[110]

Finally, Master Doherty considered the water historically passing Tri-State Dam — 81,700 acre feet annually — as a "factor in the balancing of equities between the States."[111] He found that "there undoubtedly will always be, regardless of regulation, substantial quantities of water passing Tri-

---

[108]Second Affidavit of Ann S. Bleed at 29-30 (¶ 5), 35 (Table 5) (Mar. 1, 1991) (Docket No. 296).

[109]*Id.*

[110]Under the 1990 Federal Energy Regulatory Commission ("FERC") annual license, one of the two agricultural users of Lake McConaughy water was compelled to release certain minimum instream flows specifically for threatened and endangered species for a portion of that year. The requirement also adversely affected hydropower production.

[111]Doherty Report at 158; *see also id.* at 96; 325 U.S. at 607, 654-55. Master Doherty's determination was based on Wyoming Exhibit No. 180, Nebraska's Appendices at A-337-39 (Mar. 1, 1991) (Docket No. 296).

State Dam usable in the Tri-State-Bridgeport section."[112] Special Master Doherty recognized that this amount of unavoidable operational waste could not be regulated: "[T]here will commonly be accidental water in substantial quantities passing the stateline above that allocated to the State."[113]

Since 1945, water has commonly passed Tri-State Dam due to the natural fluctuations of the river and ordinary management decisions. In May and June, accretions below Guernsey Reservoir commonly exceed irrigation demands and natural flow passes Tri-State Dam. In high flow years such as 1983, as much as 1,253,380 acre feet passed Tri-State Dam as excess flows in the system.[114] In addition, natural flow may be released from canals or it may not be diverted because of unanticipated conditions such as precipitation events. Operational waste or residual water is inadvertent and physically impossible to stop. From 1945 to 1989, the average flow passing Tri-State Dam was 60,460 acre feet, excluding extreme high and low flow years.[115]

4. Canal "Limitations"

As used by Master Doherty, "requirements" are not synonymous with "limitations" on individual canals. When Master Doherty evaluated the Whalen/Tri-State reach, he

---

[112]Doherty Report at 95. *See also* 325 U.S. at 607, 655.

[113]Doherty Report at 158. The Tri-State Diversion Dam was recently retrofitted, curtailing a significant amount of the seepage of natural flow through the Dam, *i.e.*, a component of the operational waste that Master Doherty took into account in balancing the equities among the states. In 1989, 10 acre feet of natural flow passed Tri-State Dam during the irrigation season. Second Affidavit of Ann S. Bleed at 28 (¶ 2) (Mar. 1, 1991) (Docket No. 296).

[114]Second Affidavit of Ann S. Bleed at 28 (¶ 2) (Mar. 1, 1991) (Docket No. 296).

[115]*Id.*

undertook a detailed analysis of each canal's water use.[116] Master Doherty made determinations as to acres actually irrigated and total diversion requirements in acre feet per year and cubic feet per second.[117] These numbers were called "requirements" by Master Doherty, but he explicitly rejected the contention that these determinations would operate as limitations on the canals or on the states in administering their equitable apportionments. Doherty explained that "[t]he findings herein as to requirements cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree."[118]

Master Doherty also stressed the importance of each state being able to administer her equitable share as she saw fit, without interference from the neighboring state.[119] Based upon these principles, Master Doherty recommended, and the Court accepted, an equitable apportionment of natural flows in the Whalen/Tri-State reach 75% to Nebraska and 25% to Wyoming.[120]

Paragraph IV of the Decree is also implicated by the questions presented. As part of his supply/demand analysis of the middle reaches of the North Platte River, Master Doherty evaluated the effects of the upstream federal stor-

---

[116]Doherty Report at 53-92, 196-253.

[117]*Id.* at 59 (Table II), 86-87 (Table XVII), 196-253.

[118]*Id.* at 160-61.

[119]*Id.* at 115; *see also id.* at 149-50.

[120]*Id.* at 179 (¶ 6); 325 U.S. at 667 (¶ V).

age reservoirs on downstream senior appropriators.[121] Special Master Doherty found that both the North Platte Project and Kendrick Project storage reservoirs were junior to many of the downstream canals. If these reservoirs were allowed to store water without observing downstream senior priorities, the river in the lower reach would go dry to the detriment of the senior canals.[122] To address this problem, Master Doherty decided that "[e]quity requires that the Federal Government's North Platte Project and Kendrick Project be operated according to the rule of priority with relation to each other and with relation to all senior appropriations downstream to and including the Nebraska state line canals."[123] The Court adopted Master Doherty's recommendation.[124]

SUMMARY OF ARGUMENT

A. Enforcement/Modification

In their briefs in support of exceptions, Wyoming, Colorado, and Basin have teamed up to generate as much rhetoric as possible to suggest that Nebraska is pursuing a different case than the Court decided to hear. Urging that Nebraska — with Master Olpin's help — is surreptitiously

---

[121]Doherty Report at 136-43. Specifically, he evaluated the upstream North Platte Project reservoirs, Pathfinder and Guernsey reservoirs, and the Kendrick Project, which includes Seminoe and Alcova reservoirs, and the natural flow appropriation for the Casper Canal.

[122]*Id.* at 137, 139-41.

[123]*Id.* at 10. *See also* 325 U.S. at 625-32. It was not necessary to require Wyoming to observe the diversions and priorities of the North Platte Project Canals which irrigate lands in Nebraska because these canals have headgates in Wyoming, have Wyoming permits for appropriation, and therefore Wyoming is required to observe their senior priorities according to Wyoming law. Doherty Report at 136-37, 139-40; 325 U.S. at 633.

[124]325 U.S. at 625-32.

attempting to "modify" her apportionment, their argument is twofold.

1. The first part of the enforcement/modification argument in turn has two sub-parts.

Wyoming, Colorado, and Basin argue that Nebraska is seeking a new apportionment or reapportionment downstream of Tri-State Dam by attempting to elude the Court's denial of Nebraska's motion for leave to amend her petition in 1988, by attempting to reapportion the irrigation season flows through her pending motion for leave to apportion the non-irrigation season flows, and by an alleged abuse of her diversions at and above Tri-State for irrigation purposes. They claim that Nebraska is in reality attempting to obtain an apportionment to directly protect environmental interests instead of enforcing the existing irrigation apportionment.

Nebraska and Master Olpin have recognized and fully appreciate that the Court denied Nebraska leave to obtain a reapportionment of irrigation season flows for the protection of critical wildlife habitat and endangered species in 1988, and Nebraska is not pursuing that claim. The pending motion for leave to file an amended petition is unrelated to the previous motion. Aside from being directed to the non-irrigation season flows, it seeks protection of irrigation, hydropower production, industrial, recreation, municipal, and fish and wildlife interests in Nebraska.[125]

The second aspect of the new apportionment argument is that Nebraska is seeking a reapportionment for wildlife purposes through an alleged abuse of her diversions at or

---

[125]Counts II and III of Nebraska's pending motion seek relief against Wyoming and the United States on the basis of specifically alleged violations of the existing Decree. *See* pending Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims at 12-13 (Oct. 9, 1991) (Docket No. 407). Neither count seeks to expand Nebraska's apportionment under the Decree, but rather seeks to preserve it.

above Tri-State Dam for irrigation purposes. In reality, Wyoming is seeking to preclude evidence of injury to second and subsequent users of return flows diverted at or above Tri-State Dam in order to attack the efficiencies of the primary users. The object is to prevent water from being released from storage in Wyoming. *See infra* p. 90-95.

2. In the second part of the enforcement/modification argument, Wyoming, Colorado, and Basin argue that the Decree must be read in isolation to faithfully enforce its terms. The thesis of the argument is that the Decree cannot be enforced if the Court has to resort to the original proceedings to understand or clarify its provisions. In other words, the Decree cannot be viewed as the Court's effort to effectuate the apportionment, but must be viewed as a self-executing, intrinsically complete explication of the original proceedings. They contend that the Decree cannot be enforced unless the element of the apportionment that Nebraska seeks to protect is articulated in a specific injunction or provision of the Decree. Three lines of cases enforcing decrees in original actions, however, stand for the proposition that resort to the record is essential to the enforcement of a decree.

When reduced to specifics — which Wyoming, Colorado, and Basin refuse to do — their enforcement/modification argument is ridiculous. For example, they argue that an evaluation of the effects of proposed tributary storage between Pathfinder and Guernsey cannot be undertaken through the Court's retention of jurisdiction to do so in ¶ XIII(c) without first having in hand the injunction that would result from such an evaluation.

In sum, the enforcement/modification argument is designed to lure the Court into an unconsidered resolution of Nebraska's petition. Wyoming's object, simply, is to exploit a deliberate confusion of the issues instead of setting forth the facts and applying the applicable law.

B. The Inland Lakes

The recent effort by Wyoming to change the Inland Lakes' priority of December 6, 1904, to the most junior on the river is nothing more than an attempt to greatly increase the yield of the proposed Deer Creek Project. Wyoming cannot credibly argue now that the use of the Inland Lakes to irrigate 23,500 acres of land in Nebraska was not apportioned to Nebraska in 1945, especially when Wyoming was the most outspoken proponent of this aspect of the apportionment.

Since their construction in the early 1900s, the Inland Lakes have been administered by Wyoming, Nebraska, and the United States as an integral component of the Interstate Canal with a priority of December 6, 1904. While having raised intermittent complaints about the alleged unpermitted status of the Inland Lakes between 1904 and 1934, Wyoming abandoned the complaints and actively pursued a position confirming the priority of the lakes during the original proceedings. Wyoming not only urged that the use of the Inland Lakes should be apportioned to Nebraska, but argued in 1945 that the quantity of the right should be 65,000 acre feet annually, as opposed to the 46,000 acre feet recommended by Master Doherty and adopted by the Court. The suggestion that Wyoming, Nebraska, and the United States pumped all of their quantitative evidence into an apportioned water right without a priority is absurd. Neither Master Doherty nor the Court was naive enough to apportion a right incapable of enforcement.

Factually, there is no question that the use, requirements, and priority of the Inland Lakes were litigated and determined in the original proceedings as a part of Nebraska's apportionment. Legally, the matter is *res judicata*, supported by considerations of finality and repose. Master Olpin's recommendation of a new Decree provision expressly articulating the apportionment of the use of the Inland Lakes is not a modification of the apportionment, but rather is an affirmation of it.

The issue before Master Olpin was not whether the Inland Lakes were properly permitted as storage reservoirs under Wyoming law, as Wyoming tries to argue. The state law issue, however, was framed in the pleadings in the original proceedings, and the Court held that the United States had complied with Wyoming law in obtaining permits for all of the components of the North Platte Project.

Equitable considerations apply as well. For nearly 80 years, the State of Nebraska — specifically, the Pathfinder Irrigation District — has relied on the Inland Lakes for the storage of natural flow with a priority of December 6, 1904, with Wyoming's cooperation until 1984. Since 1945, Wyoming's acquiescence in the Inland Lakes' operations has also been her post-Decree administrative construction of the apportionment. Neither Nebraska's equitable reliance nor Wyoming's affirmation of the right to the use of the Inland Lakes can be undone in 1992 simply because Wyoming desires to build a new storage reservoir.

Finally, with the post-Decree construction of Glendo Reservoir, Wyoming agreed with Nebraska and the United States in regard to the use of Guernsey and Glendo reservoirs to temporarily store accruals to the Inland Lakes' account for later transfer to the lakes. Based on this plan of operation, as set forth in the Glendo Definite Plan Report, the parties stipulated to the construction of Glendo and a related amendment of the Decree.

C. The Laramie River Inflows

Wyoming argues that the fact that the Laramie Decree was left "undisturbed" should make it clear that not a drop of the Laramie inflows was apportioned to Nebraska. It was Wyoming herself, however, who argued before Master Doherty that the Laramie Decree should be left "undisturbed," while simultaneously asserting that 35,500 acre feet annually from the Laramie could be counted on by Nebraska as part of the irrigation season apportionment fund in the Whalen/Tri-State reach. Wyoming's position in

the original proceedings, including her evidence and the arguments of counsel, should render fanciful this and all other arguments that the Laramie inflows were excluded from Nebraska's apportionment.

Wyoming also argues that the Court's "failure" to enjoin Wyoming from dewatering the Laramie accretions to the Whalen/Tri-State reach should make it clear that the Laramie accretions were not apportioned 75% to Nebraska. The Court, however, did not enjoin the future depletion of any of the accretions in the Whalen/Tri-State reach, *i.e.*, the 89,350 acre feet of accretions to the reach found available for the 75%/25% apportionment. If the Court's express addition in ¶ V of the comparatively minuscule inflows of Spring Creek means anything (2,855 acre feet), 75% of the Laramie River inflows to the Whalen/Tri-State reach must have been apportioned to Nebraska in ¶ V of the Decree. Applying Wyoming's reasoning to ¶ V, the Court would have apportioned none of the Whalen/Tri-State accretions.

Wyoming also argues that her evidence of the continuing, dependable contribution of the Laramie inflows could have been found credible only if the Court adopted her overlying theory of apportionment based on mass allocation. Bearing in mind that the apportionment theories of each of the parties who asserted one — Wyoming, Nebraska, and the United States — were rejected by Master Doherty and the Court, the application of Wyoming's reasoning would render nugatory all of the evidence as found by Master Doherty. Those findings could not have been set aside in 1945 unless they were determined to have been clearly erroneous. Wyoming should not be heard to impeach her own evidence in 1992.

D. The Proposed Deer Creek Project

Wyoming argues that Nebraska has failed to demonstrate threat to her apportionment for uses diverting in the Whalen/Tri-State reach by limiting her discussion of the genuine issues of material fact to the 43 mile reach between

Whalen and Tri-State. Wyoming conveniently omits discussion of the proven injury to Nebraska's storage interests above Whalen which serve diversions in the Whalen/Tri-State reach, as well as the injury to the apportionment of the use of the Inland Lakes located below Tri-State. *See* Appendix at A-1. Wyoming also fails to address the facts showing that the proposed Deer Creek Project is not a municipal project. As she neglected to explain to the Court, the project is planned and permitted as a multi-purpose project for irrigation, industrial, recreational, and municipal uses. As was determined by Master Olpin, the evidence weighs heavily in Nebraska's favor.

Wyoming makes two additional arguments. Despite the specific paragraph of the Decree which provides that the effect of tributary storage should be examined if an imminent threat to the apportionment is raised, *i.e.*, ¶ XIII(c), Wyoming argues that Nebraska may not avail herself of ¶ XIII(c) because the Court must first reach the conclusion that can only be reached after a ¶ XIII(c) evaluation. Pursuing her enforcement/modification theme, Wyoming construes enforcement pursuant to ¶ XIII(c) as an impossibility.

Finally, Wyoming argues that ¶ X creates an absolute "municipal exemption" to the Decree, allowing complete usurpation of the irrigation apportionment without scrutiny of any kind under the Court's retention of jurisdiction. The concept of a "municipal exemption" is premised on the inversion of the subject and object of ¶ X, as well as changing the predicate of the sentence from the negative to the positive. Wyoming's argument, however, goes a step further. It is based on the view that "this decree," in the phrase "[t]his decree shall not affect or restrict" municipal uses, plainly means the whole Decree, including ¶ XIII(c). Applying Wyoming's logic consistently, the Deer Creek Project could not be built because ¶ X would override of ¶ XII(a), which states that the Decree shall not affect priority of appropriation in Wyoming. In this regard, the municipal

part of the Deer Creek Project is designed to obviate priority of appropriation in Wyoming. Wyoming's logic would also preclude an evaluation of the effects of any kind of new or categorically different municipal development in the North Platte River system. Municipal developments could thus consume an unlimited amount of the irrigation apportionment. The answer to Colorado's front-range cities' thirst for water would lie in the headwaters of the Laramie and North Platte rivers, *carte blanche.*

E. The Tri-State Issues

Wyoming argues that because Nebraska cannot demand direct diversions of natural flows originating above Tri-State Dam for uses below the Dam, Wyoming should be able to preclude as a matter of law any evidence which Nebraska might present at trial regarding injury to downstream users. As noted above, Wyoming is arguing that proof of injury to second and subsequent users of waters diverted at or above Tri-State should be precluded. The purpose of Wyoming's argument is to eliminate the legal and equitable obstacle in the way of forcing greater efficiencies on the primary users of waters diverted at Tri-State, which would in turn allow more water to be held in storage in Wyoming.

Nebraska and Wyoming also filed cross-motions for summary judgment on an element of Wyoming's counterclaim, *viz.*, whether the Decree placed absolute ceilings or limitations on diversions for and irrigated acreage under individual Nebraska canals. Master Olpin found a complete absence of evidence to support Wyoming's claim, coupled with the unequivocal explanation by Master Doherty that he was not recommending and could not recommend limitations on individual Nebraska canals.

ARGUMENT

POINT I

NEBRASKA SEEKS CLARIFICATION AND ENFORCEMENT — NOT MODIFICATION — OF THE 1945 APPORTIONMENT

In their briefs in support of their exceptions, Wyoming, Colorado, and Basin have teamed up to generate a smoke screen by arguing that Nebraska is attempting to extend the case beyond the Court's grant of Nebraska's motion for leave to file. *See Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). They argue loudly that Nebraska has transformed the claims in her petition "into different claims" and that Nebraska has redefined " 'enforce' to mean 'modify.' " Basin's Brief on Exceptions at 6 (July 1, 1992); Colorado's Brief on Exceptions at 6 (July 2, 1992). Wyoming urges that the Court may not change "enforce" to "modify" via "clarification" or "construction." *See* Wyoming Reply Brief in Support of Motion for Summary Judgment at 4 (Sept. 19, 1988) (Docket No. 86).

The allegation that Nebraska is seeking to modify the Decree behind the Court's back is designed to avoid the substantive issues presented by the Court's exercise of its original jurisdiction, namely, whether the actions complained of by Nebraska in her petition will upset the equitable apportionment established by the Court in 1945. 479 U.S. at 1051. The argument has two parts. First, Wyoming, Basin, and Colorado try to support their modification theory by mixing up unrelated pleadings. In concert, they purposely confuse a motion filed by Nebraska in 1988 to amend her petition concerning irrigation season flows for the protection of critical wildlife habitat — which the Court denied — with an alleged effort to accomplish the same thing in the present proceedings, despite the Court's denial of the motion. They also try to confuse the motion that was denied in 1988 with the pending motion to apportion the

non-irrigation season flows. The Court denied Nebraska's 1988 motion for leave to file her amended petition, and the matter ended there. Nebraska has never pursued an increased apportionment in the context of the 1986 petition and has not attempted an end run around the Court's 1988 decision.

The modification theory is also supported by reference to the so-called "Tri-State" issues. The assertion is that Nebraska is attempting to increase her apportionment by claiming new "rights" for fish and wildlife, particularly threatened and endangered species, independently of the apportionment for the irrigation of lands served by canals diverting at and between Whalen and Tri-State Dam. This is what is loosely described as Nebraska's attempt to obtain a new or increased equitable apportionment during the irrigation season. Wyoming's, Colorado's, and Basin's assertions are patently wrong. Nebraska is not seeking such rights, either directly or indirectly. The fact of the matter is that Wyoming is seeking a new apportionment.

The second part of Wyoming's argument is that the Decree cannot be enforced unless the element of the apportionment that Nebraska seeks to protect is expressly recited in a specific injunction or provision of the Decree. Wyoming asserts that the language of the Decree alone determines what was decided by the Court. Wyoming is asking the Court to ignore the Report of Special Master Doherty, as well as its own opinion and the underlying record, in order to construe the Decree in isolation.[126]

---

[126]This argument was the basis of Wyoming's opposition to Nebraska's initial motion for leave to file, as well as Wyoming's first motion for summary judgment. *See, e.g.*, Wyoming Brief in Opposition to Motion for Leave to File Petition at 26 (Dec. 17, 1986) (Docket No. 2); [First] Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion at 79 (Sept. 11, 1987) (Docket No. 23) ("Wyo-

(cont'd.)

Articulated in specific terms, this part of Wyoming's enforcement/modification argument has five elements. Wyoming asserts that: 1) Nebraska cannot protect her apportionment of the Inland Lakes with a priority of December 6, 1904, because the Decree does not enjoin the Attorney General of Wyoming from filing a lawsuit to force the United States to obtain a permit; 2) Nebraska cannot enforce her apportionment for the Inland Lakes because no provision of the Decree mentions a priority of December 6, 1904; 3) Nebraska cannot protect her apportionment of 75% of the Laramie River's inflows to the Whalen/Tri-State reach of the North Platte River because ¶ V of the Decree does not say "including the contribution of the Laramie River;" 4) Nebraska cannot protect her apportionment of 75% of the Laramie inflows because the Decree places no injunction or limitation on Wyoming's use of the Laramie and thus there is no provision of the Decree to enforce; and 5) Nebraska cannot exercise the Court's retained jurisdiction to assess the effects of new tributary storage on the existing apportionment because there is no provision of the Decree which prohibits new tributary storage.

A. The "Argument" that Nebraska is Seeking to Enlarge her Apportionment through her Original Petition and Allegedly Excessive Diversions at and above Tri-State Dam is Specious

Wyoming's most egregious misstatement is superficially her most attractive argument:

> The Special Master reached the wrong result . . . because he failed to recognize this lawsuit as one to enforce and protect the existing apportionment, not to enlarge, expand or modify the apportionment.

---

ming's First Motion for Summary Judgment"). No law has been cited by Wyoming, Colorado, or Basin for the proposition that comprehending a decree provision by reference to the underlying case is "modification." *See infra* p. 45-49.

> In her answer and in her first summary judgment motion, Wyoming admitted taking the actions alleged in Nebraska's petition but denied as a matter of law that those actions violate the Decree. Nebraska then sought to amend her petition to seek a modification of the Decree. Since Nebraska's motion to amend her petition was denied, Nebraska has tried to characterize her original petition as requesting enlargement of her apportionment.

Wyoming's Brief on Exceptions at 26 (July 2, 1992). Wyoming also states that "the Special Master has accepted Nebraska's changed characterization of her petition as one to modify or enlarge her apportionment and has recommended a trial to equitably apportion water among competing equities in the first instance." *Id.* at 27. Neither assertion is correct.

On January 11, 1988, Nebraska filed a motion seeking to amend her earlier petition "primarily to enforce and modify, if necessary, the Decree to protect instream uses in Nebraska." *See generally* Owen Olpin, Special Master, Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 7 (Apr. 9, 1992) (Docket No. 463) ("Second Interim Report"). The motion was limited to the irrigation season. It was precipitated by Nebraska's apprehension that the application of post-Decree, federal environmental laws in Nebraska would diminish the irrigation apportionment to Nebraska, without affecting the remainder of the balance of interests found equitable in 1945, *i.e.*, the irrigation apportionments to Colorado and Wyoming.[127] The motion was denied. *See Nebraska v. Wyoming*, 485 U.S. 931 (1988) (Docket No. 59).

---

[127]The practical effect of the application of environmental laws to protect the concentration of avian wildlife in Nebraska would be to serve the national interest at the sole expense of the agricultural economy in Nebraska. Since the entry of the Decree in 1945, increased scientific

(cont'd.)

Wyoming, Colorado, and Basin have attempted to characterize Nebraska's pending Motion for Leave to File Amended Petition for An Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims as another "in a series of attempts" to reapportion the irrigation season flows. *See, e.g.*, Wyoming's Brief on Exceptions at 9 (July 2, 1992), Colorado's Brief on Exceptions at 4 (July 2, 1992), Basin's Brief on Exceptions at 4 n.3 (July 1, 1992). Nebraska wants to make it clear that the pending motion is unrelated to the motion that the Court denied. The pending motion seeks principally an apportionment of the previously unapportioned, non-irrigation season flows because those flows have been and continue to be relied upon by equitable interests in Nebraska, including irrigation, hydroelectric power production, water-cooled power production, municipalities, recreation, and fish and wildlife, including federally threatened and endangered species. The motion also seeks relief against Wyoming and the United States on the basis of specifically alleged violations of the existing Decree without any proposed modification or expansion of the Decree.

---

knowledge and concern have been focused on the ecological effects of water development for irrigation, industrial, municipal, and domestic purposes. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1988); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668 (1988); Fish and Wildlife Conservation Act of 1980, 16 U.S.C. §§ 2901-2912 (1988); Electric Consumers Protection Act of 1986, 16 U.S.C. § 797 (1988). In the North Platte and Platte River valleys, this legislation has been directed, in part, to some 230 species of migratory birds which inhabit the area, six of which are endangered or threatened. While the application of these and other post-Decree federal laws may not be a legal "taking" of a portion of Nebraska's agricultural economy, their application will directly cause an equitable taking, *i.e.*, a diminution of Nebraska's apportionment. *Cf. Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992). An equitable apportionment for wildlife protection would have adjusted the equities among the three states, instead of forcing the wet water solely out of Nebraska's agricultural economy.

If there are competing irrigation, power production, municipal, industrial, or environmental equities in Wyoming and Colorado which have relied on the non-irrigation season flows, Nebraska presumes that those equities would be considered by the Court. Absent an apportionment of the presently unapportioned flows, however, the upstream states have a license to completely dewater the non-irrigation season flows of the North Platte River. There is no other forum in which Nebraska may seek to protect her equities.

The second aspect of Wyoming's and Colorado's claim that Nebraska is underhandedly attempting to obtain a new apportionment for wildlife purposes is asserted in the form of the allegation that Nebraska is diverting flows at or above Tri-State in excess of the water requirements for the North Platte Project Canals and the Nebraska State Line Canals. In relation to their motions for summary judgment, the issue arises in their exceptions to Master Olpin's refusal to recommend summary judgment denying Nebraska's claims of violations of the Decree "to the extent such claims are based on allegations of injury to uses diverting below Tri-State Dam." Wyoming's Brief on Exceptions at 14 (July 2, 1992). The reality is that Wyoming is seeking a new apportionment.

Wyoming sought summary judgment declaring that "evidence of instream uses and uses supplied by diversions below Tri-State Dam is immaterial to proof of violation of Nebraska's apportionment under the Decree," ostensibly to narrow the issues and simplify trial. Wyoming Second Motion for Summary Judgment and Brief in Support at 5 (Feb. 22, 1991) (Docket No. 294) ("Wyoming's Second Motion for Summary Judgment"). Wyoming has an ulterior motive which has not been explained to the Court, however.

As part of her counterclaim, Wyoming will attempt to prove at trial that the Pathfinder Irrigation District and other districts and private canals in Nebraska are diverting

in excess of beneficial use requirements, beneficial use being the basis, the measure, and the limit of the right to use water. *Cf.* NEB. REV. STAT. §§ 46-229, 46-231 (1988 Reissue); *see also* Wyoming's Brief on Exceptions at 37 (July 2, 1992). This aspect of Wyoming's case will be based on the Court's first decision in *Colorado v. New Mexico*, 459 U.S. 176 (1982), where it was stated that "wasteful or inefficient uses will not be protected." *Ibid.* at 184.

As is explained in detail below, Master Doherty and the Court predicated the apportionment of natural flows at and above Tri-State on the fact that users below Tri-State would continue to satisfy their requirements from return flows intercepted and diverted below Tri-State. Wyoming's ulterior motive in seeking "to simplify trial" lies in her awareness that proof of injury to downstream users would preclude the forced improvements in efficiency she seeks to impose on the Nebraska districts and canals from which the return flows are derived. If Wyoming could do so, she could then claim that the "wasted" water should be retained in storage in Wyoming. In other words, Nebraska is seeking no new apportionment by protecting second and subsequent users of waters diverted at or above Tri-State. It is Wyoming who wishes to obtain a new apportionment at the expense of Nebraska equities which were taken into account in 1945 and who have no alternative but to continue to rely on return flows which are not diverted for direct use at or above Tri-State Dam. *See infra* p. 90-95.

B. Enforcement of a Decree Necessitates Construction and Clarification by a Review of the Record

In her petition, Nebraska seeks to enjoin Wyoming from increasing her depletions of the natural flow of the North Platte River in violation of Nebraska's apportionment under the Decree. Nebraska's Petition at 3-4 (Oct. 6, 1986) (Docket No. 1). Enforcing the Decree to protect Nebraska's apportionment necessarily requires construing the

record of the original proceedings, as well as Special Master Doherty's Report and the Court's opinion.

Wyoming's assertion that the states' respective apportionments are confined solely to an eight page decree, without reference to the 75-page opinion of the Court in 1945, Master Doherty's 273 page report, or the 30,000 pages of testimony and 1,300 exhibits upon which the opinion was reasoned and the Decree entered, is neither reasonable nor supported by the law. That the Court has previously construed or clarified decree provisions without modifying the decisions effectuated by the particular decree is undisputable.[128] *See Oklahoma v. Texas*, 272 U.S. 21 (1926); *see also United Shoe Mach. Co. v. United States*, 258 U.S. 451 (1922); *Vicksburg v. Henson*, 231 U.S. 259 (1913). This process is most evident in a series of cases involving the enforcement of the decrees in three different original actions.

In the post-Laramie Decree cases, the cases in which Wyoming sought to enforce the initial decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), neither Wyoming, Colorado, nor the Court took the view that a decree provision must describe the underlying apportionment sought to be enforced or that the underlying record could not be examined in order to resolve ambiguities to facilitate enforce-

---

[128]Master Olpin is fully aware of the applicable law, noting that with respect to the enforcement of the Decree in some areas he "turned to a number of primary sources to determine what the Decree means," including "the Court's 1945 Opinion, the Report of Special Master Doherty and the voluminous Record of the decade of proceedings before [Master Doherty] in the original proceedings." Second Interim Report at 14 (Apr. 9, 1992) (Docket No. 463).

ment. In the 1931 action, the Court construed the 1922 Laramie Decree, stating:

> We are of the opinion that the record, opinion and decree in the prior suit, here reviewed at length, show very plainly that the decree must be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered and resolved in the opinion.

Wyoming v. Colorado, 286 U.S. 494, 506-07 (1932). In rejecting the notion that a broader injunction should have been articulated originally, the Court stated:

> Construing the decree in the light of the record and opinion, to which counsel for both States appeal, we think it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators.

Id. at 508.

Indeed, in her initial pleading in the 1940 enforcement action, Wyoming asserted that the Laramie Decree she was seeking to enforce could not be enforced without construing the record:

> Reference is hereby made to the amended original bill and exhibits filed, the answer of the defendant, the testimony taken on both sides, the decree in the cause, and each and every other paper and proceeding in this cause from the institution of the suit to the filing of this petition, and it is prayed that the same may be taken and read as a part thereof at any time and on hearings on this petition.

Wyoming's Motion for Leave to File Petition for Rule to Show Cause and Petition for Rule to Show Cause at 6 (¶ 4),

Wyoming v. Colorado, 309 U.S. 572 (1940). Colorado answered Wyoming's petition by stating that she "consents that the former proceedings in this cause may be considered by this Court in the consideration and determination of the petition now pending herein." Answer and Return of the Defendant, the State of Colorado at 2, *Wyoming v. Colorado*, 309 U.S. 572 (1940). In deciding the case, the Court reviewed the 1922 record of proceedings, as well as the 1936 record of proceedings, and construed the 1936 decision in order to hold that the second paragraph of the Laramie Decree had not been violated.[129]

More recently, the Court decided a series of enforcement actions designed to effectuate a 1947 decree relating to the ownership of submerged lands off the coast of California. *See United States v. California*, 332 U.S. 804 (1947). The original decree was supplemented three times to clarify ambiguities arising after entry of the original decree, as well as to address issues which arose after entry of the decree. In *United States v. California*, 382 U.S. 448 (1966), a supplemental decree added definitions and clarified which lands were under the jurisdiction of the State of California. In *United States v. California*, 432 U.S. 40 (1977), a supplemental decree was entered to identify the boundary between the submerged lands of the United States from those of California "with greater particularity." *Id.* at 40. The question of ownership of a national monument was addressed in *United States v. California*, 436 U.S. 32 (1978). In its last opinion, the Court observed: "This case is part of ongoing litigation stemming from an action brought in this Court more than three decades ago. [citations omitted] In each instance, jurisdiction was reserved to enter further orders necessary

---

[129]The Laramie Decree which was being construed contained two unnumbered, substantive provisions. The original Decree was entered on June 5, 1922. *Wyoming v. Colorado*, 259 U.S. 419, 496 (1922). The Decree was modified on October 9, 1922. *Wyoming v. Colorado*, 260 U.S. 1 (1922).

to effectuate the decrees." *See United States v. California*, 436 U.S. 32, 33 n.1 (1978).

Similarly, *Wisconsin v. Illinois*, 278 U.S. 367 (1929), a suit to enjoin Illinois from diverting water from Lake Michigan, resulted in a decree that was refined twice to clarify the legal consequences of the facts found. *See Wisconsin v. Illinois*, 352 U.S. 945 (1956); *Wisconsin v. Illinois*, 352 U.S. 983 (1957). The decree was later superseded. *See Wisconsin v. Illinois*, 388 U.S. 426 (1967). The replacement of the original decree with a new decree in 1967 constituted the kind of modification not at issue in this case.

In this case, Nebraska has requested the Court to affirm the apportionment and priority of the Inland Lakes, to construe ¶ V of the Decree as having apportioned 75% of the Laramie inflows to the North Platte River to Nebraska, and to evaluate the effects of a tributary storage project which threatens Nebraska's apportionment. *See generally* Nebraska's Petition (Oct. 6, 1986) (Docket No. 1); Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296); Nebraska's Brief on Exceptions (July 1, 1992). As the Court has made clear, it is reasonable to construe a decree and modify its terms if necessary to enforce an apportionment. Wyoming, Colorado, and Basin should not be permitted to avoid the fundamental dispute which the Court has granted Nebraska leave to adjudicate. Special Master Olpin construed the pertinent provisions of the Decree as he should have, never "modifying" the apportionment Nebraska seeks to enforce. *See* Owen Olpin, Special Master, First Interim Report at 4-6 (June 14, 1989) (Docket No. 140) ("First Interim Report"); Second Interim Report at 4-10 (April 9, 1992) (Docket No. 463).

C. The Attempt by Wyoming, Colorado, and Basin Electric to Redefine Enforcement or Clarification is Designed to Evade the Substantive Issues to be Resolved by the Court

Aside from the undisputable law, an examination of the specific issues which Wyoming, Colorado, and Basin would like to avoid illustrates that the enforcement/modification tactic is dissembling.

1. Inland Lakes

Paragraph 3.d of Nebraska's petition alleges that Wyoming is threatening to violate Nebraska's equitable apportionment by:

> Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

Nebraska's Petition at 2 (Oct. 6, 1986) (Docket No. 1). The allegation relates to Wyoming's attempt to change the 1904 priority of the Inland Lakes to the most junior priority on the river, which would quietly allow Wyoming to greatly increase the yield of the proposed Deer Creek Project. Master Olpin observed that there is a relationship between the Deer Creek Project and Wyoming's maneuvering regarding the Inland Lakes' priority. Second Interim Report at 29 n.44, 33 n.51 (Apr. 9, 1992) (Docket No. 463).

Wyoming has pursued two positions relating to her enforcement/modification argument with respect to the Inland Lakes. First, Wyoming contended that the sole action alleged in Nebraska's petition was the act of filing a lawsuit to stop Nebraska's use of the Inland Lakes, which could not violate the Decree because there is no express provision in the Decree prohibiting such a lawsuit. Wyoming's First Motion for Summary Judgment at 102 (Sept. 11, 1987) (Docket No. 23); *see also id.* at 80, 100. Wyoming described

the legal issue as "whether the Wyoming lawsuit *itself* violates the Decree," concluding that the "Court should rule as a matter of law that the [*Christopulos* suit] does not violate the Decree...." *Id.* at 102-03 (emphasis added). Wyoming's position was based on the fact that the Decree does not enjoin the Attorney General of Wyoming from filing such lawsuits; therefore, absent a "modification" of the Decree, Nebraska had no cause of action.

Second, Wyoming has argued that because an Inland Lakes' right or priority is not mentioned in ¶¶ III or IV of the Decree, there can be none. Wyoming's Brief on Exceptions at 54-55 (July 2, 1992). When Special Master Olpin determined otherwise based upon the Court's opinion, Doherty's Report, and the original record, recommending that a new paragraph be added to make the matter express in the Decree, Wyoming characterized the process as modification. *Id.* at 16-17, 51. The apportionment which Nebraska seeks to protect was not modified at all, but simply reaffirmed with language eliminating the ambiguities that Wyoming has sought to exploit. Second Interim Report at 32-35 (Apr. 9, 1992) (Docket No. 463).

2. Laramie River Inflows

With respect to the apportionment of the Laramie inflows, Wyoming asserts that Nebraska cannot rely on Master Doherty's Report and the Court's opinion, but must first modify the Decree in two ways before Nebraska can enforce her apportionment. Wyoming argues that ¶ V must state "including the contribution of the Laramie River" and that the Decree must expressly include an injunction prohibiting further depletions of the Laramie by Wyoming.[130]

---

[130]Basin makes one specific argument regarding the sufficiency of Nebraska's petition, noting Master Olpin's statement in his Second *(cont'd.)*

Wyoming ignores the fact that there was no need to add the phrase "including the contribution of the Laramie River" to ¶ V because the inflows had already been included in the evidence of the waters available for apportionment in the Whalen/Tri-State reach as found by Master Doherty in his report, which the Court specifically recognized. 325 U.S. at 604 n.9, 605. In other words, the "modification" that Wyoming and Basin insist is needed before Nebraska can enforce ¶ V to protect her apportionment is simply redundant of the evidence found by Master Doherty, the summary of the evidence in Table III of his report, and the Court's opinion adopting his recommendations.

Unable to counter the fact that the Laramie has been accounted as the largest tributary contribution to the

---

Interim Report that "[i]n her petition, Nebraska alleges that Wyoming unlawfully is depleting and threatening to deplete the flows of the North Platte River by her intended administration of Grayrocks Reservoir's operation and releases on the Laramie River." Basin's Brief on Exceptions at 17 (July 1, 1992). Basin states that "Nebraska alleges no such thing and the special master is wrong to indulge her undertaking to alter this claim from that the Court granted her leave to file." *Id.* at 17 n.16. Basin further states that the claim set forth in the petition is "that Wyoming is violating [Nebraska's] rights under the decree by '[d]epleting the flows of the North Platte River by the operation of the North Platte River by the operation of Grayrocks [sic] Reservoir on the Laramie River.'" *Id.* at 17.

The gist of Basin's assertion is that Nebraska has complained only of **Basin's** operation of Grayrocks, as opposed to **Wyoming's.** That ¶ 3.a of the petition was intended to address Wyoming's administration of Grayrocks Reservoir, including its most obvious component in the context of this case, *i.e.*, its releases, was thoroughly aired and explained in the briefs on the initial motion for leave to file. *See* Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 1, 4, 11-12 (Jan. 14, 1987) (Docket No. 4). Master Olpin's statement of the claim in the petition is exactly the same as Nebraska's explanation of it in 1986. The Court subsequently granted the motion for leave to file. *See supra* p. 3-4.

Basin's argument that the actual Laramie issue is not the one the parties have all been arguing about, *i.e.*, Wyoming's claim to all of the water of Laramie River, is chimerical.

Whalen/Tri-State apportionment under the operation of the Decree, and unable to counter the fact that Laramie inflows have been accounted as part of the daily 75%/25% apportionment since the Decree was entered in 1945, Wyoming argues that because the Decree contains no injunction preventing her from dewatering the Laramie, she may proceed to do. The assertion is more nonsensical than Wyoming's principal modification argument in regard to the Laramie.

It is true that the Court did not add a specific provision to enjoin Wyoming from further depletions of the Laramie River. It is also true, however, that the Court placed no injunctions on Wyoming's use of water from any of the other tributaries or sources of accretions in the Whalen/Tri-State reach. Applying Wyoming's argument to the entire Whalen/Tri-State reach, none of the accretions in this reach of the river — 89,305 acre feet — was apportioned between Nebraska and Wyoming, except the 2,855 acre feet contribution of Spring Creek which the Court expressly included in ¶ V, and possibly the precipitation that falls during the irrigation season on the streambed of the mainstem North Platte. *See infra* p. 73-74; *see also* Appendix at A-1. The fifteen other sources of accretions in this reach would be subject to complete depletion by Wyoming, along with the Laramie. Wyoming's argument would eliminate not only the Laramie inflows, but 89,305 acre feet from the total apportionment fund of 1,061,500 acre feet. Carried to its logical conclusion, Wyoming's argument would have the Court eliminate 8½% of the total apportionment fund, depriving Nebraska of 67,000 acre feet of anticipated flows.[131] The net result, of course, would be to increase the amount of water available to Wyoming.

---

[131]Master Doherty determined from the evidence that 1,058,645 acre feet would be the dependable supply in the Whalen/Tri-State reach. Doherty Report at 67 (Table III). He recommended that it be apportioned 75%/25% on a daily basis based on United States Exhibit

(cont'd)

3. Proposed Deer Creek Project

With respect to Deer Creek, Nebraska alleged in her petition that Wyoming was depleting or threatening to deplete tributary flows between Pathfinder Reservoir and Guernsey Reservoir by the construction of new storage facilities. Nebraska's Petition at 2 (Oct. 6, 1986) (Docket No. 1). Nebraska specifically alleged that the Court retained jurisdiction pursuant to ¶ XIII(c) of the Decree to address the effects of proposed tributary storage on her apportionment.

Wyoming has argued that even if ¶ XIII(c) is applicable and adverse effects are proven, Nebraska cannot enjoin the construction of the project because to do so would require an additional injunction in the Decree — a modification. Wyoming Reply Brief in Support of First Motion for Summary Judgment at 11, 24-25 (Sept. 19, 1988) (Docket No. 86). Wyoming argues that because Nebraska sought only enforcement of the Decree and because no provision of the Decree prohibits additional storage capacity on tributaries entering the North Platte between Pathfinder and Guernsey reservoirs, Nebraska cannot prevail "in this limited enforcement action."

When the Court granted Nebraska's motion for leave to file her petition, it necessarily understood that if it were proven at trial that construction of additional storage capacity had the adverse impacts envisioned in ¶ XIII(c), a provision enjoining such construction would be necessary. In requesting the Court to exercise its retained jurisdiction in her petition, Nebraska sought the "enforcement" of the retention of jurisdiction in ¶ XIII(c). If a new injunctive provision were to result, it would flow from the enforcement of ¶ XIII(c). Wyoming is arguing that trial cannot proceed on the effects of new tributary storage under

---

No. 204A. *Id.* at 69, 179 (¶ 6). After being apprised of the Spring Creek omission by Wyoming, the Court amended Doherty's proposed decree provision No. 6 (¶ V) to expressly add in 2,855 acre feet, making the total 1,061,500 acre feet. *See generally* 325 U.S. at 648, 667.

¶ XIII(c) without first having in hand the injunctive provision that would result from such a trial. Wyoming's argument is tantamount to saying you can't get there from here.

D. Nebraska Seeks No New Rights Below Tri-State Dam

Wyoming argued at length in her first and second motions for summary judgment that Nebraska is claiming something beyond what was apportioned to her. Colorado's and Basin's arguments mirror Wyoming's. Colorado, for example, complains that Nebraska has asserted "claims for the continuation of flows in excess of [her] decreed apportionment to serve uses that do not divert at or above Tri-State Dam."[132] Colorado's Brief on Exceptions at 1 (July 2, 1992). Wyoming and Colorado argue that Nebraska has "failed to articulate any factual basis for claiming such injury." *Id.* at 3. Both arguments are designed to create the false impression that Nebraska is pursuing a different case than accepted and that her purpose is to obtain a new apportionment for wildlife, particularly threatened and endangered species.

Wyoming, Colorado, and Basin have raised a rather portly red herring. There is no reference to any so-called "Tri-State" issue in Nebraska's petition. Nebraska's allegations generally involve Deer Creek, the Inland Lakes, and the Laramie River dispute. The Tri-State issues were raised

---

[132]Nebraska has never made such a claim. In Nebraska's motion for summary judgment, she pointed out that she "recognizes that '[l]ands in Nebraska supplied by diversions below the so-called Tri-State Dam have no equitable claim upon direct flow water originating in Wyoming or Colorado.' " Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at 126-27 (Mar. 1, 1991) (Docket No. 296). Nebraska also stated that she "cannot demand natural flow for the North Platte Project canals or for the State Line Canals with the intention of bypassing diversion points at or above Tri-State Dam so that natural flows can be used downstream." *Id.* at 127 (paraphrasing 325 U.S. at 628; Doherty Report at 9, 96).

and framed by Wyoming's counterclaim. In her first and second motions for summary judgment, Wyoming asserted that Nebraska does not have a right under the Decree to protect equities below Tri-State Dam which rely on return flows as their water supply. Wyoming's First Motion for Summary Judgment at 103, 108 (Sept. 11, 1987) (Docket No. 23); Wyoming's Second Motion for Summary Judgment at 57-85 (Feb. 22, 1991) (Docket No. 294). Nebraska responded that return flows below Tri-State Dam constitute an enforceable part of Nebraska's apportionment. *See, e.g.*, Doherty Report at 59 n.2, 87 n.1 and n.2. Nebraska explained that both Special Master Doherty and the Court regarded return flows as a critical component underlying the apportionment of direct flows of the North Platte River to Nebraska. Nebraska was not seeking an increase in return flows below Tri-State Dam, but recognition that second and subsequent users of water diverted at or above Tri-State Dam are among the group of Nebraska users that the State of Nebraska can protect *parens patriae. See supra* p. 23-29; *infra* p. 90-95.

In both instances, Wyoming's motions for summary judgment had nothing to do with Nebraska seeking a new apportionment. The dispute related to Nebraska's enforceable rights under the original apportionment. Master Olpin concluded that Nebraska's evidence of injury should not be constrained, especially when its injury claims were not yet fully articulated. First Interim Report at 35-36 (June 14, 1989) (Docket No. 140); Second Interim Report at 35 (Apr. 9, 1992) (Docket No. 463). Special Master Olpin correctly determined that Wyoming's requests for summary judgment were not tied to the pleadings and merely sought to limit Nebraska's evidence at trial. A ruling of the nature sought by Wyoming would be premature, speculative, and amount to an advisory opinion dictating the evidence that Nebraska could present at trial. Second Interim Report at 19, 92-94 (Apr. 9, 1992) (Docket No. 463). Nebraska is not seeking to "modify" the Decree in this regard or seeking a new apportionment.

Wyoming's, Colorado's, and Basin's apprehensions have no basis in Nebraska's pleadings. The real dispute is whether subsequent users of natural flow diverted at or above Tri-State are among the group of users which Nebraska can protect *parens patriae*. The issue cannot be addressed by a meaningless digression into whether the construction of the Decree constitutes enforcement or modification. It should be resolved by reference to the evidence in the original proceedings and the hydrologic facts which established the right of second and subsequent users of waters diverted at or above Tri-State to rely on the Decree for protection. *See supra* p. 23-29; *infra* p. 90-95.

POINT II

THE RECORD DEMONSTRATES THAT THE USE OF THE INLAND LAKES WAS APPORTIONED TO NEBRASKA WITH A PRIORITY OF DECEMBER 6, 1904

The accrual of natural flow during the months of October, November, and April for storage in the Inland Lakes began in 1913 when the lakes were completed as structural components of the Interstate Canal, the largest canal serving the North Platte Project. The continued use of the Inland Lakes to offset the demand on the accrual of natural flow during the irrigation season was apportioned to Nebraska in *Nebraska v. Wyoming*. Forty-six thousand acre feet have accrued annually to the lakes under the doctrine of prior appropriation, with a priority of December 6, 1904, since 1913.[133]

---

[133]The doctrine of prior appropriation has been defined as the exclusive right "to divert from a public water supply a specific quantity of water . . . and to apply such water to a specific beneficial use or uses in preference to all appropriative rights of later priority." 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN

(cont'd.)

While the Inland Lakes' storage right has been administered in this manner by the United States and Nebraska in conjunction with the State of Wyoming since 1913, Wyoming took judicial action in 1986 to terminate the diversion of natural flow to the Inland Lakes on the theory that the United States had not complied with Wyoming law in obtaining a state permit to store a portion of the water diverted into the Interstate Canal. *See supra* p. 17. The purpose of *Christopulos* was to eliminate the use of the Inland Lakes with a priority of 1904 so that other uses in Wyoming, including the proposed Deer Creek Project, would gain seniority over the water which has been historically stored in the Inland Lakes.

In her petition and in her motion for summary judgment, Nebraska sought confirmation of the Court's apportionment of the continued use of Inland Lakes. Wyoming sought a determination that water to serve the Inland Lakes could not be administered with a priority of 1904 because the United States had allegedly not complied with Wyoming law and had not obtained the necessary state permits.

A party moving for summary judgment on issues on which it bears the burden of persuasion at trial is required to demonstrate that "it is entitled to summary judgment" through the use of "credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan, J. dissenting). *See also Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S. Ct. 3177 (1990). Here the standard was satisfied on the basis of the record of the original proceedings, the submission of affidavits, and documentary

---

WESTERN STATES, 226 (1971). All of the western states subscribe to the appropriation doctrine. First in time, first in right is the basis of the doctrine. The essential element is that senior priorities are entitled to be fully satisfied before any water may be distributed to priorities junior in time. *See, e.g., Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 276 P. 1017 (1929); 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, 488, 569 (1971).

evidence. Wyoming has suffered a "complete failure of proof." *Celotex*, 477 U.S. at 323.

A. The Use, Requirement, and Priority of the Inland Lakes were Litigated and Determined by the Court in the Original Proceedings

The principal contention of Nebraska and the United States in their motions for summary judgment was that the Inland Lakes' entitlement was conclusively determined in the original litigation. After an extensive review of the record, Special Master Olpin found that there were no genuine issues of material fact that all necessary elements of the Inland Lakes' water right were litigated and determined in the original proceedings. Specifically, Master Olpin found that it was undisputed that the "use and requirements of the Inland Lakes were litigated by Colorado, Wyoming, Nebraska and the United States during the original proceedings." Second Interim Report at 26 (Apr. 9, 1992) (Docket No. 463). He also found that Master Doherty and the Court affirmed the right of the Inland Lakes to store 46,000 acre feet during the months of October, November, and April, with a priority of December 6, 1904. *Id.* at 28. Master Olpin further determined that Wyoming argued in 1945 that the Inland Lakes should be used to their maximum capacity by Nebraska to store natural flow during the non-irrigation season in order to reduce Nebraska's demand on natural flow during the irrigation season. The record unequivocally supports Master Olpin's findings. *See supra* p. 11-14.

While having raised complaints intermittently from 1904 to 1934 about the alleged unpermitted status of the Inland Lakes, Wyoming reversed her position during the original proceedings. *See supra* p. 7-14. She advocated that the storage of natural flow in the Inland Lakes during the non-irrigation season should be maximized, thereby increasing her irrigation season apportionment. Master Doherty adopted Wyoming's proposal that the Inland Lakes should

be utilized for that purpose. Doherty Report at 60-61. In her brief on exceptions in 1945, Wyoming continued to advocate that Nebraska be given a fixed amount of water during the irrigation season together with the diversion of 73,000 acre feet to the Inland Lakes during the winter months. Brief of Defendant, State of Wyoming at 83 (Jan. 29, 1945) (Appendix at A-10).

The Court found that the Inland Lakes formed an integral part of the North Platte Project and that the entire North Platte Project had a priority of December 6, 1904. 325 U.S. at 595, 613. Additionally, the Court decided that natural flow diversions into the Inland Lakes during the non-irrigation season should be deducted from Nebraska's apportionment of natural flow during the irrigation season.[134] *Id.* at 646. This secured the use of the Inland Lakes as part of Nebraska's apportionment.

Wyoming raises two vacuous arguments to dispute Special Master Olpin's findings. First, Wyoming asserts that the "only Inland Lakes issue that was decided in the original proceeding was that any storage in the Inland Lakes during

---

[134]If the Inland Lakes had not been allocated a storage right of 46,000 acre feet of natural flow during the non-irrigation season, the Interstate Canal's allotment would have increased by 46,000 acre feet, thereby increasing Nebraska's irrigation season apportionment. The Interstate Canal irrigation season demands would have been greater, likely resulting in a 80%/20% split of natural flow between Nebraska and Wyoming in the Whalen/Tri-State reach.

Wyoming finds it inconsistent that Master Olpin could determine that the Inland Lakes have an immutable priority and a fixed quantity of storage when Master Doherty left open the possibility of one day increasing the non-irrigation season storage of natural flows in the Inland Lakes. Wyoming's Brief on Exceptions at 56 (July 2, 1992). The possibility that Inland Lakes may someday be allowed to increase their storage of natural flow could not affect their priority date. Master Doherty was merely leaving open the possibility of increasing the Inland Lakes storage and accordingly adjusting downward the Interstate Canal requirements if the Decree were amended in the future to adjust the percentage allocation.

the nonirrigation season was to be counted against the requirement of the Interstate Canal for the purpose of determining Nebraska's irrigation season apportionment of natural flow in the Whalen to Tri-State section." Wyoming's Brief on Exceptions at 56 (July 2, 1992). Second, Wyoming contends that without an explicit designation in the Decree, no priority can be recognized for the Inland Lakes.[135] *Id.* at 54-56.

With respect to Wyoming's first argument, Master Olpin concluded that the assertion of a right to store natural flow in the Inland Lakes necessarily involves a recognition of a priority. Second Interim Report at 33 (Apr. 9, 1992) (Docket No. 463). Wyoming advocated that the Inland Lakes must store natural flow to their maximum capacity in the original proceedings. It is unreasonable to conclude that Nebraska, Wyoming, and the United States advocated the use of the Inland Lakes knowing that their use could not continue into the future and that Special Master Doherty and the Court accorded an empty right, *i.e.*, a right without a priority.[136]

Second, Wyoming argues that the Inland Lakes' priority is not made explicit in ¶¶ III or IV of the Decree. Wyoming

---

[135]If Wyoming's argument were applied to all the reservoirs, none of the North Platte Project or Kendrick Project reservoirs would have a right to store natural flow because no priority date is set forth in the Decree for any of them.

[136]Wyoming also contends that it was Nebraska's or the United States' duty to present evidence in the original proceeding regarding the Inland Lakes priority, not her's. Wyoming's Brief on Exceptions at 55-56 (July 2, 1992). Neither Master Doherty nor the Court saw the need to place an affirmative provision in the Decree regarding the Inland Lakes because all of the parties' supported the use of the Lakes as an integral component of the Interstate Canal and the North Platte Project. Further, none of the parties contested the right of the North Platte Project, the Interstate Canal, or the Inland Lakes to store natural flow during the non-irrigation season with a priority of 1904.

overlooks that ¶ IV is limited to storage of natural flows during the irrigation season and that the Inland Lakes store natural flow during the non-irrigation season. Wyoming fails to examine the purpose of ¶ III. Paragraph III sets the order of priority for the storage of natural flow in Pathfinder, Guernsey, Glendo, Seminoe, and Alcova reservoirs. The paragraph was included in the Decree as a response to the United States' proposal that the upstream federal storage reservoirs — specifically, Pathfinder, Seminoe, and Alcova — should be permitted to operate jointly and not in priority.[137] 325 U.S. at 632-33; *see also* Doherty Report at 143-45, 181-185; Appendix at A-1. Omission of the Inland Lakes in this paragraph of the Decree means nothing because the Court was tailoring relief to a proposal of the United States that had nothing to do with the Inland Lakes.

For the same reasons, the Inland Lakes were not included in ¶¶ III or IV of the Decree as amended in 1953. *Cf.* Wyoming's Brief on Exceptions at 55 (July 2, 1992). The Decree was amended to add a new reservoir to the system and to address any adjustments that needed to be made in that regard. *See* 345 U.S. at 981-83. It was not the purpose of the amendment to reconfirm rights that had been recognized by the Court eight years earlier. More importantly, before the parties stipulated to the construction of Glendo Reservoir and an amended Decree, they examined the operation of the new reservoir *vis-a-vis* pre-existing rights on the river as described in the Glendo Definite Plan Report. *See* First Affidavit of David G. Wilde at 9 (¶ 26) (Aug. 22, 1992) (Docket No. 83). Their purpose was to assure that the new reservoir would not interfere with established rights. In the Glendo Definite Plan Report, which was to govern the operation of the reservoir, the Inland Lakes were recognized as a senior, enforceable right,

---

[137]Master Doherty described the proposal as "[t]he desire of the United States is to pool the water to be stored in the three reservoirs and administer it as a common fund. . . ." Doherty Report at 181.

with a priority of December 6, 1904, to store 46,000 acre feet of natural flow during the months of October, November, and April. Third Affidavit of David G. Wilde (Mar. 4, 1992) (Docket No. 297).

Wyoming has raised no issues of fact, either genuine or material, disputing that the use, requirements, and priority of the Inland Lakes' were not fully litigated and determined in the original proceedings as a part of Nebraska's apportionment. She has suffered a "complete failure of proof," and Master Olpin's recommendation of summary judgment in favor of Nebraska and the United States should be granted. *See Celotex*, 477 U.S. at 323.

B. The Court has Determined that the United States had Complied with Wyoming State Law in Obtaining Permits for the North Platte Project, Including the Inland Lakes

Wyoming contends that she "presented extensive documentary evidence before the Special Master showing that the United States never acquired a water storage right under state law for the Inland Lakes."[138] Wyoming's Brief on Exceptions at 52 (July 2, 1992). Wyoming's argument, however, ignores that the Court decided the question in 1945. The issue is *res judicata*.

In the original proceedings, the United States claimed that the "irrigation works" of the North Platte Project included the Inland Lakes. *See generally* Petition of Intervention of the United States of America (June 15, 1938), Appendix 1 to Nebraska's Post-Hearing Brief on Nebraska's, Wyoming's, Colorado's, and the United States'

---

[138]Special Master Olpin found that facts relating to a Wyoming state water right were immaterial to whether or not the Inland Lakes enjoy a priority of December 6, 1904, as he should have pursuant to Nebraska's petition. Second Interim Report at 32 (Apr. 9, 1992) (Docket No. 463). Aside from Master Olpin's recommended decision, however, the alleged lack of a state permit was also addressed by the Court.

Motions for Summary Judgment at 3-4 (¶ 6) (July 26, 1991) (Docket No. 375) ("Nebraska's Post-Hearing Brief"). The United States further asserted that it had fully and completely complied with § 8 of the Reclamation Act by adhering to the laws of both Wyoming and Nebraska in obtaining permits for all of the project's components. *Id.* at 4-5 (¶ 7).

In her answer to the United States' petition for intervention, Wyoming admitted that the Inland Lakes were part of the North Platte Project, but denied that the United States had complied with her laws with respect to that part of the North Platte Project which diverted water in Wyoming for use in Nebraska, *viz.*, the Interstate Canal, the Inland Lakes, the Ft. Laramie Canal, and the Tri-State Canal. Answer of Defendant State of Wyoming to Petition of Intervention of the United States of America (July 13, 1938), Appendix 2 to Nebraska's Post Hearing Brief at 6-7 (¶¶ 6 & 7) (July 26, 1991) (Docket No. 375). Accordingly, the issue of compliance with Wyoming state law in relation to all components of the North Platte Project was framed by the pleadings in the original proceedings with respect to the use of North Platte River waters in both states.

The Court addressed whether the United States had complied with state laws in initiating and constructing the North Platte and Kendrick projects. 325 U.S. at 611-16. The Court determined that "the water rights on which the North Platte Project and the Kendrick Project rest ***have been obtained in compliance with state law.***" *Id.* at 612 (emphasis added). The Court described at length the practices and procedures that were adhered to by the appropriators, specifically the United States, to comply with state law for perfecting their rights to divert and store water. *Id.* at 613. In several passages, the Court stated that the United States

had complied with Wyoming law in obtaining permits for the North Platte Project:

> Initiation of both projects was accompanied by filings made pursuant to § 8 in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the projects.
>
> * * *
>
> All of [the procedures for obtaining permits] make plain that those projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act.
>
> * * *
>
> We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction.

Id. at 613-15. The Court determined that the United States had fully and completely complied with Wyoming state law in obtaining all applicable permits for the North Platte Project, which includes the Inland Lakes. In sum, the point was argued, litigated, and conclusively determined in 1945.

C. Wyoming is Equitably Estopped from Attempting to Change the Historical Use and Operation of the Inland Lakes with a Priority of December 6, 1904

Although all of the essential elements of the Inland Lakes water rights were litigated and determined in the original proceedings, Master Olpin did not base his recommendation solely on the doctrine of *res judicata*. Second Interim Report at 34 (Apr. 9, 1992) (Docket No. 463). He recognized that the Court has announced its reluctance to apply the doctrine of *res judicata* or to import wholesale law-of-the-case principles into original actions. *Id. See Wyoming v.*

Oklahoma, ____ U.S. ____, 112 S. Ct. 789, 796 (1992); *Arizona v. California*, 460 U.S. 605, 618-20 (1983). Judiciously, Master Olpin also based his recommended ruling with respect to the Inland Lakes on "equitable concerns," *i.e.*, finality and repose, as the Court has done when not directly applying the doctrine of *res judicata*.

The Inland Lakes provide a direct example of the need to affirm historical acquiescence and administrative practice based on principles of finality and respose to avoid an inequitable result.[139] Since the early part of the twentieth century, the Inland Lakes have stored natural flow during the non-irrigation season for use during the irrigation season by the appropriators under the Interstate Canal. Since 1945, Nebraska, Wyoming, and the United States have mutually interpreted the Decree as apportioning to Nebraska a right to store 46,000 acre feet in the Inland Lakes in October, November, and April, with a priority of December 6, 1904. Despite 75 years of continuous operation, Wyoming did not attempt to undo the Inland Lakes' priority until *Christopulos* was filed in 1986. Instead, Wyoming affirmed the use and priority of the lakes before, during, and after the original proceedings. Nebraska irrigators have continuously relied on the use of the lakes since 1913.[140] Any change at this late date would be detrimental to the State of Nebraska.

Wyoming complains that Master Olpin's findings were founded on equitable considerations. She claims that because Master Olpin could not find a basis under state law or

---

[139]*Cf. Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983).

[140]The Inland Lakes are also integral components of the North Platte National Wildlife Refuge and certain Nebraska state parks and recreation areas. If the Inland Lakes' water supply were terminated, these federal and state wildlife refuges and parks would be stripped of their water supply.

the Decree for the Inland Lakes rights, he resorted to using "equitable concerns" to justify his recommendation. Wyoming's Brief on Exceptions at 56-57 (July 2, 1992). Master Olpin, however, did find a basis in the original proceedings for the Inland Lakes' priority and entitlement and that the right was expressly confirmed by Wyoming's conduct until 1986, creating equitable reliance in Nebraska which should not be disturbed. *See Washington v. Oregon*, 297 U.S. 517 (1936).

Wyoming accuses Master Olpin of drawing the "groundless inference" that the Inland Lakes have been operated with a priority of December 6, 1904, claiming that "a priority was never once exercised or administered for the Inland Lakes." Wyoming's Brief on Exceptions at 59-60 (July 2, 1992). Without blushing, she argues that other reservoirs — which happen to have junior priorities — have complaisantly "postponed" the exercise of their rights to allow the Inland Lakes to fill first. *Id.* at 60.

The Inland Lakes have always been operated and administered with a priority of December 6, 1904. If the Inland Lakes' priority had been a mystery, the parties would not have known to fill the lakes on an equal priority with Pathfinder Reservoir — December 6, 1904 — for the last eighty years. In short, actions speak louder than words.

Another aspect of the Inland Lakes historical operation that Wyoming excepts to is the temporary use of Glendo and Guernsey Reservoirs. *Id.* at 62-63. After reviewing the operation and administration of the Inland Lakes for the past eighty years, and after reviewing the record in the original proceedings, Master Olpin recommended that the Court find that the Inland Lakes right includes the right to use Glendo or Guernsey reservoirs for the temporary storage of the Inland Lakes natural flow during the non-irrigation season. Second Interim Report at 16, 32, 35, 109, 110 (Apr. 9, 1992) (Docket No. 463).

Shortly after Guernsey Reservoir was completed in 1928, it began temporarily storing Inland Lakes water during the non-irrigation season for later transfer to the lakes without objection from Wyoming. First Affidavit of David G. Wilde at 9 (¶ 25) (Aug. 22, 1988) (Docket No. 83). The original litigation came and went, and still Wyoming did not object to this conservation practice. The Decree was amended in 1953 with reference to the use of Guernsey or Glendo by the Inland Lakes, and Wyoming agreed to the construction of the reservoir and an amended Decree. Wyoming did not object to the use of these two reservoirs until July 2, 1992, when she lost her motion for summary judgment on the Inland Lakes before Master Olpin. The sixty-year history of the use of the Guernsey and Glendo reservoirs for temporary storage of natural flows for the Inland Lakes storage account and a review of the original proceedings support Master Olpin's recommendation. *See supra* p. 7-17.

The affidavits submitted by the United States and the State of Nebraska provided the Special Master with expert testimony on the administration and operation of Inland Lakes from Michael Jess, the Director of the Nebraska Department of Water Resources, and David G. Wilde, the North Platte Project Manger for the Bureau of Reclamation. Mr. Jess established that Special Master Doherty's recommended diversion of 46,000 acre feet had been incorporated into the North Platte Ownership and Natural Flow Accounting Procedures approved and signed by the Wyoming State Engineer as late as 1984. *See* [First] Affidavit of J. Michael Jess at 5 (¶ 4), Nebraska's Response to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 296). Mr. Wilde testified to the operation of the Inland Lakes, as well as the impacts that would result from the changes in operation and administration proposed by Wyoming. *See generally* First Affidavit of David G. Wilde at 6-14 (¶¶ 15-37), 38-51 (¶¶ 73-89) (Aug. 22, 1988) (Docket No. 83). Both were appropriate subjects of expert testimony. Master Olpin not only found Nebraska's and the United States' the evidence overwhelming in this

regard, but concluded further that Wyoming had produced no evidence.

POINT III

THE RECORD ESTABLISHES THAT THE COURT ADOPTED WYOMING'S EVIDENCE IN 1945 WHICH SHOWED THAT THE LARAMIE RIVER WOULD CONTINUE TO CONTRIBUTE TO THE COURT'S APPORTIONMENT OF 75% OF THE NATURAL FLOWS IN THE WHALEN/TRI-STATE REACH TO NEBRASKA

In Special Master Olpin's introductory comments regarding the Laramie River in his Second Interim Report, he noted that "[I] . . . find that a crisp result eludes me on the Laramie." Second Interim Report at 38 (Apr. 9, 1992) (Docket No. 463). Referring to Master Olpin's inability to find a "crisp result," Wyoming has argued that various passages which say that the Laramie apportionment was "in no way affected" by the North Platte Decree should provide the answer that eluded Master Olpin in declining to grant summary judgment.[141] A party moving for summary judg-

---

[141]Master Olpin alluded to Master Doherty's statement in 1944 that Doherty was left with "some uncertainty as to Nebraska's position respecting the Wheatland Project and the Laramie River in general. . . ." Doherty Report at 270-71. Master Doherty's concern related only to Nebraska's treatment of the Wheatland Project. Nebraska's position respecting flows below Wheatland was always the same, *i.e.*, that the flows should be apportioned to Nebraska, though Nebraska's evidence indicated that the Laramie inflows were less dependable than indicated by Wyoming's, Colorado's, and the United States' evidence. Doherty's uncertainty went to the fact that Nebraska had cross-examined Wyoming at length regarding the post-Laramie Decree development of Wheatland acreage, suggesting that the inchoate acreage — the late developing and undeveloped acreage — should not have been afforded Wheatland's 1883 priority. Nebraska never argued the point, however, because it contradicted her own position with respect to the Tri-State priority. The purpose of the cross-examination on Wheatland development was to

(cont'd.)

ment on issues on which its opponent bears the burden of persuasion at trial is compelled to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Wyoming failed to do so.

A. Laramie Inflows Were Included in the Apportionment

Master Olpin correctly described Wyoming's reliance on the passages indicating that the Laramie Decree was "undisturbed" as only "facially persuasive language. . . ."[142] Second Interim Report at 39 (Apr. 9, 1992) (Docket No. 463). In presenting her evidence of the dependability of the Laramie inflows in the original proceedings, Wyoming herself argued that the Laramie Decree "should not be disturbed," but that the remaining dependable inflows from the Laramie to the North Platte should be accounted in the manner and in the amount proposed by Wyoming's expert. Brief of State of Wyoming, Defendant at 142 (Sept. 5, 1942). Wyoming's position in 1945, including her evidence and the arguments of counsel, should render

---

counter Wyoming's attack on Tri-State's slow development, as Master Doherty concluded: "I gather what Nebraska is really contending for is consistency of treatment as between Wheatland and Tri-State. . . ." Doherty Report at 271; *see generally id.* at 270-271, Record at 1607-09; Brief of State of Nebraska, Complainant at 152-175 (Jan., 1945).

[142]Wyoming also relies on the decree in *Wyoming v. Colorado*, 353 U.S. 953 (1957), to which Wyoming and Colorado stipulated, for the proposition that she has an absolute right to *all* of the Laramie River after Colorado's diversions. Wyoming's Brief on Exceptions at 23, 66-67 (July 2, 1992). Master Olpin's response to the argument is the correct one:

> Even if this 1957 Decree were relevant to interpreting the 1945 and 1922 Decrees, my conclusions would not change. Whatever rights Nebraska had to Laramie contributions prior to the 1957 Decree would not have been affected by that new Decree to which she was not a party.

Second Interim Report at 39 n.58 (Apr. 9, 1992) (Docket No. 463).

fanciful Wyoming's arguments to the contrary today.[143] It is also of no small importance that Master Doherty and the Court found the evidence of available flows as presented by Wyoming to be the most credible.

Wyoming also sees inordinate significance in the Court's comparison in 1945 of the South Platte River and the Laramie River:

> The waters of the South Platte and the Laramie were previously apportioned — the former between Colorado and Nebraska by compact (44 Stat. 195), the latter between Colorado and Wyoming by decree. *Wyoming v. Colorado*,. . . . Those apportionments are in no way affected by the decree in this case.

Wyoming's Brief on Exceptions at 65 (July 2, 1992) (citing 325 U.S. at 592 n.1). These "plain words," according to Wyoming, should have produced a definite answer for Master Olpin and for the Court.

Wyoming's argument is another example of her reluctance to examine the record to comprehend the Court's understanding of the evidence providing for the North Platte apportionment in 1945. The purpose of comparing the South Platte Compact and the Laramie Decree was to point out that each party wanted to preserve the existing allocation of flows embodied in those documents. While Wyoming did not want the acreage allocated in the Laramie Decree between Colorado and Wyoming to be challenged, Wyoming did argue that flows were available from the Laramie below Wheatland to meet mainstem needs of Wyo-

---

[143]Basin makes the same half-learned argument, adding some florid language. Basin's Brief on Exceptions at 20-26 (July 1, 1992). Recognizing the weakness of her position, Wyoming made three separate estoppel arguments in her first motion for summary judgment on the assumption that Nebraska is entitled to the Laramie waters below Wheatland. *See* Wyoming's First Motion for Summary Judgment at 82-92 (Sept. 11, 1987) (Docket No. 23). Special Master Olpin saw through each of the estoppel arguments.

ming and Nebraska, rather than satisfying those needs with natural flow conveyed from upstream of Whalen. Accordingly, what the Court's language shows is not an exclusion of flows from the Laramie, but a reflection that a portion of the flows was previously apportioned between Colorado and Wyoming which would not be disturbed by the Court.

Wyoming also argues that there was no ambiguity "in Special Master Doherty's exclusion of the Laramie River from his recommended apportionment." *Id.* at 65. Doherty's exclusion, however, was never intended to be a categorical exclusion. Prefacing his recommended decree, he said:

> With respect to the water of the North Platte River and its tributaries, except the Laramie River, I recommend the entry of a decree. . . .

Doherty Report at 177. In his Second Interim Report, Special Master Olpin noted that the Court "did not include this exclusionary language." Second Interim Report at 49 (Apr. 9, 1992) (Docket No. 463). He further stated that he was "not inclined to inflate the significance of this omission, [but that] it may be interpreted as a reluctance to accept that wholesale exclusion."[144] *Id.; see generally* Nebraska's Brief on Exceptions at 18-32 (July 1, 1992). The Court in 1945 was also sensitive to the over-broad "exclusion" because of its amendment of Doherty's proposed ¶ 6 (¶ V) to expressly add the inflows of Spring Creek to all of the other accretions in the Whalen/Tri-State reach reflected in Ta-

---

[144]Acknowledged as the pivotal section of the river, the Whalen/Tri-State reach was treated differently from the remainder of the basin. The reason that Master Doherty prefaced his recommended decree with an "exclusion" of the Laramie was simply to indicate that the Laramie had been treated differently. It was not examined as part of the drainage basin in the same way the other tributaries were because the drainage basin down to Wheatland had been treated in *Wyoming v. Colorado*. While the Laramie is the major tributary in the Whalen/Tri-State section, it was treated no differently than the other tributaries in the reach insofar as its accretions to the North Platte were concerned.

ble III. With the Court's express inclusion of the inadvertently omitted Spring Creek flows in the apportionment in ¶ V, it could not have escaped the Court's understanding that the Laramie inflows had already been included in the fund of water the Court was apportioning 75%/25% in ¶ V of the Decree. *See id.* at 27-32.

B. The Allegation that the Court "Failed" to Limit or Enjoin Future Uses of the Laramie is Insignificant

Wyoming argues that because the Decree contains no injunction preventing Wyoming from dewatering the Laramie the conclusion must follow that Wyoming may proceed to dewater it. The purpose of the argument is to prevent Nebraska from pursuing her petition because of the need to "modify" the Decree, *i.e.*, to manufacture an allegedly needed injunction against dewatering before Nebraska could claim something to enforce. Substantively, the argument is not only baseless, but counterproductive.

Pursuing her enforcement/modification argument, Wyoming urges that no injunction appears in the Decree preventing Wyoming from dewatering the Laramie at its mouth; therefore, Nebraska has no provision in the Decree to enforce and Wyoming is thus free to dewater the river.[145] If Wyoming's argument is cogent with respect to the Laramie accretions, it is equally cogent with respect to all of the other accretions in the Whalen/Tri-State reach, the depletion of which was also not enjoined. It follows that the only "accretions" in Whalen/Tri-State reach that Master Doherty and the Court could have apportioned, absent a "modification" of the Decree, was the precipitation that falls on the streambed of the mainstem of the North Platte River between May 1 and September 30. Arguably, the

---

[145]Stated directly, Wyoming is arguing that she may clip Column 2 from Table III contained in Doherty's report and adopted by the Court, *i.e.*, delete the Laramie accretions to the apportionment fund in the Whalen/Tri-State reach.

Court's express addition of 2,855 acre feet would still be viable, though if the Whalen/Tri-State accretions in Table III had never been intended to have been apportioned, the Court would have had nothing to have added the 2,855 acre feet to.

C. That Master Doherty and the Court Rejected Wyoming's Method of Apportionment Does Not Reflect a Rejection of the Facts Found

Wyoming has argued that her evidence of the continuing contribution of the Laramie inflows to the North Platte was put in the record only in relation to her mass allocation theory. Wyoming's Second Motion for Summary Judgment at 19-20 (Feb. 22, 1991) (Docket No. 294); Second Interim Report at 54-55 (Apr. 9, 1992) (Docket No. 463). This evidence, according to Wyoming, had no independent, technical or hydrologic credibility once removed from the context of legal argument. Accordingly, when Master Doherty rejected her mass allocation theory, her evidence must have died on the vine.[146]

There are two problems with Wyoming's modern-day argument. First, Wyoming cannot be heard in 1992 to assert that Master Doherty's findings of fact as to the dependable, apportionable supply of natural flow were not supported by substantial evidence and therefore should be set aside or ignored. Those findings were made in the 1945 proceeding and Wyoming did not then take exception. Findings of the Special Master once adopted are considered findings of the Court and will not be set aside unless clearly erroneous — certainly not at this late date. Wyoming cannot be heard in 1992 to impeach her own evidence.

---

[146]Master Doherty and the Court rejected not only Wyoming's apportionment theory, but Nebraska's and the United States' theories as well, along with Colorado's motion to dismiss. Applying Wyoming's logic, all of the hydrologic evidence was rendered nugatory.

Wyoming has also tried to explain that her mass allocation proposal "would have had a fixed obligation to Nebraska but no fixed source from which she had to fill that obligation — the overall supply in the basin would be a single 'fund.' " *See* Second Interim Report at 54 (Apr. 9, 1992) (Docket No. 463). According to Wyoming, this would have left her free "to completely dry up the Laramie but, if she did so, she would have to meet the delivery obligation [that would have obtained had the mass allocation proposal prevailed] at the state line by restricting uses of the North Platte above Whalen." Wyoming's Second Motion for Summary Judgment at 20 (Feb. 22, 1991) (Docket No. 294).

Wyoming fails to mention that Master Doherty debunked this argument in 1944. Describing Wyoming's mass allocation plan, Doherty stated:

> There was a suggestion that shortages be prorated. How this could be done is not clear. The limitation and distribution being on a seasonal basis, shortages could be determined only at each season's end — too late for proration.

Doherty Report at 116-17. Master Doherty also concluded that Wyoming's plan for a single "fund" was "predicated on the theory that there is sufficient water for all, and hence no necessity for segregation." *Id.* Doherty rejected the view that the water supply was adequate based on Wyoming's own evidence. *See* Wyoming Exhibit Nos. 148 and 173, Nebraska's Appendices at A-334, A-207-20 (Mar. 1, 1991) (Docket No. 296); *see also* Engineers' Stipulation. The Court held that "the inadequacy of the supply is too clear to permit adoption of Wyoming's formula." 325 U.S. at 642.

D. Special Master Olpin's Recommended Remedies Regarding the Laramie Inflows are Appropriate and Correct

After his analysis of the original proceedings, Special Master Olpin determined that Nebraska was given an enti-

tlement to the Laramie River by Master Doherty and the Court in 1945. Second Interim Report at 59 (Apr. 9, 1992) (Docket No. 463). He concluded that the "continued contribution [of the inflows] to the North Platte was assumed," and that "that assumption has governed the administration of the North Platte Decree from its entry until the onset of this litigation." *Id.* at 60. As a consequence, Master Olpin recommends the amendment of ¶ XIII to add a subsection explicitly recognizing the results reached by Master Doherty and the Court in 1945. Paragraph XIII(g) would read:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief.... Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to the following:
>
> (g) The question of the effect upon the rights of Nebraska or the United States of future water rights administration by Wyoming of the Laramie River that interferes with or threatens to interfere with the flow releases and other obligations of the parties to that certain Agreement of Settlement and Compromise dated December 4, 1978, in *Nebraska v. Basin Electric Cooperative*, No. 78-1775 (D. Neb. 1978).

Id. at 110; 325 U.S. at 671. Master Olpin also recommends that he proceed pursuant to Nebraska's petition to hold a status conference to determine whether "the operation of Corn Creek [will] disturb the delicate balance of the North Platte River and thereby cause injury to Nebraska's apportionment under the Decree." Second Interim Report at 71 (Apr. 9, 1992) (Docket No. 463).

1. Paragraph XIII(g)

Characterizing the proposed remedy as an invitation "to determine whether an apportionment or reapportionment of the Laramie River is warranted as a matter of equity," Wyoming argues that "the Settlement Agreement [resolving the 1978 Grayrocks litigation] does not supersede Wyoming law." Wyoming's Brief on Exceptions at 23, 71 (July 2, 1992). Wyoming's argument, however, misses the import of Master Olpin's recommendation.

In concluding that Nebraska has an entitlement to the Laramie inflows and that the recognition of that 'assumed' right has been made clear by the parties' administration of the Decree since 1945, Master Olpin correctly construed the original proceedings as having provided Nebraska with 75% of **all** of the Laramie inflows to the North Platte. Recognizing that Nebraska agrees that "Grayrocks will not harm her if operated in accordance with the 1978 Settlement Agreement," and that "Basin agrees with Wyoming that Wyoming has so far not interfered in the operation [of Grayrocks, including prescribed releases] pursuant to the 1978 Settlement Agreement," Master Olpin's recommendation addressed Nebraska's right to continued reliance of the Laramie inflows to the extent the Settlement Agreement does so. Second Interim Report at 66 (Apr. 9, 1992) (Docket No. 463). This is not a new apportionment or reapportionment, but rather an informed and smart way of resolving the matter.

2. Corn Creek Status Conference

Wyoming describes Master Olpin's proposal to proceed with a status conference on Corn Creek's depletions in terms of the untethered theory that the conference is "designed to consider whether in equity an apportionment or reapportionment of the Laramie is warranted." Wyoming's Brief on Exceptions at 73 (July 2, 1992). Nebraska's petition alleges threatened depletions of both the Laramie inflows and the mainstem North Platte if the Corn Creek

Project were to be built. The Project would deplete Laramie and North Platte flows far beyond the amount mentioned in the Settlement Agreement.[147]

In conclusion, Nebraska disagrees with Master Olpin regarding the Laramie River only to the extent that he did not recognize more than the 'assumption' of a continuing right to the Laramie inflows. Master Olpin, however, viewed Nebraska's earlier arguments as seeking an "implicit" apportionment of the Laramie inflows. Accordingly, he proceeded with caution. Nebraska believes that the record demonstrates the express apportionment of the Laramie inflows beyond doubt. We therefore urge that the Court adopt Special Master Olpin's recommendations with respect to the Laramie River, with the further recognition that the Laramie inflows were directly apportioned in ¶ V of the Decree.

POINT IV

THE RECORD DEMONSTRATES THAT GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING INJURY TO NEBRASKA'S APPORTIONMENT RESULTING FROM THE PROPOSED CONSTRUCTION OF THE DEER CREEK PROJECT

Wyoming argues that she should summarily be allowed to build a multi-purpose storage project on Deer Creek, a tributary to the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, because: 1) The affida-

---

[147]Wyoming tried previously to eliminate the effects of the Corn Creek Project on the theory that it would likely never be developed and thus posed no imminent threat. When the principal proponent of the Project, former Governor Stanley Hathaway, however, caught up with his "old friend," Counsel of Record for Wyoming, the Corn Creek Project came to life again. *See* Second Interim Report at 70 (Apr. 9, 1992) (Docket No. 463).

vits incorporated in her motion for summary judgment and in Nebraska's responses reveal that Nebraska has failed to set forth "clear and convincing evidence [of] a serious and imminent threat to [her] apportionment for uses diverting at or above Tri-State Dam;"[148] 2) ¶ X "exempts" municipal uses from review under the Decree; and 3) certain allegedly "undisputed facts" warrant judgment without trial. *See generally* Wyoming's Brief on Exceptions at 38-50 (July 2, 1992). Wyoming has distorted the little evidence she discusses and has failed to discuss the evidence presented in the counter-affidavits which demonstrates the existence of genuine issues of material fact, *i.e.*, the evidence which Special Master Olpin has evaluated.

A. Wyoming's First Motion for Summary Judgment

After stating in her first motion for summary judgment in 1987 that the storage of natural flows in the proposed Deer Creek Reservoir would "*unlikely* . . . conflict with the water supply for the Nebraska canals specified in the Decree," Wyoming argued:

> The Decree places specific restrictions on the diversion, storage and use of water in each of the three states. None of those restrictions applies to Wyoming's use of water from the tributaries entering the North Platte River below Pathfinder Reservoir. Wyoming's use of water from those tributaries cannot, as a matter of law, violate the Decree.

Wyoming's First Motion for Summary Judgment at 77, 92 (Sept. 11, 1987) (Docket No. 23) (emphasis added).

---

[148]The Court should note Wyoming's limitation of potential injury to one area, *viz.*, the 43-mile Whalen/Tri-State reach. Wyoming has not discussed the proven injury to Nebraska's storage interests above Whalen, to the apportionment for the use by the Inland Lakes below Tri-State, or to the potential impact on return flows which formed a basis of the apportionment. *See supra* p. 23-29; *infra* p. 90-95.

Despite the specific provision which provides that the effect of tributary storage should be examined if an imminent threat is raised, Wyoming argues that Nebraska may not avail herself of ¶ XIII(c) because the Court **must first** reach a conclusion **before** a ¶ XIII(c) examination. Catch-22.

Following this argument, Wyoming stated that "[t]here is no dispute that . . . Deer Creek Reservoir will result in certain depletions to the flow of the North Platte River," referring to ¶ 3(c) of her answer. *Id.* at 90. Wyoming further stated that "[t]he precise amount and timing of depletions [caused by the Project]" are not stated, but that Nebraska had alleged that they could be as high as 25,000 acre feet annually. *Id.* at 90-91. Wyoming then argued that:

> Even if that fact issue is still in dispute, it is immaterial to the question of whether Deer Creek Reservoir violates the Decree . . .
>
> * * *
>
> Wyoming has a right under the Decree to construct Deer Creek Reservoir regardless of the precise amount and timing of its depletions to the North Platte. . . ."[149]

Id. at 91.

---

[149]Wyoming also argued in 1987 that the Decree is the source of its unlimited right:

> The Decree, in effect, apportioned to Colorado and Wyoming the right to use water from the North Platte and its tributaries for future ordinary and usual domestic uses without restriction.

Wyoming's First Motion for Summary Judgment at 96 (Sept. 11, 1987) (Docket No. 23). In 1992, Wyoming argues the opposite, *i.e.*, the "Decree is not the source of, but only a limitation on, Wyoming's authority to use and permit the use of water of the North Platte River or its tributaries. . . ." Wyoming's Brief on Exceptions at 19 (July 2, 1992).

The principal problem with Wyoming's argument the first time around was that the Deer Creek Project is not a municipal project. The FEIS prepared in relation to the § 404 permit states that the non-municipal uses of Deer Creek would include "irrigation and industrial water supply, flood control, fish and wildlife resource enhancement and recreation purposes." *See* First Affidavit of Ann S. Bleed at 18 (¶ 6) (Aug. 22, 1988) (Docket No. 81).

The second factual problem with Wyoming's first motion arose out of the depletions that the Deer Creek Project would cause not just to the canals diverting in the Whalen/Tri-State reach, which is the only area of potential injury that Wyoming has related to the Court, but to the injury above Whalen and to the Inland Lakes. Nebraska's evidence showed that Deer Creek Reservoir "frequently [would store] water despite [more senior] Pathfinder and Kendrick ownerships not being filled." First Affidavit of H. Lee Becker at 22 (¶ 4) (Aug. 22, 1988) (Docket No. 81). Mr. Becker also testified that the operation of Deer Creek Reservoir according to Wyoming's own model would deplete the end-of-year or carry over storage for the same two federal reservoirs serving both Nebraska and Wyoming lands. *Cf.* 325 U.S. 666 (¶ III). For the period 1951-1983, Pathfinder storage was reduced an average of 9,000 acre feet per year and Kendrick storage was reduced an average of 46,000 acre feet per year. During a period of less precipitation, 1965-1983, Pathfinder was reduced by an average of 9,400 acre feet and Kendrick by 77,000 acre feet annually.

A witness for the United States, David G. Wilde, who was the Project Manager for the North Platte River Project Office near Casper, Wyoming, testified at length in regard to the injury that would be caused by the construction and operation of the Deer Creek Project to the existing federal projects serving lands in both Nebraska and Wyoming. *See* First Affidavit of David G. Wilde at 33-38 (¶¶ 64-72), 42-51, (¶¶ 79-89) (Aug. 22, 1988) (Docket No. 83). Mr. Wilde concluded that the federal "projects [would] be

substantially impacted during a period of extended drought" if Deer Creek Reservoir were built and not administered for all senior downstream water rights. *Id.* at 51. If the proposed project were administered as junior to the storage rights of Glendo, Guernsey, and the Inland Lakes, the impacts would still be substantial, but "minimized." *Id.* Wyoming discusses none of this evidence in maintaining that Nebraska has not presented sufficient evidence to warrant a trial. Wyoming's Brief on Exceptions at 38-43 (July 2, 1992).

B. Wyoming's Second Motion for Summary Judgment

In her second motion for summary judgment, Wyoming tried to circumvent the genuine issues of material fact by ignoring the potential depletions she admitted in her first motion for summary judgment by arguing more strenuously that the evaluation of potential injury must be limited to the Whalen/Tri-State reach. On her exceptions to Master Olpin's report, Wyoming takes the same tack:

> In support of her second motion for summary judgment, Wyoming pointed out that none of the affidavits by Nebraska's and the United States' experts had demonstrated any material injury by Deer Creek Reservoir to Nebraska's apportionment under the Decree — to the supply for Nebraska lands irrigated by diversions between Whalen and Tri-State Dam.

Id. at 40. Wyoming then emphasizes that in Mr. Becker's affidavit of April 25, 1991, it was stated that the proposed project Deer Creek "*could* limit diversions in the Whalen to Tri-State reach in a series of dry years." *Id.* at 41 (emphasis Wyoming's). Wyoming tries to persuade the Court that Master Olpin relied solely on this statement to find sufficient evidence to conclude that Nebraska met her burden of

proof.[150] Because of the use of the word "could," Wyoming characterizes Mr. Becker's testimony as "mere speculation of some possible impact on the diversions in the Guernsey to Tri-State section." *Id.* at 42.

Letting out more slack, Wyoming mixes and matches affidavit testimony relating to two different computer programs. Special Master Olpin was not fooled by Wyoming's attempt to ignore significant issues of material fact presented by the affidavits relating to injury caused by the proposed Deer Creek Project, including injury in the Whalen/Tri-State reach. Second Interim Report at 74-77 (Apr. 9, 1992) (Docket No. 463). He recognized that two separate computer programs had been discussed, each showing significant effects in different geographical areas. *See supra* p. 20-22. The NPRSM was Wyoming's computer program designed to obtain a § 404 permit for the proposed Deer Creek Project by minimizing depletions on flows below the Tri-State Dam, thereby avoiding an adverse decision under the ESA. Fourth Affidavit of H. Lee Becker at 8-9, (¶ 2) (Apr. 25, 1991) (Docket No. 335)

Realizing the need to show the least amount of depletions in flows past Tri-State Dam in order to meet FWS criteria, Wyoming backed into its computer program by using simulated output as an input parameter. In order to reduce depletions below Tri-State Dam to avoid a jeopardy opinion under the ESA, Wyoming's program pushed the significant depletions of Deer Creek upstream to the federal storage reservoirs. Under the NPRSM, the end-of-year carryover storage for both the Pathfinder and Kendrick ownerships

---

[150]Wyoming fails to bring to the Court's attention Mr. Becker's conclusion during the debate over Wyoming's first motion for summary judgment: "[T]he operation of Deer Creek Reservoir *will* reduce the end of year (carryover) storage for both the Pathfinder and Kendrick ownerships. . . ." First Affidavit of H. Lee Becker at 22 (¶¶ 5 & 6) (Aug. 22, 1988) (Docket No. 81) (emphasis added). Mr. Becker's testimony was fully supported by Mr. Wilde's testimony.

were reduced by as much as 9,400 acre feet and 77,000 acre feet annually. First Affidavit of H. Lee Becker at 22 (¶ 5) (Aug. 22, 1988) (Docket No. 81); First Affidavit of David G. Wilde at 43-46 (Aug. 22, 1988) (Docket No. 83). In short, the NPRSM reduced depletions at and below Tri-State Dam at the expense of significant depletions on upstream federal storage reservoirs. Neither the Corps of Engineers nor the FWS was concerned with Deer Creek's effects on the federal storage reservoirs. Therefore, the large depletions in upstream reservoir storage were of no significance to Wyoming in obtaining its § 404 permit. In the administrative forum, Wyoming deliberately diminished the impacts measured at Tri-State Dam, while ignoring depletions on upstream federal storage reservoirs.

The Deer Creek issue is now in a judicial forum in which the Court must assess how the Deer Creek Project would affect the interests of Nebraska and the United States. In conjunction with the present litigation -- and quite aside from the contrived results of the NPRSM — Nebraska developed a computer program which simulates the actual operation and administration of the North Platte River and the facilities located thereon. Third Affidavit of H. Lee Becker at 40-47, (¶¶ 1-10) (Mar. 1, 1991) (Docket No. 296); *see also* Fourth Affidavit of H. Lee Becker at 9 (¶ 3) (Apr. 25, 1991) (Docket No. 335). The Deer Creek Project was evaluated using this simulation model. The resulting depletions on the upstream federal storage reservoirs are much less, while there are much greater impacts on flows below the Tri-State Dam. *Id.*

The NPRSM is the computer program of record upon which the proposed Deer Creek Project must be operated. Wyoming has obtained state and federal permits based

upon the representations produced by the program, and the Deer Creek Project must be evaluated accordingly.[151] Nebraska's program relating to the proposed Deer Creek Project has utility in assessing the NPRSM and the actual operation of the proposed project without contrived parameters. Through the NPRSM, Wyoming deliberately chose to transfer the depletions of the proposed Deer Creek Project to the federal reservoirs to avoid jeopardizing the critical habitat of threatened and endangered species. Wyoming cannot now advocate the use of Nebraska's computer program to counter Nebraska's claim of injury to upstream storage. Special Master Olpin concluded, as did Mr. Becker, "that 'the impacts can be transferred from one location to another, but they cannot be obliterated.' " Second Interim Report at 77 (Apr. 9, 1992) (Docket No. 463) (quoting Mr. Becker's affidavit of April 25, 1991).

Even confining injury to the Whalen/Tri-State reach, the affidavits of H. Lee Becker and David G. Wilde present genuine issues of material fact regarding significant depletions caused by the proposed Deer Creek Reservoir. Special Master Olpin made a determination in this regard with respect to Wyoming's first motion for summary judgment. Nothing has changed the presence of the issue for trial. Master Olpin concluded that Nebraska met her burden of demonstrating genuine issues of material fact simply on the

---

[151]In issuing the § 404 permit, the United States was aware that Wyoming could attempt to change Deer Creek's operation once the permit was issued. In response, the United States stated in the Record of Decision that "should the project be operated in a manner different than that provided by the Applicant and described in the EIS, the impacts as described in the EIS would need to be reevaluated." Record of Decision, Deer Creek Dam and Reservoir at 20. The Record of Decision states that the U.S. Army Corps of Engineers would have the discretion to reevaluate the project at any time. To avoid reevaluation, the Project must be operated pursuant to the NPRSM. If there were a reevaluation under § 404 due to increased depletions at and below Tri-State Dam, a jeopardy opinion would likely be rendered.

basis of the depletions to carryover storage in the federal projects, "even [on] the most stringent civil standard. . . . in contradicting the moving party's factual claims." *Id.* at 13.

C. Paragraphs X and XIII(c)

Nebraska has explained her view of Master Olpin's misreading of ¶¶ X and XIII(c) in her Brief in Support of Exceptions. *See* Nebraska's Brief on Exceptions at 32-54 (July 1, 1992). That explanation will not be repeated here. In her exceptions to the Special Master, however, Wyoming notes that ¶ X states that "[t]his decree shall not affect or restrict" municipal uses, arguing:

> 'This Decree' plainly means the whole Decree, including Paragraph XIII(c). Therefore, an action under the retained jurisdiction of Paragraph XIII(c) to consider the effect of the construction of storage capacity on tributaries between Pathfinder and Guernsey Reservoirs cannot affect or restrict municipal uses.

Wyoming's Brief on Exceptions at 44 (July 2, 1992).

In making the argument, however, Wyoming creates anomalies she cannot explain away. First, if "this decree" means the whole Decree, ¶ X must supercede ¶ XII(a), which provides that "[t]his decree shall not affect . . . [t]he relative rights of water users within any one of the States," *i.e.*, priority of appropriation. It follows that the Deer Creek Project could not be built because its municipal purpose is to overcome priority of appropriation as between the City of Casper and downstream senior irrigators and industrial users.

Second, if Wyoming is correct that "[t]his decree plainly means the whole Decree," ¶ X would create not only an exemption from ¶ XIII(c), but also ¶ XIII(f). Accordingly, the Decree could never be modified under the Court's retention of jurisdiction no matter what municipal depletions would result from changed conditions. In other words, a city the size of Denver could develop anywhere in

the North Platte system in Colorado or Wyoming notwithstanding the obvious subversion of the irrigation apportionment that would result.[152]

Finally, one of Wyoming's principal theses which ostensibly explains what "led [Master Olpin] to recommend the wrong result," is that the Decree does not grant any affirmative rights, but simply places limits on Wyoming's authority to use North Platte waters. *Id.* at 19. However, this is the opposite of Wyoming's assertion that ¶ X cuts through ¶ XII(a), ¶ XIII(c), ¶ XIII(f) and thus affirmatively grants municipalities rights that supersede Wyoming law.

D. Wyoming's "Undisputed" Facts

Wyoming summarizes her arguments regarding Deer Creek by describing two undisputed facts which "establish that the proposed municipal uses of Deer Creek Reservoir are ordinary and within the plain meaning of Paragraph X and no trial is necessary."[153] *Id.* at 47. These alleged undisputed facts are:

> 1) The proposed Deer Creek Reservoir will supply water to the City of Casper, Wyoming and other smaller municipalities along the North Platte River in Wyoming. [Citations omitted].

---

[152]In the original litigation, the parties fought over less than 3,000 acre feet of water. 325 U.S. at 648. It defies common sense to argue that the parties agreed to give municipal uses a *carte blanche* to gut the irrigation season apportionment, including the construction of a new 66,000 acre feet reservoir which would impound twenty-two times the amount of the disputed Spring Creek flows.

[153]This plain meaning is the one which inverts the subject and object of the sentence and simultaneously changes the predicate from the negative to the positive.

> 2) The types of uses supplied by Casper and the other Wyoming municipalities to be served by Deer Creek are like those supplied by Nebraska municipalities in the North Platte Basin. [Citations omitted].

Id. at 46-47. Again, however, with respect to the former "fact," Wyoming neglects to explain that the Deer Creek Project was planned and permitted as a multi-purpose project which must be operated as represented to the Corps of Engineers in the § 404 permitting process and according to her state permits. *See supra* p. 18-23. With respect to the later "fact," Wyoming seeks to avoid an evaluation of the project under ¶ XIII(c).

Quite aside from the genuine issues of material fact relating to the proposed project's adverse effects on Nebraska's apportionment from the upstream reservoirs to the Inland Lakes, there are genuine issues of disputed fact regarding the project's relation, if any, to ¶ X. The assertion that "Nebraska concedes that ordinary and usual municipal use is within Wyoming's apportionment under the Decree," was pulled out of the air in relation to these exceptions. Wyoming's Brief on Exceptions at 44 (July 2, 1992). Nebraska has never made such a concession.[154] Ne-

---

[154]Wyoming is referring to an argument made by Nebraska when Nebraska was laboring under the illusion that ¶ X could be construed as creating "a municipal exemption," *i.e.*, an affirmative grant of municipal water rights, based on a misreading of the plain language of the sentence. Nebraska had argued that if there were a municipal exemption, giving Casper and other municipalities rights above Wyoming law, ¶ X would immunize Casper from calls by senior irrigators and industrial uses intrastate. Accordingly, under *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), which stands for the proposition that an apportionment is paramount to state law, the Deer Creek Project would have been absolutely unnecessary because Casper could continue diverting out-of-priority. The earlier argument, however, has no application to Nebraska's understanding of ¶ X as explained to Master Olpin and to the Court.

braska firmly believes that the plain reading of ¶ X, which provides that "[t]his decree shall not affect or restrict" municipal uses, must not invert the subject and object of the sentence and simultaneously change its predicate from the negative to the positive.

Finally, Wyoming contends that Master Olpin erred by indicating that trial should be held on issues of fact such as the "economic feasibility of Deer Creek Reservoir, the efficiency of Deer Creek Reservoir and policy decisions about alternatives to Deer Creek Reservoir. . . ." *Id.* at 21. Wyoming argues that these issues are "inappropriate for judicial resolution." *Id.*

Special Master Olpin has no intention of holding trial on Wyoming's "policy decisions," which he has told Wyoming before. Second Interim Report at 85 (Apr. 9, 1992) (Docket No. 463); *see also* Transcript of Proceedings (June 7-8, 1991). Because the proposed Deer Creek Project, however, would be located on a tributary entering the North Platte River between Guernsey Reservoir and Whalen Dam, the project must be considered pursuant to ¶ XIII(c). The Court was aware that new tributary storage in this reach could upset apportioned water uses, and the Court expressly retained jurisdiction to examine the effects of proposed projects.

Also, water supply alternatives vary in efficiency. Some projects "give more water bang for the buck." Transcript of Proceedings (June 7-8, 1991). If an alternative can be pursued that is less detrimental to a contiguous state's apportionment, that alternative should be considered under *Colorado v. New Mexico*, 459 U.S. 176 (1982).

POINT V

NEBRASKA IS ENTITLED TO 75% OF THE NATURAL FLOW IN THE WHALEN TO TRI-STATE REACH WITH THE RIGHT TO ADMINISTER HER EQUITABLE APPORTIONMENT AMONG HER CANALS ACCORDING TO NEBRASKA STATE LAW

In her brief in support of her exceptions, Wyoming has explained that:

> [Her] first motion for summary judgment sought to simplify the case and narrow the issues for trial by confirmation that Nebraska's apportionment under the Decree is 'limited to the water supplies for Nebraska lands irrigated by the canals identified in the Decree that divert at or upstream of Tri-State Dam. . . .'

Wyoming's Brief on Exceptions at 11-12 (July 2, 1992). During discovery following Master Olpin's denial of Wyoming's first motion, Wyoming maintained that:

> It became apparent [to her] that Nebraska was claiming under her present petition that the Decree entitles her to the continuation of historical return flows and historical direct flow past Tri-State Dam *even though it is undisputed that those flows were surplus to the requirements of the canals in the Guernsey to Tri-State section.*

Id. at 12 (emphasis added). Wyoming explained that as a consequence:

> [She] then sought summary judgment on Nebraska's claims that Wyoming is violating or threatening to violate the Decree 'to the extent they are based on (1) alleged reduction of direct flow passing Tri-State or (2) alleged reduction of return flow from diversions in excess of the water requirements of the North Platte Project canals and the Nebraska State Line Canals.'

Id. at 13. Wyoming then took "exception to the Special Master's refusal . . . to recommend summary judgment de-

nying Nebraska's claims of violation of the Decree *to the extent such claims are based on allegations of injury to uses diverting below Tri-State Dam.*" *Id.* at 14 (emphasis added).

Ostensibly, three issues were raised before Master Olpin: 1) whether the case should be "simplified" and the issues "narrowed;" 2) whether Nebraska is claiming or "demanding" that flows pass Tri-State Dam; and 3) whether the Decree places limitations or caps or individual Nebraska canals diverting at or above Tri-State.[155] With respect to the first issue, Wyoming has not explained to the Court the ulterior reality of her motion. The second issue is simply not an issue. Special Master Olpin's recommended granting of summary judgment on the third issue is supported unequivocally by three aspects of the original proceedings: 1) Special Master Doherty's determination that his findings regarding "requirements" were not to be construed as limitations on individual canals; 2) the equitable apportionment adopted by the Court as set forth in ¶ V of the Decree granted to each state the right to allocate her share of the natural flow; and 3) the fact that ¶ IV was a restriction on upstream reservoir storage, not canal diversions.

A. Wyoming's Alleged Effort to Simplify the Case is an Attempt to Retain Water in Upstream Storage for Use in Wyoming

In the Court's first decision in *Colorado v. New Mexico*, 459 U.S. 176 (1982), it was stated that "wasteful or inefficient uses will not be protected," suggesting strongly that the

---

[155]Nebraska and Wyoming filed cross-motions for summary judgment on whether the Decree placed absolute ceilings on diversions and irrigated acreages for individual Nebraska canals in the Whalen/Tri-State reach. Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at 5-7, 61-68, 115-41 (Mar. 1, 1991) (Docket No. 296); Wyoming's Second Motion for Summary Judgment at 3-5 (Docket No. 294). Master Olpin granted Nebraska's motion in this regard.

Court might impose stricter standards of conservation in interstate water disputes than might be imposed under state law. *Id.* at 184. The Court also stated that "equitable apportionment [has been invoked] not only to require the reasonably efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Id.* at 185.

As noted above, the Tri-State issues arose out of Wyoming's counterclaim, which focuses on the concept that "beneficial use is 'the basis, the measure and the limit of the right to use water.' " Wyoming's Brief on Exceptions at 37 (July 2, 1992). Pursuing this principle in terms of modern-day farm management and irrigation practices, Wyoming is in the process of assembling evidence to try to prove that Nebraska irrigation districts — the Pathfinder Irrigation District, for example, — are inefficient and wasteful.[156] Pursuant to *Colorado v. New Mexico*, Wyoming's object is to show that water diverted above Tri-State need not be diverted and thus can be stored in Wyoming reservoirs because the total diversions are allegedly "in excess of the water requirements. . . ." *Id.* at 13.

Wyoming, however, faces an unmanageable legal problem in the form of a predicate to the equitable apportionment in *Nebraska v. Wyoming*. The denial of a direct apportionment to the lands below Tri-State Dam and west of Bridgeport was predicated on their continued use of return flows during the irrigation season which constituted the available "local supplies." *See supra* p. 23-29. Increasing "efficiencies" in the districts served by the canals in the Whalen/Tri-State reach necessarily causes a corresponding decrease in return flow upon which the downstream users have relied since the inception of the North Platte Project

---

[156]Nebraska's evidence will establish that such districts are neither inefficient nor wasteful.

some 80 years ago. Such a reduction would also effectively cause a reapportionment. A single example can illustrate the point.

In Table II of Master Doherty's report, he describes the estimated requirements for the canals diverting in the Whalen/Tri-State reach, including the Interstate Canal. The Interstate Canal delivers water directly to the Pathfinder Irrigation District, the largest district within the North Platte Project (98,000 acres). The Tri-State Canal, further downstream, serves not only the Farmers Irrigation District (52,300 acres), but also the Northport Irrigation District, which is a part of the North Platte Project (13,000 acres). As is shown in the Appendix at A-2, the acreage under PID is situated to the north of the river between the Interstate Canal and the Tri-State Canal, above the lands of Northport Irrigation District, which also lie further to the east (cross hatched). Additionally, the Interstate Canal is a "highline" canal, situated above the uppermost irrigable acreage. The Tri-State Canal is lower in elevation, delivering water first to the Farmers' Irrigation District in the area of Scottsbluff and then to the Northport Irrigation District.[157]

In Table II of Doherty's report, he estimated the Northport District's requirement to be 54,600 acre feet annually. He made the following notation, however:

> The full Tri-State requirement for 52,300 acres at 3.5 acre feet per acre is 183,050 acre feet, **but this canal has in the past intercepted and utilized certain flows below the Tri-State Dam, which averaged yearly during the 1931-1940 period 35,500 acre feet (W-149).** Deducting this from 183,050 leaves 147,750 (called

---

[157]The initial engineering design of the North Platte Project contemplated extending the 120 Interstate Canal to serve the Northport Irrigation District. It was subsequently determined that it would be more efficient to extend the 80 mile Tri-State Canal to serve the NID lands.

> 148,000) shown above as the Tri-State requirement on water from Wyoming. These interceptions will presumably in the future go to the Northport Irrigation District under the decision of *United States v. Tilley*, 124 F. (2d) 850. They are charged here against Tri-State to correspond with some requirement and historical supply tables to follow. Later in priority and apportionment studies they will be charged to the Northport.

Doherty's Report at 59 n.2 (emphasis added). In *United States v. Tilley*, 124 F. 2d 850 (8th Cir. 1942), the Eighth Circuit held that certain return flows from North Platte Project lands could be utilized as a matter of right by the Northport District. *Ibid* at 862.

In Table XVII of Master Doherty's report, reference was made to the canal priorities and requirements. Master Doherty again qualified the annual value estimated for the Tri-State Canal:

> The value for Tri-State assumes that the historical interceptions (35,500 acre feet annually) by this canal below the state line will in the future be delivered to the Northport District, in compliance with the decree in U.S. v. Tilley, 124 F. (2d) 850.

Doherty Report at 87 n.1. Master Doherty also noted that the North Platte District "supplies a total of 13,000 acres, but 8,452 acres will be supplied in the future by interception below [the] state line," *i.e.*, by return flows below Tri-State Dam. *Id.* at n.3.

The lands in the Northport Irrigation District constituted a part of the equities used to derive the 75%/25% division of the apportionment fund in the Whalen/Tri-State reach. As a clear predicate of the apportionment and because of limitations in the capacity of the Tri-State Canal, the vast majority of the Northport Irrigation District lands can only be supplied by waters intercepted below Tri-State Dam. These are part of "the return flows approximating historic averages" from the "inefficient" and "wasteful" canals that

Wyoming, Colorado, and Basin so obstreperously maintain that Nebraska has no right to. While Nebraska does not claim that these flows were apportioned for direct application to beneficial use in the Whalen/Tri-State reach, Nebraska insists that users of return flows are among the group of users that Nebraska is not only entitled to protect but is obligated to protect under the Decree. These users, like the 8,452 acres in the Northport District served by return flows, have no other adequate source of water and would be forced to cease irrigating if return flows were curtailed.

The advisory opinion that Wyoming seeks in the guise of summary judgment to "simplify the case" and "to narrow the issues" is designed to prevent Nebraska from proving injury to second and subsequent users of return flows at trial. For instance, Wyoming is aware that proof of injury to downstream users would preclude forcing increases in "efficiency" on Pathfinder Irrigation District because PID's level of efficiency in 1945 is the foundation of Northport's ability to survive. In other words, what Wyoming is seeking in reality is an increased apportionment of her own at the expense of Nebraska equities which were accounted in the apportionment and which continue to rely on return flows from North Platte waters which are not diverted for direct use at or above Tri-State Dam.

B. Nebraska has Neither "Demanded" Nor Claimed Continuing Flows Passing Tri-State Dam

Wyoming contends that it has become "apparent" that Nebraska is claiming direct flows passing Tri-State Dam. Wyoming's Brief in Exceptions at 12 (July 2, 1992). What is "apparent" to Wyoming is neither expressed in Nebraska's petition nor claimed by Nebraska. *See generally* Nebraska's Petition (Oct. 6, 1986) (Docket No. 1). Nebraska is not seeking an enlargement of her apportionment. While the continuation of significant direct flows passing Tri-State Dam was a basis upon which the equitable apportionment was determined, an examination of Nebraska's petition

shows that no claim is made in this regard.[158] *See supra* p. 23-29; *see also* 325 U.S. at 607, 655; Doherty Report at 95-96, 158. Wyoming, Colorado and Basin all appear to forget what Nebraska has stated repeatedly, *i.e.*, that "Nebraska does not claim direct flow past Tri-State Dam as part of [her] apportionment and has never demanded such . . . flow during the irrigation season." *See* Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment and to Basin Electric's Memorandum in Support Thereof at 42 (Apr. 25, 1991) (Docket No. 335).

C. "Requirements" are not "Limitations"

Based on a thorough review of the record, Master Olpin found that the "Decree does not impose absolute ceilings for Nebraska's diversions in the Whalen to Tri-State section on a canal-by-canal basis." Second Interim Report at 92 (Apr. 9, 1992) (Docket No. 463). In her brief on exceptions, Wyoming continues to maintain that in the original litigation, "the water requirements of the specific irrigation canals diverting in the Guernsey Dam to Tri-State Dam section of the river were litigated and determined as the measure and the limit of Nebraska's right to demand water from Wyoming." Wyoming's Brief on Exceptions at 20 (July 2, 1992). Completely unsupported by the record, Wyoming seeks new restrictions on Nebraska's apportionment which are not contained in the Decree. The facts are undisputed that Nebraska's apportionment in the Whalen/Tri-State reach of the river is 75% of the natural flows, with the discretion to allocate that share among her canals pursuant to Nebraska law. *See supra* p. 29-31.

---

[158]The Tri-State Diversion Dam was recently retrofitted, curtailing a significant amount of the seepage of natural flow through the Dam, *i.e.*, a component of the operational waste that Master Doherty took into account in balancing the equities among the states. In 1989, 10 acre feet of natural flow passed the Tri-State Dam during the irrigation season. Second Affidavit of Ann S. Bleed at 28 (¶ 2) (Mar. 1, 1991) (Docket No. 296).

When Master Doherty evaluated the Whalen/Tri-State reach of the North Platte River, he undertook an analysis of each canal's water use. Doherty Report at 53-92; 196-253. The Special Master explained the reason for his analyses of individual canals:

> While a decree in a water suit between States cannot, generally speaking, deal with individual appropriations or projects, yet in such a situation as that here presented the equitable shares of the States cannot well be arrived at except through an analysis of the requirements, priorities, and equities of the individual canals as well as the water supplies available for the lands served by them.

Id. at 54. For each canal in the section, Master Doherty made determinations as to acres actually irrigated and total diversion requirements in acre feet per year and cubic feet per second.[159] These numbers were called "requirements" by Master Doherty, but he explicitly rejected the contention that these determinations would operate as limitations on the canals or on the states in administering their equitable apportionments:

> In arriving at the equitable share of each State I have first determined for that purpose the *requirements* of the various canals or districts. Is this to be taken as a determination of the limits of beneficial use for the purpose of intra-state administration? If so, those limits would apply to both storage and natural flow water.

---

[159]The Special Master determined the number of acres actually irrigated and the water required to irrigate those acres based on a drought cycle. Farming practices necessarily reflected the decreased water supply. To use Special Master Doherty's figures as restrictions would constrain today's agricultural economy in western Nebraska to the 1930s conditions. The Special Master and the Court equitably apportioned the North Platte River. They did not intend to restrict the distribution of available flows.

> Wyoming feels that such a limitation should be placed on the Nebraska State Line Canals for its effect upon the conservation of storage water. From a practical standpoint, and perhaps from an equitable standpoint, this might be a proper and desirable measure. From a legal standpoint, I doubt the jurisdiction of this Court to fix such limitations upon individual canals. The suit is between States and jurisdiction is invoked to determine the equitable rights of the States, that is, to determine the proper apportionment of water between them. The requirements of individual appropriators in each State being one of the elements in the ascertainment of the State's equitable share, they are incidentally a proper matter for investigation and determination for their bearing on the ultimate issue. But it would be quite a different matter to undertake to define the rights of individual appropriators between each other or between them and their State, or to determine what portion of the State's share must be allocated to any appropriator or group of appropriators, or to place a limit upon the participation of any appropriator or group in such allocation. That, in the absence of the appropriators as parties, would, I apprehend, as to them amount to a denial of due process of law. Consequently, the findings herein as to *requirements* cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree.

Id. at 160-61 (emphasis in original).

Master Doherty also stressed the importance of each state being able to administer her equitable share as she saw fit, without interference from a neighboring state:

> An interstate priority schedule [as suggested by Nebraska] would necessarily interfere with the freedom of each State in the intrastate administration of the State's

> share of the water. It would have the effect of fixing the rights of appropriators within each State as between each other. Constitutionality of a decree having this effect would appear to be open to serious question in view of the absence of the appropriators as parties to the case.

Id. at 115. *See also id.* at 149-50.

Master Doherty took extensive evidence on the requirements of canals in the Whalen/Tri-State reach to determine the "proper" allocation for this river section in order to equitably apportion the natural flows between Nebraska and Wyoming. *See* Second Interim Report at 95 (Apr. 9, 1992) (Docket No. 463). Special Master Doherty did not adjudicate the water rights of individual appropriators. On the contrary, he stated: "The share of each State, determined by the established ratio, would be subject to administration by that State in any manner it saw fit or the rights of its appropriators might require." Doherty Report at 150. As Master Olpin concluded from his analysis and review of the original proceedings, Special Master Doherty was "unequivocal" in his recommendation that the Decree would leave to each state the administration of her share of the natural flow. Second Interim Report at 95 (Apr. 9, 1992) (Docket No. 463).

The Whalen/Tri-State apportionment arrived at by Master Doherty and accepted by the Court is a 75%/25% division of natural flows between Nebraska and Wyoming. Doherty Report at 179 (¶ 6); 325 U.S. at 667 (¶ V). Each state has the discretion to allocate her share according to state law.[160] Accordingly, no requirements, limitations, or restrictions were placed on the North Platte Project or the

---

[160]The Interstate, Fort Laramie, French, and Mitchell canals were individually listed in ¶ V for designation of natural flow because they all had headgate diversions in Wyoming at that time. 325 U.S. at 619. Master Doherty and the Court deemed the language necessary to assure

(cont'd)

State Line canals within Nebraska's 75% share, and none can be implied.

Wyoming relies on ¶ IV of the Decree to make her argument regarding "limitations" on all of Nebraska's canals in the Whalen/Tri-State reach as the measure and limit of Nebraska's apportionment. In broad terms, ¶ IV operates as Wyoming's "delivery obligation" to assure water in the Whalen/Tri-State reach. It is unrelated to any question of intrastate administration of either state's allocation among her canals in any given year.

Paragraph ¶ IV is an injunction only against Wyoming and the storage of water in the upstream storage reservoirs. 325 U.S. at 666 (¶ IV). Without some restriction, the upstream junior reservoirs would have been able to store water during the irrigation season and essentially dry up the river downstream, thus consuming Nebraska's apportionment.[161] The cumulative water requirements for the individual canals were used to define Wyoming's gross "delivery obligation," but they were not intended to interfere with

---

that Wyoming would comply with Nebraska's requests in allocating her 75% share of the natural flow among her canals with points of diversion in Wyoming.

[161]Master Doherty knew that the canals in the Whalen/Tri-State reach, specifically the State Line Canals in Nebraska, were dependent on upstream North Platte River water for their supply. Doherty Report at 136-43. He also knew that Wyoming refused to administer the North Platte River to recognize these senior priorities in Nebraska. Wyoming law required priority administration for canals diverting in Wyoming, including the North Platte Project canals, thus legally assuring their water supply.

Nebraska's intrastate administration of her apportionment.[162] The reservoirs were enjoined accordingly.[163]

If there were merit to Wyoming's "limitations" argument, ¶ IV would have contained an injunction against Nebraska that confines individual canals to stated diversion quantities. Instead, there is a restriction on Wyoming's administration in order to preserve the downstream water supply. Master Doherty had previously explained that jurisdictionally he could not fix restrictions or limitations on individual canals. Doherty Report at 160-61.

With the exception of the injunction against Wyoming in ¶ IV, there is no correlation between the exercise of the storage rights of the upstream reservoirs and the rights of Nebraska's senior downstream canals to enjoy their rights under Nebraska law within Nebraska's apportionment. Even when the upstream reservoirs exercise their storage rights under ¶ IV, there can still be accretions in the Whalen/Tri-State reach that may be diverted by the downstream senior canals. Accordingly, the injunction against Wyoming in ¶ IV is not a limitation on individual canal diversions within Nebraska's broader apportionment.

---

[162]Special Master Olpin also saw ¶ IV as a gross "delivery obligation." Second Interim Report at 98-99 (Apr. 9, 1992) (Docket No. 463). He specifically found that "there is nothing in the Decree that can be read to forbid shifting deliveries among the senior canals so long as the junior storage rights of the reservoirs are not harmed thereby." *Id.* Master Olpin correctly interprets the Decree. *Cf.* Wyoming's Brief on Exceptions at 36 (July 2, 1992).

[163]Certain figures had to be inserted as quantities available for diversion by the State Line Canals before the reservoirs could store in order to establish the rights between the upstream reservoirs and the downstream canals. These figures were not meant as limits on diversions, and Master Doherty made this clear. In the recommended decree, he prefaced the referenced paragraph with "for the purpose of this clause . . ." the canal limitations will be as follows. Doherty Report at 177-78. Likewise, the Court confirmed that the limitations in ¶ IV were for "[the] purpose" of determining rights between upstream, junior reservoirs and downstream, senior canals. 325 U.S. at 625.

Wyoming's position on limitations was also raised in the original proceedings and was rejected by the Court, making Wyoming's present argument *res judicata*. On exceptions to Master Doherty's Report in 1945, the United States sought to place limitations on Nebraska's canals in ¶ IV, exactly as Wyoming now contends. 325 U.S. at 628-29. After briefing and argument, the Court rejected the United States' argument finding that the imposition of limitations was not consistent with the equitable apportionment it was ordering, further concluding that such limitations were not necessary as a practical matter. *Id.* Wyoming's present argument was raised, litigated, and determined in the original proceedings and thus is *res judicata*.

Additionally, there is absolutely no basis for Wyoming's proposition that Nebraska would receive an unlimited supply of water if limitations are not placed on the State Line Canals.[164] Wyoming's Brief on Exceptions at 37 (July 2, 1992). Since the entry of the Decree, Nebraska has been limited to 75% of the natural flow in the Whalen/Tri-State reach of the North Platte River. Because of the manner in which the river is administered, Nebraska cannot receive an unlimited supply.[165]

Finally, Wyoming admits that the Decree contains no injunctions prohibiting Nebraska from allocating her share

---

[164]Beneficial use is the basis, the measure, and the limit of a diversion in Nebraska. This is a principle of Nebraska law and forms the basis of Nebraska's administration of her share of the natural flow. Nebraska does not agree, however, that in formulating the Decree, the Court or Master Doherty intended to artificially determine beneficial use for individual canals in the form of diversion restrictions or that they intended these "limits" to apply in perpetuity.

[165]By the operation of the river and through the system of accounting done independently by Nebraska, Wyoming, and the United States, neither Nebraska nor Wyoming can receive more than her allocated apportionment, unless the river is in a high flow condition or the other state is not in need of her share.

(cont'd)

of the natural flow, but argues that discretion in distributing her allocation under Nebraska law can happen only "when there is surplus water available for such diversion." *Id.* at 35. The Decree contains no qualification that Nebraska can only allocate her 75% share of the natural flow in the Whalen to Tri-State reach when there is surplus water in the system, nor is there any basis to imply such a qualification. To the contrary, the Court and the Special Master wanted to assure that both Nebraska and Wyoming would share the surpluses, as well as the deficiencies, of the North Platte River on an annual basis. Doherty Report at 120.

Special Master Olpin found that there were no material facts in dispute on the absence of diversion ceilings for the canals in the Whalen to Tri-State reach. Second Interim Report at 12 (Apr. 9, 1992) (Docket No. 463). He found the record "unequivocal" and filled with "uncontradicted facts." *Id.* at 95. Wyoming points to nothing in the record to show that the Master Olpin erred in his interpretation and recommendation.

On an annual average basis, the Whalen to Tri-State reach receives only about 50% of the natural flow needed to meet the irrigation needs of Nebraska's canals diverting in that reach. The deficiency has to be made up with storage water purchased from the Bureau of Reclamation.

CONCLUSION

The parties have taken very different approaches to their exceptions to Special Master Olpin's first and second interim reports, both in substance and in style. Wyoming would like the Court to ignore the Special Master, with Colorado and Basin Electric following suit. In Wyoming's view, the Court should reject the Master's findings and recommendations after an independent review of the evidence, including the affidavits of the present-day administrative officials from Nebraska, Wyoming, and the United States, the documents reflecting the administrative construction of the North Platte Decree since 1945, Master Doherty's report, and the original proceedings. Based on the arguments of all of the parties, Nebraska believes that the Court should adopt Master Olpin's reports, with two modifications, in recognition of the knowledge he has developed in dealing with the issues over the past six years.

Comparing the positions of the parties reveals three fundamental differences. The most conspicuous difference lies in the pursuit of the enforcement/modification theme by Wyoming, Colorado, and Basin. Nebraska has taken a more time-consuming approach, involving the recitation of the facts material to the resolution of the questions presented and then applying the law to the facts in regard to the specific issues raised in the exceptions.

The relation between the positions of the parties on specific issues in 1945 and their positions today frames a second contrast. With respect to the apportionment of the Laramie River inflows in ¶ V of the Decree, Nebraska takes the same position today as she did in 1945. Wyoming takes a diametrically opposite position. With respect to the apportionment of the use of the Inland Lakes, Nebraska's positions are the same. Wyoming's are polar.

The parties also have noticeably different views of the meaning of the North Platte Decree. Instead of reading the plain language of ¶¶ X, XII(a), XIII(c), and XIII(f) in a

clear and perceivable manner, free from obstruction, Wyoming reads these unambiguous provisions in a way that engenders obstruction and mutual conflict. Nebraska's reading of these provisions gives ordinary and expected meaning to their terms, resulting in mutual consistency and integration. With respect to the ambiguous provision or the provision which is incomplete on its face — ¶ V — Wyoming ignores the record and urges that the underlying apportionment of the Laramie inflows cannot be accomplished without rewriting the provision. Nebraska, on the other hand, believes that resort to the record makes the apportionment clearly manifest.

Nebraska finds fault with two elements of Special Master Olpin's findings and recommendation. One derives from a mind-set initially shared by all of the parties and Master Olpin, namely, that ¶ X of the Decree creates a "municipal exemption" which includes an affirmative grant of the right, conferred by the Decree, to deplete the natural flows of the North Platte River and undermine the irrigation apportionment. Nebraska urges the Court to modify Master Olpin's recommendations to conform to the plain reading of ¶ X.

Nebraska also finds fault with Master Olpin's failure to conclude that 75% of the Laramie inflows were apportioned to Nebraska in ¶ V of the Decree, notwithstanding that he concluded that Nebraska's continuing entitlement to the Laramie inflows was "understood." Accordingly, Nebraska requests that the Court modify Master Olpin's recommendations to reflect that the Laramie inflows were apportioned 75% to Nebraska in 1945.

Finally, Nebraska would like to reiterate her conviction that the Court's resolution of the cross-motions for summary judgment will not resolve the issues framed in Nebraska's pending motion for leave to apportion the non-irrigation season flows and to assert new claims.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

Simms & Stein, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

APPENDIX

TABLE OF CONTENTS

	Page
Map — North Platte River Drainage	A-1
Map — Interstate/Northport Canal System	A-2
Brief of Defendant, State of Wyoming (Jan. 29, 1945) (Excerpts)	A-3-10
Application for Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 21 6/198, Dist. No. 15-5, Water Division No. 1 (Feb. 9, 1973)	A-11-12
Application for a Water Supply Project on Deer Creek, Tributary of the North Platte River, for Municipal and Multi-Purpose Water Development (Dec. 1978)	A-13-18
Application for a Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 24 6/356, Dist. No. 15-5, Water Division No. 1 (Feb. 10, 1983)	A-19-20
Substitute Application for Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 24 6/356, Dist. No. 15-5, Water Division No. 1 (June 25, 1986)	A-21-22

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1-2

IN THE

Supreme Court of the United States

No. 6 Original

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING,
Defendant,

THE STATE OF COLORADO,
Impleaded Defendant,

UNITED STATES OF AMERICA,
Intervener.

BRIEF OF DEFENDANT, STATE OF WYOMING

LOUIS J. O'MARR,
Attorney General.

W. J. WEHRLI,
Special Counsel.

NEBR. BUREAU OF IRRIGATION
LIBRARY
NO. 2794 DATE Sec. 16

PRAIRIE PUBLISHING CO., CASPER

BEST AVAILABLE COPY

of the element of carry-over storage, the flow of a particular year, or what might be determined to be a dependable annual flow, is not the measure of the stream's ability to meet demands, and we must determine what the dependable supply is; that is to say, how much water can be furnished each year to meet requirements from the production of a series of years conserved and carried over by reservoir use. The principles applicable we find set forth in Wyoming v. Colorado supra, but in that case, since there was no reservoir conservation in the upper state and no carry-over storage from year to year, it was found adequate to determine the dependable flow of the stream. The same principles should be applied here, but the "dependable supply" instead of "dependable flow" should be ascertained. In the language of the opinion in that case, it is the "supply which is fairly constant and dependable, or is susceptible of being made so by storage and conservation within parcticable limits" which should govern. We need not here be concerned with the question of practicability, as the storage reservoirs are in actual existence.

The storage capacity of the three upper reservoirs, which we have been discussing, as set forth by the Master, is 175% of the long-time average run-off of the stream at Pathfinder Reservoir (M.R. p. 36). The run-off at Pathfinder is extremely variable, having been as low as 382,200 acre feet in 1934, and as high as 2,399,400 acre feet in 1917 (M.R. p. 23). A 37 year average, 1904 to 1940, as determined by the Master was 1,315,-900 acre feet (M.R. p. 24). Total capacity of the three reservoirs, as disclosed by the Engineers' Stipulation and set forth in a tabulation hereinabove is 2,261,000 acre feet. These reservoirs are very obviously designed for the purpose of carrying over storage from one year to the next and the stream can not be beneficially utilized unless they are so employed.. To make such use, the down-stream diversion each May-Septemeber period must be limited to actual requirements, and surplus supplies retained in the reservoirs for succeeding years.

Guernsey Reservoir (M.R. p. 30), is located a few miles above Whalen and is used primarily for regulatory purposes, while Lakes Alice and Minatare (M.R. p. 30) are located in Nebraska, and used in connection with the Interstate Canal. These three reservoirs are all used in connection with the North Platte Project, but are comparatively small in size, and not particularly useful for conservation of supplies from year to year.

The Wyoming water supply study, presented by witness Elmer K. Nelson and comprised in Wyoming exhibits numbered 170 to 176 inclusive, uses as a basis of supply the actual run-off of the years 1904 to 1940 inclusive, reduced to represent present conditions of development as to present irrigation in Colorado, in Wyoming on all tributaries, and upon the main stream above Guernsey, exclusive of the Kendrick Project. Since the Master has determined that all present uses in Colorado, and those upon tributaries in Wyoming and upon the main stream above Guernsey, exclusive of the Kendrick Project, should be enjoyed without restriction, but that additional development should be enjoined, the assumption of the Wyoming study agrees exactly with the findings and conclusions of the Master. However, in the Wyoming study an allowance was made for additional depletion above Pathfinder of 68,500 acre feet annually (M.R. p. 65). The Whalen-Tri-State Dam seasonal requirement of the Wyoming study was 950,000 acre feet, while that proposed by the Master is 1,027,000 (M.R. p. 65). The testimony set forth in the appendix hereto attached, relating to Wyoming Exhibit 176, and the exhibit itself, disclose that the Wyoming study also made allowance for an October-April release of 10,000 acre feet at Pathfinder (Record p. 27,576, Appendix p. 23). The assumed demand upon the stream of the Wyoming study therefore is 950,000 acre feet for the Whalen-Tri-State Dam section, 68,500 for additional depletion above Pathfinder, and 10,000 for winter release, or a total of 1,028,500 acre feet. This is 1,500 acre feet in excess of the demand proposed by the Master, and consequently the conclusions of the Wyoming study are not disturbed if the Master's proposed requirement is substituted. It should be pointed out that the figures above given do not include a winter diversion at Whalen of 46,000 acre feet for Lakes Alice and Minatare reservoirs proposed by the Master (M.R. p. 61), or a similar diversion of 65,000 acre feet proposed by Wyoming (M.R. p. 60). Neither of these values affects the ultimate conclusions because a diversion of either amount in the winter months can be made without any release from the upper storage reservoirs for that purpose.

As above stated, the Wyoming study is predicated upon the use of run-off as it actually occurred, reduced to accord with what it will be in the future under present conditions of development. Wyoming Exhibit 170 shows the run-off for the years 1904 to 1940 inclusive at Pathfinder Reservoir, and at a

lative of the Master's findings and conclusions and of the principles announced by this Court in Wyoming v. Colorado, supra.

At page 141 of his report the Master admits that it may be suggested that the proposed regulation, with reference to the Kendrick Project, is inconsistent with the view expressed, that the decree may not deal with the rights of individual appropriators or parties. We do make such suggestion and emphatically urge it upon the Court. We do not find any justification for the action of the Master in making such a recommendation as he has with reference to the Kendrick Project, for the reasons set out at page 141 of his report wherein he states that the legal owner of the storage appropriation is the United States and that storage facilities are operated by the United States, and that consequently some regulation may be proposed not otherwise applicable. As found by the Master, in this respect, the United States occupies the same position as any other appropriator, and this was determined by this Court in ruling on Wyoming's motion to dismiss, (295 U. S. 40). It is also stated at page 141 of the Master's Report, that Wyoming has not objected to regulation of natural flow diversions supplying the Kendrick Project upon jurisdictional grounds.

The statement is in error as this Defendant has never proposed any solution of the case which would purport to fix or determine the rights of the Kendrick Project, or the Casper canal, except as one of the elements in a determination of equitable apportionment between Wyoming and Nebraska.

The report of the Master makes a type of mass allocation, as to all sections of the stream except the Whalen-Tri-State Dam section and the Kendrick Project. The restrictions to present uses in Colorado and upon tributaries in Wyoming and from the main stream above Whalen, exclusive of the Kendrick Project, are an acceptable form of mass allocation. We perceive no reason for departing from established principles as to the Whalen-Tri-State Dam section and the Kendrick Project.

The Master has determined that 46,000 acre feet may be diverted at Whalen to the inland reservoirs of the Pathfinder

Irrigation District, Lakes Alice and Minatare, during the winter months (M. R. pp. 60, 61). This, too, is an acceptable form of mass allocation. As to the Whalen-Tri-State Dam section, the Master has determined a requirement of 1,027,000 acre feet to be necessary in the May-September period (M. R. pp. 60, 61). This can readily be divided between Wyoming and Nebraska on the basis of the tables appearing at pages 59 and 86 of the Master's Report. Inadvertently an error was made in the report in computation of the Wyoming requirement, same appearing at page 163 as 227,000 acre feet. Quantities shown for Wyoming land in Table II, page 59, are as follows:

Goshen Irrigation District	137,500 acre feet
Wright and Murphy Lands	577 acre feet
Lingle and Hill Districts	46,000 acre feet
Nine Wyoming Private Canals (Including French lands in Wyoming)	43,000 acre feet
Total	227,077 acre feet

This, no doubt, is the derivation of value at page 163, but there is omitted the Wyoming lands in the Pathfinder Irrigation District comprising 2,300 acres with a requirement of 9,844 acre feet, as shown in Table XVII, page 86 of the report. Adding this requirement to that above shown, makes a total of 236,921 for which, a round value figure of 237,000 may be used, leaving 790,000 acre feet for Nebraska use, or total sectional requirements of 1,027,000. The actual Nebraska total, according to the tabulation on page 59 of the Master's Report, is something less than 790,000, but for practical purposes the total requirement of 1,027,000 should be divided—237,000 to Wyoming and 790,000 to Nebraska.

The diversion requirement of the Kendrick Project is 168,000 acre feet (M. R. p. 138). A mass allocation of these May-September requirements should be made, resulting in an allocation of 790,000 acre feet to Nebraska and 237,000 plus 168,000, or 405,000 to Wyoming.

We have pointed out in the preceding discussion relating to water supply, that during the period 1895 to 1940 inclusive, lands presently irrigated in Colorado, and lands presently

age of the "net cropped acreage" 1931 to 1940 is 82,577 and 1936 to 1940, 81,030.

A liberal delivery at the land of 1.8 acre feet per acre has been allotted and a distribution system loss of 58 per cent which, according to the Master, if it is in error, errs on the upper rather than on the lower side. It also seems apparent that a liberal acreage value has been used and one which is considerably in excess of the actual irrigated acreage under present conditions. An exact adjustment of these different values would require the consideration of a large amount of testimony. We believe the demands of justice can be met by reducing the acreage to the 1936-1940 average of the "developed farms irrigable acreage" or, in round figures, 94,500 acres. Since it is necessary to divert 4.28 acre feet per acre at the headgate to deliver 1.8 acre feet per acre at the land, with a loss factor of 58 per cent (M.R. p. 213), the total reduction we propose is 4.28 acre feet per acre for 3,500 acres, or 15,000 acre feet.

One of the elements which must be considered in determining the May-September requirement of the Pathfinder Irrigation District, under the Interstate canal, is the amount of water which can be diverted to the inland reservoirs serving the Pathfinder District lands, Lakes Alice and Minatare. The capacities of these reservoirs are respectively 11,400 and 67,000 acre feet (M.R. p. 30). The Master's allowance for winter diversions to the reservoirs is 46,000 acre feet (M.R. pp. 60, 61). Whatever is diverted to these reservoirs in the winter months reduces the May-September requirement as the water is stored and used in the succeeding irrigation season. In our opinion the Master's Report (pp. 60, 61) contains no adequate explanation for the allowance of only 46,000 acre feet. It is said that icing of the canal may have been a factor in past operations (M.R. p. 61). We have been unable to find any evidence in the record supporting such a conclusion.

Storage impounded in the Government reservoirs is utilized for the Pathfinder Irrigation District, and Barry Dibble, a witness for the United tSates testified that 73,000 acre feet could be diverted to Lakes Alice and Minatare during the winter months (Record pp. 28696, 28697). This witness made the water supply study comprised in U.S. Exhibits 267 to 273, discussed in the Master's Report, pages 65 to 67 inclusive. This study covered the period from 1926 to 1940, and Mr. Dibble used

as basis for his May-September demand the diversion of 73,000 acre feet to the inland reservoirs during each winter season. The Dibble testimony on this subject appears at pages 78 and 79 of the Appendix. We know of no reason why this testimony as to the winter diversion may not be accepted. Upon the same subject Elmer K. Nelson, witness for Wyoming, testified that diversions of 65,000 acre feet could be made in the winter months to the inland reservoirs (Record, pp. 27444-27446).

If the testimony of Mr. Dibble is used, the May-September requirement of the Pathfinder Irrigation District will be reduced 27,000 acre feet, which is the difference between 46,000 acre feet of winter diversions, specified by the Master, and 73,000. The lands served by the inland reservoirs lie wholly within the State of Nebraska.

No mention whatever is made in the Master's Report of a supply that is available from pumps for Nebraska lands in the Pathfinder Irrigation District. The testimony is undisputed and appears at page 29243 of the Record. The project history of the Pathfinder Irrigation District for the year 1940, as quoted at page 29243, is as follows:

> "An important factor in curing seeped conditions of farm lands is the fact that seventy-five irrigation wells were drilled and operated by pumping during the past season. There was about 7,640 acre feet of water pumped from the underground supply and 550 acre feet from drains. The total water pumped was equal to almost sixteen per cent of the amount of water delivered to the lands."

The supply diverted at the headgate for this canal in 1940 was quite low, as shown by Table VII, page 76 of the Master's Report. If such a supply of water as is disclosed was available from pumps in such a low water year as 1940, it is obvious that it would not be less, but would probably be considerably more under less adverse conditions.

Since the 7,640 acre feet is available at the land and the distribution system loss of the Pathfinder Irrigation District is 58 per cent (M.R. p. 213) this supply is the equivalent of 18,000 acre feet at the headgate, as it would require the latter amount of water diverted at the headgate with loss of 58 per cent in

1. Enjoining Colorado (a) from the diversion of water for the irrigation in North Park of more than 135,000 acres of land, (b) from the accumulation in storage facilities in North Park of more than 17,000 acre feet of water between October 1 of any year and September 30 of the following year, and (c) from the transbasin diversion out of North Park of more than 6,000 acre feet of water between October 1 of any year and September 30 of the following year.

2. Enjoining Wyoming (a) from the diversion of water from the main river above Guernsey and from its tributaries above Pathfinder Reservoir for the irrigation of more than 168,000 acres of land, and (b) from the accumulation of storage water in reservoirs above Pathfinder Reservoir in excess of 18,000 acre feet of water between October 1 of any year and September 30 of the following year. This is exclusive of Seminoe Reservoir and the Kendrick Project, which are given consideration elsewhere.

3. Enjoining Wyoming from the diversion of water from the North Platte River for the irrigation of lands of the Kendrick Project and the Wyoming lands served by diversions at and below Whalen of more than 405,000 acre feet in each irrigation season, May to September inclusive, providing that until five years have elapsed immediately following the commencement of irrigation of lands of the Kendrick Project, the limitation shall be 342,000 acre feet, and further providing that irrigation under the Kendrick Project shall not be commenced until the first year in which storage in the upper storage reservoirs, Seminoe, Pathfinder and Alcova, plus anticipated in-flow equals 1,000,000 acre feet, and that until the year in which such irrigation is commenced, the Wyoming allotment shall be 237,000 acre feet.

4. Enjoining Nebraska from the diversion of water from the North Platte River in the Whalen-Tri-State Dam section for Nebraska lands of more than 705,000 acre feet in each irrigation season, May to September inclusive, and from obtaining the conveyance past the Tri-State Dam of any water originating above that point for diversion from the North Platte River below Tri-State Dam, and permitting diversion of 73,000 acre feet to the inland reservoirs of the Pathfinder Irrigation District, Lakes Alice and Minatare, during the winter months, October 1st to April 30th, inclusive.

5. Providing that the May-September supplies mentioned in the preceding paragraphs 3 and 4 shall be delivered in accordance

NOTE "DO NOT FOLD THIS FORM —ONLY FORMS COMPLETED WITH TYPEWRITER OR NEATLY LETTERED WITH BLACK WATER-PROOF INK WILL BE ACCEPTED"

P. CARR
B. McCann

Form C-1
Rev 3-71

THIS SECTION IS NOT TO BE FILLED IN BY APPLICANT

Filing/Priority Date

THE STATE OF WYOMING } ss
STATE ENGINEER'S OFFICE }

This instrument was received and filed for record on the 9 day of February A.D. 19 71 at 9:20 o'clock A. M.

James H. Aduddell, Asst. State Engineer

Recorded in Book _____ of Reservoirs on Page _____ Fee Paid $2.00 Map Filed F

STATE OF WYOMING

OFFICE OF THE STATE ENGINEER

APPLICATION FOR PERMIT TO APPROPRIATE SURFACE WATER

WATER DIVISION NO 1

PERMIT NO _____ RESERVOIR

DISTRICT NO 13-S

Time Filing No 2 4/98

NAME OF FACILITY

THE Deer Creek RESERVOIR

I, Peter J. Hutchison

of Cheyenne (City or Town) County of Laramie

State of Wyoming for myself, or in behalf of the applicant or applicants named in Item 1, do say:

1. The name(s) and complete mailing address(es) of the applicant(s) is/are Wyoming Water, Inc. P. O. Box 1407, Cheyenne, Wyoming 82001

(If more than one applicant, designate one to act as Agent for the others)

2. The use to which the water is to be applied is Irrigation Recreation, M & I

3. The source of the proposed appropriation is Deer Creek, tributary of North Platte River

4. The outlet of the proposed reservoir is located N 200 50' E 3862.6' feet distant from the SW corner of Section 11 T 31 N. R 77 W. and is in the S½ SE½ of Section 11 T 31 N. R 77 W

The formation of the outlet consists of _____

5. Fill out either (a) or (b).

(a) The reservoir is located in the channel of Deer Creek

(b) The reservoir is to be filled through the _____ Canal, which has a carrying capacity of _____ cubic feet per second.

6. (a) The area of the high-water line of the reservoir is 1045 acres.

(b) The total available capacity of the reservoir is 88785 acre-feet.

(c) If enlargement, the capacity of the enlargement is _____ acre-feet.

(d) Reservoir Capacity Breakdown by Uses

[redacted] acre-feet

[redacted] acre-feet

[redacted] acre-feet REMARKS

7. (a) The dam is to be constructed as follows: An impervious core of bentonite is to be filled as the earth fill is brought up - bentonite mixed as filled and rolled Contains an estimated 7,550,000 Cubic Yards

(b) The water face of the dam is to be protected from wave action in the following manner: Reno mattress type wire cages filled with rock

8. The estimated cost of said work is $ 7,750,000.00 Dollars

9. Construction work will begin within 1 year from date of approval of this application.

10. The estimated time required for completion of the works is 3 year(s).

11. The accompanying map is prepared in accordance with the State Engineer's Manual of Regulations and Instructions for filing applications and is hereby declared a part of this application.

Under penalties of perjury, I declare that I have examined this application and to the best of my knowledge and belief it is true, correct and complete.

Peter J. Hutchison Wyo PE. #1261
Signature of Applicant or Agent

Date 9 Feb 1972

Permit No _____ Res

A-11

BEST AVAILABLE COPY

NOTE: If construction under this application is for enlargement of an existing reservoir, consent to the enlargement should be attached hereto from the present owners.

REMARKS

RESERVOIR CAPACITY ALLOCATION BY USES

Dead Storage 822 Ac/Ft
Irrigation 1362 Ac/Ft
Recreation 1717 Ac/Ft
Municiple 2000 Ac/Ft
Industrial 60084 Ac/Ft
Total Available Capacity = 65,785 Ac/Ft

BEST AVAILABLE COPY

APPLICATION FOR A WATER SUPPLY PROJECT ON DEER CREEK, TRIBUTARY OF NORTH PLATTE RIVER FOR MUNICIPAL AND MULTI-PURPOSE WATER DEVELOPMENT INCLUDING THE CITY OF CASPER, WYOMING

December, 1978

1. Applicant
   A. Casper Board of Public Utilities, 200 North David, Casper, Wyoming 82601, phone 235-8266.
   Duplicate correspondence to Frank J. Trelease, Manager Cheyenne Office, Wright Water Engineers, 3228 Locust Drive, Cheyenne, Wyoming 82001, phone 638-9261.
   B. Entity Representative
   Mr. Sam Hobbs, Utility Director
   Water Resources Consultant: Frank J. Trelease
   C. Reasons for applying for a state water resources project.
   The attached "Summary Report on Casper Water Supplies and Needs" briefly states the reason for the Casper Board of Public Utilities seeking additional water supplies. It has been estimated that the Casper population will increase from 49,000 in 1977 to 84,800 by the year 1990 and to 112,000 past the year 2000. This population will demand additional water supplies as stated in the Summary Report. The City needs to develop supplies to meet these increased demands. In addition, the State Engineer has indicated that increasing water rights scrutiny on the North Platte River may result in regulation of municipal water rights once thought exempt from regulation because of the provisions of the North Platte decree relating to ordinary domestic and municipal water use.

   The options open to Casper and other municipal water users along the North Platte River apparently are:
   1) To transfer senior irrigation water rights from irrigation use to municipal use;

2) To use water made available through development of the unused waters of the North Platte River tributaries below Pathfinder Dam;
3) To use water from trans-basin diversions into the North Platte River;
4) Develop ground water supplies.

The Casper Board of Public Utilities is proceeding to pursue several of these options. It is the desire of the Board (as has been expressed by the State) that agricultural water not be transferred to other uses, but that municipal and industrial water supplies should be developed from the remaining undeveloped supplies that Wyoming has available.

There are obvious intrastate and interstate implications of development of the waters of the North Platte River tributaries below Pathfinder Dam. Although these waters, according to the North Platte decree, are not regulated by the decree, development of the water will obviously be scrutinized by the State of Nebraska. In the scheme of regulation of the River there are implications to other Wyoming water rights and availability of water. We, therefore, believe that the State of Wyoming should be involved in water development projects on the North Platte River tributaries in order to determine the feasibility of the project or alternatives, the feasibility of State project financing, and to assist in estimating the available water supplies.

An additional reason that the State should be involved in tributary water developments is that they should be multi-purpose in nature. There is a possibility for development of irrigation, storage, regulation of water supplies for fisheries, wildlife and recreation purposes, while providing for municipal use. These beneficial uses can relate to the public at large and to groups beyond the City of Casper. Therefore, it seems most logical that the State should be a catalyst in the development and play a prime coordinating and, perhaps, project management role.

The City of Glenrock approached the Casper Board of Public Utilities in the spring of 1978 with the idea

of developing this project. The Board has responded to the City of Glenrock, but has received no acknowledgement. We believe, therefore, this is a second reason that the State should be involved — that is to coordinate the interests of Casper, Glenrock and possibly others in the project. Additionally, we are aware that Wyoming Water Inc. filed an application to construct a reservoir on a potential site on Deer Creek. We believe the third reason the State should be involved is to correlate that interest along with the interests of the two municipalities, the public interest in such a project, and combining the interests of other potential water users.

D. Cooperative water development

The Casper Board of Public Utilities is interested in a cooperative water development with the State of Wyoming, who would correlate the interests of other water users and project purposes.

2. Project Description and Map

A. Description

A project description and map are not included herewith because the State of Wyoming can refer to Wyoming Water Planning Program Report No. 9, "Water and Related Land Resources of the Platte River Basin, Wyoming." Figure 5-1 on page 159 of that report shows the location of the potential Deer Creek Dam and Reservoir and a description of the Deer Creek project is given on page 161 of the report. In September, 1971, the date of the report, the State was considering a reservoir of some 85,000 acre feet capacity, including purposes of flood control, municipal and industrial storage, irrigation storage, and a minimum pool for recreation purposes. Minimum flows down Deer Creek were incorporated in the State's project plan, along with the delivery of municipal and industrial water. The files and records of the Wyoming Water Planning Program contain the preliminary engineering analysis contained in the State Water Plan.

In addition, the Office of the State Engineer was presented a reconnaissance report prepared by the firm of R. W. Beck for Wyoming Water Inc. Having

reviewed that report, we found that they had increased the estimated municipal and industrial water supply yield but had underestimated the demands of the senior Deer Creek irrigation water rights, and, in our opinion, had not adequately estimated the irrigation water demand and effect of senior water rights on the project. We, therefore, believe that a water supply review is necessary before proceeding with pre-feasibility or feasibility studies of the project.

There are, however, probably enough data upon which to base preliminary cost estimates to that once the water supply estimate is completed, a pre-feasibility or reconnaissance type of cost-benefit analysis can be performed.

B. Project Lands and Soils

The information is in the State files.

C. Water Supply and Hydrology Studies

1) Water Supply Information — see A above.

2) Project Water Rights

The application to construct a dam and reservoir by Wyoming Water Inc. is temporary filing permit number 21 6/198, priority — February 9, 1973; source — Deer Creek; capacity — 69,915 acre feet; uses — irrigation, municipal, industrial supply; location — Section 11, T 31 N, R 77 W.

3) Legal Water Supply Limitations, etc.

There is no known protest or other type of legal action affecting the project.

Deer Creek is a tributary of the North Platte River in Wyoming between Pathfinder Dam and Guernsey. The U.S. Supreme Court decree on the North Platte River controls the irrigation use and storage of water on the main stem North Platte River above Guernsey Dam and on the tributaries of the North Platte River and the main stem in Wyoming and Colorado above Pathfinder Dam. Since Deer Creek is a tributary not included in the provisions of the decree, it is presumed that the State of Wyoming has a water supply that can be developed in Deer Creek. Nevertheless, Article XIII (c) states, "The question of the effect of the construction or threaten the construction of stor-

age capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, "— is a matter to which "further relief may hereafter be sought."

4) Water Quality Data

The waters of Deer Creek are suitable for the purposes and uses included in this application. Analysis of water quality should be done along with water supply studies.

5) Contracts With Others To Supply Water

The City of Casper does supply water to entities in and around the city which relate to the general supply of water. There are no specific contracts relating to the Deer Creek project.

6) Acquisition Of A Water Supply By Contracts From Others

The City of Casper is seeking to contract for an interim water supply from the reservoirs of the Kendrick Project — Seminoe and Alcova. This contract with the USBR has not been consummated. We are working with the Casper-Alcova Irrigation District in this matter and on a longer range acquisition of water supply, which would meet a portion of the future water needs of the City of Casper.

D. Engineering Data

All investigations of geology, foundation, materials, etc. and preliminary engineering layouts and costs are available in the offices of the State Engineer and the Wyoming Water Planning Program.

E. Economic and Social Considerations

No specific economic or social studies have been done by the City of Casper relating to this project. However, the State of Wyoming has endeavored to estimate the costs and benefits of the water supply and the overall impact of developing or not developing the water supply upon the future of the State. This information could be readily assembled from economic models and engineering and cost information.

3. Environmental
   A. Environmental Assessments
      The Wyoming Water Planning Program did contract with the University of Wyoming WRRI for an analysis of minimum stream flows in Deer Creek required for a project on the stream. In addition, WWPP discussed the project with the Game and Fish Department in the development of the State Water Plan. Nevertheless, additional environmental work is necessary before the project could be consummated. It may be that an environmental assessment should be a part of preliminary studies, particularly if federal lands are involved in any way.
4. Other Permits and Applications
   No attempt has been made at obtaining any other city, county, state, federal permits inasmuch as this is believed to be an outcome of initial studies relating to the project.
5. Financial
   Casper has not prepared any financial analyses other than to estimate the cost of developing water from Deer Creek Dam will be rather expensive compared to acquiring other supplies, such as purchasing and transferring water rights. It is because State policy to preserve irrigation and prudent water management would seem to indicate that unused water supplies should be developed not at the expense of agriculture that a State project is sought, hoping that the financial burden can be shared among other project purposes and that the cost of public use of facilities might be borne by a public entity, the State, to whose citizens the benefits will accrue.
   In addition, through the Wyoming Water Development Fund or other mechanism, it is hoped that a financing plan can be derived which would defray the cost of the project water supplies until the population has increased to the point where the ability to pay has developed in the City of Casper. The problem of front-end financing of water supply projects in order to properly develop for future use at today's high costs presents a dilemma to Casper and every municipal and quasi-municipal entity in the State at this time.
6. Name of Person Completing this Application
   Frank J. Trelease

STATE OF WYOMING

OFFICE OF THE STATE ENGINEER

APPLICATION FOR PERMIT TO APPROPRIATE SURFACE WATER

THIS SECTION IS NOT TO BE FILLED IN BY APPLICANT

Filing/Priority Date

THE STATE OF WYOMING } ss
STATE ENGINEER'S OFFICE }

This instrument was received and filed for record on the 10th day of February, A D 19 83 at 4:30 o'clock P. M.

MAYLAND ANDERSON, Assistant State Engineer

Recorded in Book ____ of Reservoirs, ____ on Page ____

Fee Paid $ 25.00 Map Filed P

WATER DIVISION NO 1

DISTRICT NO 15-5 Temp. Filing No 24 6/356

PERMIT NO ____ RESERVOIR

NAME OF FACILITY

THE Deer Creek RESERVOIR

1. Name(s), mailing address and phone no. of applicant(s) is/are State of Wyoming - DEPAD
Barrett Building
Cheyenne, Wyoming 82002

(If more than one applicant, designate one person to act as Agent for the others)

2. Name & address of agent to receive correspondence and notices None

3. The use to which the water is to be applied is Irrigation, Recreation, Municipal, Industrial

(a) If more than one beneficial use is being applied for, the reservoir capacity must be allocated in acre-feet to the various uses.

Active Capacity	Inactive Capacity
See Remarks	

(b) The area of the high-water line of the reservoir is 1099 acres.

(c) The total available capacity of the reservoir is 65785 acre-feet.

(d) If enlargement, the capacity of this enlargement is ____ acre-feet.

4. The source of the proposed appropriation is Deer Creek, tributary of the North Platte River

5. The center of the proposed reservoir is located N 70 degrees 50 min. E 1867.4 feet from the SW corner of Section 11 T. 31 N. R. 77 W., and is in the SW 1/4 SE 1/4 of Section 11 T. 31 N. R. 77 W

6. Are any of the lands covered by the proposed reservoir owned by the State or Federal Government? If so, describe lands and designate whether State or Federally owned.

State of Wyoming - leased for grazing
U.S. Forest Service - Medicine Bow National Forest
U.S. Bureau of Land Management

7. Fill out either (a) or (b)

(a) The reservoir is located in the channel of Deer Creek

(b) The reservoir is to be filled through the ____

Canal which has a carrying capacity of ____ cubic feet per second.

8. (a) The dam is to be constructed as follows: rockfill dam with impervious core

Contains 1,550,000 Cubic Yards.

(b) The water face of the dam is to be protected from wave action in the following manner:

rip-rap

Permit No. ____ Rev.

Page No. ____ (Leave Blank)

BEST AVAILABLE COPY

9. The estimated time required for commencement of work is 3 yrs. for completion of Construction is 5 yrs.

10. The accompanying map is prepared in accordance with the State Engineer's Manual of Regulations and Instructions for filing applications and is hereby declared a part of this application. The State Engineer may require the filing of detailed construction plans.

Under penalties of perjury, I declare that I have examined this application and to the best of my knowledge and belief it is true, correct and complete.

Signature of Applicant or Agent

Date February 1, 1982

NOTE: If construction under this application is for enlargement of an existing reservoir, a consent to the enlargement should be attached hereto from the present owners.

REMARKS

Reservoir Capacity Breakdown by Uses:

Municipal	16,700 AF
Irrigation	7,600 AF
Recreation & Dead Storage	5,300 AF
Industrial	36,485 AF
	65,785 AF

NOTICE

A Manual of Regulations and Instructions for filing applications will be furnished by the State Engineer's Office upon request. By carefully complying with the instructions contained in the Manual, much trouble and delay will be saved the applicant, the professional engineer or land surveyor, and the State Engineer's Office.

The application must be accompanied by maps in duplicate, prepared in accordance with the Manual and by a filing fee of twenty-five dollars ($25.00).

Applications returned for corrections must be resubmitted to the State Engineer within 90 days with the corrections properly made; otherwise the filing will be cancelled.

This application, when approved, does not constitute a complete water right. It is a permit authority to begin construction work, which must be commenced within the time allowed in the permit.

Notice of commencement of work and completion of the work described in the permit, must be filed in the State Engineer's Office before the expiration of the time allowed in the permit.

If extensions of time beyond the time limits set forth in the permit are required, requests for same must be in writing, stating why the additional time is required, and must be received in the State Engineer's Office before the expiration of the time allowed in the permit.

To perfect your water right, your Water Division Superintendent, or his authorized representative, will contact you after you have submitted notice to the State Engineer stating you have completed the construction as described in your permit. After inspection of the proof, it will be considered by the State Board of Control, and, if found to be satisfactory, the Board will issue to you a Certificate of Appropriation which will constitute a completed water right.

The granting of a permit does not constitute the granting of right-of-way. If any right-of-way is necessary in connection with the application, it should be understood that the responsibility is the applicant's.

BEST AVAI

Form S.W. 3
Rev. 4-68

LaVon Hewitt

No. 5. Do not fold this form. Use typewriter or print neatly with black ink.

STATE OF WYOMING

OFFICE OF THE STATE ENGINEER

Substitute/APPLICATION FOR PERMIT TO APPROPRIATE SURFACE WATER T.F. No. 24 6/356 RECEIVED APR 15 '87

THIS SECTION IS NOT TO BE FILLED IN BY APPLICANT

Filing Priority Date

THE STATE OF WYOMING, STATE ENGINEER'S OFFICE } ss.

The original of this instrument was received and filed for record on the 10th day of February A.D. 19 83 at 4:30 o'clock P. M.

Frank J. Trelease
Frank J. Trelease, Asst. State Engineer

Recorded in Book 42 of Reservoirs on Page 51

Fee Paid $ 25.00 Map Filed X

WATER DIVISION NO 1 DISTRICT NO 15-5 Temp Filing No 24 6/356

PERMIT NO. 9248 RESERVOIR

Substitute application received 4-24-86 at 10:00 A.M. I-22

NAME OF FACILITY

THE Dear Creek RESERVOIR

1. Name(s), mailing address and phone no. of applicant(s) is/are: State of Wyoming, Water Development Commission, Herschler Building, Cheyenne, WY 82002 (307)777-7626

Note: Name of applicant changed due to Legislative changes in agency authorities and duties.

If more than one applicant designate one as agent for the others

2. Name & address of agent to receive correspondence and notices: Wyoming Water Development Commission, Herschler Bldg., 3rd Floor East, Cheyenne, WY 82002 (777-7626)

3. The use to which the water is to be applied is: municipal, recreation and fisheries, industrial, irrigatio

(a) If more than one beneficial use of water is applied for, the reservoir capacity must be allocated to serve each of the various uses

Active Capacity	Inactive Capacity
65,216.42 acre-feet municipal, irrigation, industrial, recreation, and fisheries	568.38 acre-feet recreation and fisheries

(b) The area of the high water line of the reservoir is 1,917.37 acres.

(c) The total available capacity of the reservoir is 65,785 acre feet.

(d) If enlargement, the capacity of the enlargement is N/A acre feet.

4. The source of the proposed appropriation is: Dear Creek, tributary of the North Platte River

5. The center of the proposed reservoir is located S 41° 18'52"W 8,232.70 feet distant from the NE corner of Section 12 T 31 N. R 77 W. and is on the NE¼SE¼ of Section 11 T 31 N. R 77 W

6. Are any of the lands covered by the proposed reservoir owned by the State or Federal Government? If so, describe lands and designate whether State or Federally owned

Federal Lands (BLM) NW¼ SE¼, SW¼ SE¼, Section 11, T31N, R77W
State Lands NW¼, Section 13, T31N, R77W, NE¼ NW¼, Section 25, T31N, R77W, SE¼ NE¼, Section 22, T31N, R77W

7. Fill out either (a) or (b)

(a) The reservoir is located on the channel of Dear Creek

(b) The reservoir is to be filled through the N/A Canal which has a carrying capacity of N/A cubic feet per second

8. (a) The dam is to be constructed as follows: compacted rockfill embankment with an upstream reinforced concrete face-plate and specifications filed in State Engineer's Library under TC 530 .W8 D2 1984 Contains 1,317,000 Cubic Yards

(b) The water face of the dam is to be protected from wave action in the following manner: reinforced concrete face

Permit No. 9248 Res.

Page No. 51 (Leave Blank)

ABLE COPY

9 The estimated time required for commencement of work is Spring 1987 for completion of Construction is Fall 1990

10 The accompanying map is prepared in accordance with the State Engineer's Manual of Regulations and Instructions for filing applications and is hereby declared a part of this application. The State Engineer may require the filing of detailed construction plans

Under penalties of perjury, I declare that I have examined this application and to the best of my knowledge and belief it is true, correct and complete.

Signature of Applicant or Agent — Date 6/24/86

NOTE If construction under this application is for enlargement of an existing reservoir, a consent to the enlargement should be attached hereto from all persons owners.

REMARKS

The primary purpose of the project is to supply municipal water to those Wyoming communities in the North Platte River drainage below Alcova Reservoir that demonstrate a need for water and wish to participate in the project; however, the use of stored water is not limited to municipal use.

After the initial filling of the reservoir, the project shall be operated in such a manner as to provide a minimum pool of twelve thousand four hundred (12,400) acre-feet unless the storage is required to meet municipal water demands. Initially, and until municipal demands reach their ultimate levels, some of the water could be made available on a temporary basis for other uses such as industrial supplies and supplemental irrigation water.

After initial filling of the reservoir, the project shall be operated in such a manner as to ensure the following monthly minimum bypasses and releases unless making these bypasses and releases will affect the project's capability to meet municipal demands:

January	10 cfs	July	15 cfs
February	10 cfs	August	15 cfs
March	10 cfs	September	15 cfs
April	15 cfs	October	10 cfs
May	15 cfs	November	10 cfs
June	15 cfs	December	10 cfs

NOTICE

A Manual of Regulations and Instructions for filing applications will be furnished by the State Engineer's Office upon request. By carefully complying with the instructions contained in the Manual, much trouble and delay will be saved by the applicant, the professional engineer or land surveyor and the State Engineer's Office.

This application must be accompanied by maps in duplicate, prepared in accordance with the Manual and by a filing fee of twenty-five dollars ($25.00).

Applications returned for corrections must be resubmitted to the State Engineer within 90 days with the corrections properly made; otherwise the filing will be cancelled.

This application, when approved, does not constitute a complete water right. In a case necessary or large construction work, which must be completed within the time allowed in the permit.

Notice of commencement of work and completion of the work described in the permit must be filed in the State Engineer's Office before the expiration of the time allowed in the permit.

If extensions of time beyond the time taken set forth in the permit are required, requests for same must be in writing, stating why the additional time is required, and must be received in the State Engineer's Office before the expiration of the time allowed in the permit.

To perfect your water right, your Water Division Superintendent, or his authorized representative, will contact you after you have submitted notice to the State Engineer stating you have completed the construction as described in your permit. After inspection of the proof, it will be considered by the State Board of Control and, if found to be satisfactory, the Board will issue to you a Certificate of Appropriation which will constitute a completed water right.

The granting of a permit does not constitute the granting of a right of way. If any right of way is necessary in connection with the application, it should be understood that the responsibility is the applicant's.

BEST AVAILA

THE STATE OF WYOMING, STATE ENGINEER'S OFFICE } ss

SUBSTITUTE APPLICATION, ORIGINAL APPLICATION AND FIRST SUBSTITUTE APPLICATION FILED IN MISCELLANEOUS NOTICES UNDER THIS PERMIT.

THIS IS TO CERTIFY that I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions

This permit grants only the right to use the water available in the stream after all prior rights are satisfied

This permit is granted for municipal (Wyoming communities in the North Platte drainage that participate in the project - 65,216.42 acre-feet active) and fisheries and recreation (568.58 acre-feet inactive) purposes; however, some of the water could be used on a temporary basis for industrial and irrigation purposes.

After the initial filling, the reservoir will be operated to maintain a minimum pool of 12,400 acre-feet (568.58 acre-feet inactive capacity and 11,831.42 acre-feet active capacity) for recreation and fisheries purposes, unless the active contents portion may be needed for the municipal and temporary industrial and irrigation purposes.

After the initial filling, the reservoir will be operated to insure monthly bypasses and or releases of water at the dam during the water year of 10 cfs October through March and 15 cfs April through September to provide a minimum flow below the dam. Natural flow water bypassed to meet the demands of senior downstream water rights shall not be charged against the storage right; any water bypassed and not stored can be charged against the storage right in keeping with the one fill per year rule and practice. Water properly stored for fishery purposes can be released for minimum downstream flow purposes.

If the State Engineer determines at any point in time that the public safety so requires, water impounded in this facility shall be evacuated or maintained at any water level which may be required by the State Engineer. This condition is imposed in order to satisfy the requirements of Section 41-3-307 through 41-3-310, Wyoming Statutes.

The reservoir of this permit will inundate lands with water rights, creating a conflict in the records. The permittee has until 5 years from the date of completion of the reservoir to submit appropriate petitions to the State Board of Control to remove the conflicts from the record, or the State Board of Control will abandon the water rights.

The time for commencement of construction work shall terminate on December 31, 1982

The time for completing the construction of the reservoir shall terminate on December 31, 1990

Witness my hand this 12th day of March A D 1987

George L. Christopulos

GEORGE L. CHRISTOPULOS, State Engineer

Permit No. 9248 Res

Page No. 51 (Over Done)

BLE COPY

PERMIT NO 9248 RES

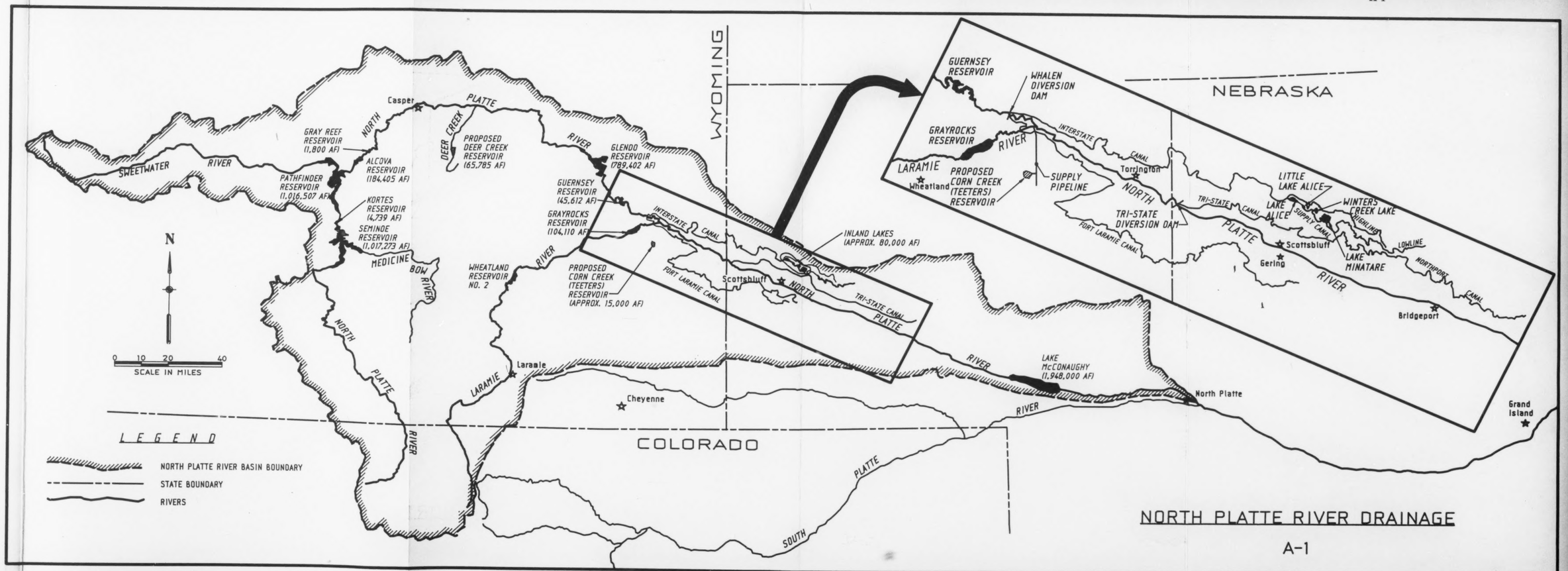
E-22

PERMIT STATUS

Receipt Date February 10, 1983 Approval Date March 13, 1987

March 13, 1987 - Construction Plans approved for Deer Creek Dam. Thirty-one (31) reproducible plan sheets are filed in Construction Plans Safety of Dams File, Water Division No. 1, under Permit No. 9248 Res.

APR 1 3 87



NORTH PLATTE RIVER DRAINAGE

A-1


WYOMING
NEBRASKA
INTERSTATE
SYKES CREEK
AKERS DRAW
DRY SPOTTEDTAIL CREEK
WET SPOTTEDTAIL CREEK
CANAL
LOB SPRINGS
HIERSCHE DRAIN
N
SCOTTSBLUFF
TRI STATE
DRAIN
LATERAL
NINEMILE
CANAL
HIGH LINE CANAL
LOW LINE CANAL
DRAIN
MOFFAT
CREEK
NORTH PLATTE RIVER
BAYARD
NORTHPORT
CANAL
BRIDGEPORT
2 MILES 0 2 MILES
SCALE

Supreme Court, U.S.
FILED
AUG 17 1992
OFFICE OF THE CLERK

No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES OPPOSING EXCEPTIONS

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether, in this proceeding to enforce the decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), Nebraska and the United States are entitled to summary judgment affirming that the Inland Lakes in Nebraska shall continue to receive water from the North Platte River with the same priority as other components of the North Platte Project.

2. Whether either Nebraska or Wyoming is entitled to summary judgment resolving Wyoming's right to develop water resources on the Laramie River, a tributary of the North Platte River.

3. Whether either Nebraska or Wyoming is entitled to summary judgment resolving Wyoming's right to develop water resources on Deer Creek, another tributary of the North Platte River.

4. Whether Nebraska, Wyoming, or Colorado is entitled to summary judgment resolving Nebraska's rights to water in the North Platte River downstream of the Tri-State Dam in Nebraska.

TABLE OF CONTENTS

	Page
Statement	1
A. The original proceedings	2
B. The current proceedings	5
Introduction and summary of argument	10
Argument:	
I. The Special Master correctly understood the nature of these proceedings and the North Platte Decree	12
II. The Special Master has recommended a proper resolution of the pending motions for summary judgment	15
A. The Inland Lakes dispute	16
B. The Laramie River dispute	23
C. The Deer Creek dispute	30
D. The below-Tri-State-Dam issues	36
Conclusion	41

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 460 U.S. 605 (1983)	19
City of Vicksburg v. *Henson*, 231 U.S. 259 (1913)	26
Nebraska v. *Wyoming*, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953)	*passim*
United States v. *Louisiana*, 485 U.S. 88 (1988)	14
Wyoming v. *Colorado*, 259 U.S. 419 (1922), amended, 260 U.S. 1 (1922), vacated and new decree entered, 353 U.S. 953 (1957)	3, 7-8, 24, 25, 26
Wyoming v. *Colorado*, 286 U.S. 494 (1932)	13, 19, 20
Wyoming v. *Colorado*, 298 U.S. 573 (1936)	26
Wyoming ex rel. Christopulos v. *United States*, No. C86-0370-B (D. Wyo. Aug. 31, 1990)	17

Statute:

Flood Control Act of 1944, ch. 665, § 9(c), 58 Stat. 891	22
43 U.S.C. 373	22

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES OPPOSING EXCEPTIONS

STATEMENT

On October 6, 1986, the State of Nebraska petitioned this Court to enforce the North Platte Decree entered in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953). The Court granted Nebraska leave to file its petition, 479 U.S. 1051 (1987), and referred the matter to Special Master Owen Olpin, 483 U.S. 1002 (1987), who has filed his First and Second Interim Reports, 492 U.S. 903 (1989); 112 S. Ct. 1930 (1992). The States of Nebraska, Wyoming, and Colorado and amicus curiae Basin Electric Power Cooperative have filed exceptions to the Master's reports. The United States submits this brief in response to those exceptions.

A. The Original Proceedings

In 1934, the State of Nebraska brought an original action in this Court against the State of Wyoming, seeking an equitable apportionment of the North Platte River. See *Nebraska* v. *Wyoming*, 325 U.S. at 591. In the course of the next 11 years, the State of Colorado was impleaded as a defendant, the United States intervened, Special Master Michael Doherty was appointed to take evidence, and (after a lengthy investigation) he issued a report. This Court reviewed the 274-page Doherty Report and largely followed its recommendations. See 325 U.S. at 616-617.

The Court's 1945 decision focused on the immediate problem at hand: the North Platte's flow was overappropriated, and water users in Wyoming and Colorado were depleting the water supply before it reached downstream users in Nebraska. The Court perceived a clear need for an interstate apportionment of available water based on principles compatible with state water law systems. 325 U.S. at 616-617. As the Court explained, under the state law doctrine of prior appropriation, "priority of appropriation gives superiority of right." *Id.* at 617. The Court concluded that this "priority rule" should be the "guiding principle" in ensuring that available water is fairly allocated among the States. The Court also noted, however, that a "just and equitable" apportionment might require departures from that principle. *Id.* at 618.

The Court was well aware that the apportionment controversy was "a delicate one and extremely complex." 325 U.S. at 617. It attempted to provide a workable solution to the practical problem by formulating a decree to "deal with conditions as they obtain

today." *Id.* at 620. The Court observed that if conditions "substantially change, the decree can be adjusted to meet the new conditions." *Ibid.* Mindful that the North Platte Basin was experiencing a drought, the Court also concluded that its apportionment should be based on the "dependable flow." *Ibid.* "Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years." *Ibid.*, quoting *Wyoming* v. *Colorado*, 259 U.S. 419, 476 (1922).

Having stated those principles, the Court applied them to sequential sections of the North Platte River, from its source in Colorado to the Nebraska-Wyoming border. 325 U.S. at 621-655; see App., *infra* (map); 325 U.S. at 593-607 (describing the "natural sections" of the river). For each section, the Court examined Special Master Doherty's detailed inventory of the water supply, existing and proposed uses, their water requirements, their priorities compared to other rights, and the downstream effect of upstream limitations. The Court basically concluded that established priorities should be protected from any material increase in diversions that pose a concrete threat to the water supply. But the Court declined to prohibit alleged harms that were speculative, concluding that appropriate relief would be available if the threat materializes and "promises to disturb the delicate balance of the river." *Id.* at 625. See also *id.* at 622-623, 626-627, 628-629, 632-633, 637, 654, 655, 657.

Broadly viewed, the Court's decision had three prominent features. First, it allowed Colorado and Wyoming water users on the upper reaches of the North Platte River (from its source to Pathfinder Reservoir) to continue existing diversions, while pro-

hibiting certain new diversions that would diminish downstream water supplies. See 325 U.S. at 621-625. Second, the decision established priorities among federal storage reservoirs and certain canals that supply water for irrigation during the growing season. *Id.* at 625-637.[1] Third, the decision provided a proportional allocation of the North Platte River's natural flow from Whalen Dam near the confluence of the North Platte and Laramie Rivers in Wyoming to the Tri-State Dam, just across the border in Nebraska. *Id.* at 637-654.[2]

The Court directed the parties to formulate a decree "to carry this opinion into effect." 325 U.S. at 657. The resulting North Platte Decree contains a series of injunctions that, in accordance with the Court's decision, impose specific prohibitions on water diversions that pose an actual or impending threat to established uses. See Decree ¶¶ I-V (325 U.S. at 665-672).[3] The Decree also contains other definitional

---

[1] Generally speaking, certain Nebraska canals that predated the Bureau of Reclamation's North Platte and Kendrick Projects have the most senior rights. 325 U.S. at 625-626, 630-631. The North Platte Project's Pathfinder and Guernsey Reservoirs, which store water primarily for Nebraska irrigation districts, have seniority over the subsequently constructed Kendrick Project's Seminoe and Alcova Reservoirs, which store water primarily for a Wyoming irrigation district. *Id.* at 626, 632-633.

[2] The Court apportioned 75% of the irrigation season flow to Nebraska and 25% to Wyoming, based on a rough proportion of the respective States' irrigation requirements and relative priorities in that reach. See 325 U.S. at 640-646.

[3] The Decree generally follows the structure of the Court's opinion, imposing prohibitions beginning at the headwaters of the North Platte River and extending to the Wyoming-Nebraska border. Thus, paragraph I of the Decree enjoins

and administrative provisions. See Decree ¶¶ VI-XV (325 U.S. at 669-672). Paragraph XIII, the so-called "reopener" provision, is particularly important. In keeping with the Court's decision to postpone resolution of abstract conflicts until they pose a concrete problem, paragraph XIII provides that "[a]ny of the parties may apply at the foot of this decree for its amendment or for further relief." *Id.* at 671-672.[4]

B. The Current Proceedings

In 1986, Nebraska invoked paragraph XIII of the Decree for an order enforcing the decree and for injunctive relief. See First Interim Rep. 2 & n.1; Second Interim Rep. 4. Nebraska contended that Wyoming has violated Nebraska's rights under the Decree through actions or proposed actions that would deprive Nebraska of water. Wyoming admitted the actions alleged in Nebraska's petition but denied that those actions violated the Decree, and it also filed a

---

Colorado from diverting or storing water in excess of prescribed amounts from the source of the North Platte River to the Colorado-Wyoming border. 325 U.S. at 665. Paragraph II enjoins Wyoming from diverting or storing water in excess of prescribed amounts from the Colorado-Wyoming border to Guernsey Reservoir. *Id.* at 665-666. Paragraphs III and IV establish priorities among the Nebraska canals, the North Platte Project reservoirs, and the Kendrick project reservoirs, which divert water at various points for the most part in Wyoming. *Id.* at 666-667. Paragraph V apportions the natural flow from the Guernsey Reservoir to the Tri-State Dam, located in Nebraska near the Wyoming border. *Id.* at 667-669.

[4] In 1953, this Court approved a stipulation by the parties to amend the Decree to take into account the Bureau of Reclamation's construction and operation of the Glendo Unit of the Pick-Sloan Missouri Basin Program. See 345 U.S. at 981. The Decree, as modified, appears in Special Master Olpin's Second Interim Report at B1-B11.

counterclaim against Nebraska. This Court referred the matter to Special Master Olpin, together with several requests for intervention by private parties. See Second Interim Rep. 5-7.

The Special Master has supervised pretrial proceedings and discovery aimed at narrowing and defining the isues. His First Interim Report, filed in 1989, explained his reasons for preliminary denial of Wyoming's comprehensive motion for summary judgment. The Special Master basically concluded that "there are outstanding issues of material fact" that precluded summary judgment at that stage of the proceedings. First Interim Rep. 16. He left open, however, "the possibility of summary adjudication on any issue later in the proceedings." *Id.* at 17-18; see *id.* at 18-37.[5] After the parties conducted extensive discovery, the Special Master entertained renewed motions for summary judgment. His Second Interim Report explains his recommendation on four central issues in the case: (1) the Inland Lakes dispute; (2) the Laramie River dispute; (3) the Deer Creek dispute; and (4) the "below-Tri-State" issues. See Second Interim Rep. 16-19; see also *id.* at 109-110 (proposed order).[6]

1. The Inland Lakes are Bureau of Reclamation reservoirs located in Nebraska. They are part of the Bureau's North Platte Project and serve Nebraska irrigators. During the non-irrigation season, the

---

[5] The Special Master also denied the pending motions for intervention, but gave the private parties liberal opportunity to participate as amici curiae. See First Interim Rep. 6-14.

[6] The Special Master also recommended against granting the private parties' renewed motions for intervention. Second Interim Rep. 101-108. Those parties have not filed exceptions to that recommendation.

Bureau diverts North Platte water at the Whalen Dam, located in Wyoming, to the Inland Lakes by way of the Interstate Canal. In addition, the Bureau frequently stores water temporarily in the Glendo and Guernsey Reservoirs, upstream of the Whalen Dam, pending its transfer through the Interstate Canal. Nebraska's petition alleged that Wyoming was interfering with the Bureau's water deliveries to the Inland Lakes. See Neb. Pet. ¶ 3(d). Wyoming responded that it was entitled to curtail deliveries because the Inland Lakes do not have a Wyoming storage permit. The Special Master recommended that the Court grant the motions of Nebraska and the United States for summary judgment on this issue, concluding that the Inland Lakes are entitled to continue receiving water deliveries with the same priority date as other components of the North Platte Project. See Second Interim Rep. 16, 19-35.

2. The Laramie River is a North Platte tributary that originates in Colorado and flows into the Whalen-to-Tri-State section of the North Platte River. Wyoming granted a permit for construction of the Grayrocks Reservoir on the Laramie River and is considering whether to grant a permit for construction of the Corn Creek Project, which would result in additional diversion facilities at the confluence of the Laramie and North Platte Rivers. Nebraska's petition alleged that those storage and diversion facilities would deplete the Laramie River contributions to the North Platte, and thereby diminish flows that Nebraska is entitled to receive under the Court's apportionment. See Neb. Pet. ¶ 3(a) and (b). Wyoming responded that it is entitled to consume all of the relevant Laramie flows under a prior decree of this Court. See *Wyoming* v. *Colorado*, 259 U.S. 419 (1922),

amended, 260 U.S. 1 (1922), vacated and new decree entered, 353 U.S. 953 (1957) (Laramie Decree). The Special Master recommended that the Court deny the motions of both Nebraska and Wyoming for summary judgment. He concluded that the North Platte Decree takes into account Laramie contributions, but that the Grayrocks Reservoir does not currently pose a "tangible threat" to Nebraska's asserted rights and a trial may be necessary to determine the effect of the Corn Creek Project. Second Interim Rep. 17-18, 35-71.

3. Deer Creek is a North Platte tributary that originates in central Wyoming and flows into the Pathfinder-to-Guernsey section of the North Platte River. Wyoming's proposed Deer Creek Project would result in the construction of a reservoir on Deer Creek that would store and divert water for various uses. Nebraska's petition alleged that the project would deplete the Deer Creek contributions to the North Platte and would diminish flows that Nebraska was entitled to receive under the Court's apportionment. See Neb. Pet. ¶ 3(d). Wyoming responded that the Deer Creek development would not diminish Nebraska's entitlement and that, in any event, the North Platte Decree's "municipal use" provision would allow the development. See Decree ¶ X (Second Interim Rep. B7). The Special Master recommended that the Court deny the motion of Wyoming for summary judgment, concluding that "material factual issues remain as to how Deer Creek actually will be operated" and "whether and to what extent it is an exempt municipal use." Second Interim Rep. 18, 71-89.

4. The Tri-State Dam, located about one mile east of the Wyoming-Nebraska border, marks the end of the Whalen-to-Tri-State section of the North Platte River.

As we have explained, this Court has apportioned the natural flow in that section during the irrigation season, granting 75% to Nebraska and 25% to Wyoming. The Court did not impose an apportionment of the North Platt eRiver downstream of the Tri-State Dam, because it appeared that other sources, including return flows from North Platte irrigation diversions, would provide sufficient water to meet the needs in the downstream section. See 325 U.S. at 654-655. Nebraska contended in the proceedings below that it has a legal entitlement to use of those return flows, because the Decree was premised on their availability. Colorado and Wyoming responded that the Decree protects only Nebraska's right to divert specific amounts of water upstream of the Tri-State Dam. The Special Master recommended that the Court deny for the most part the motions of Nebraska, Wyoming, and Colorado for summary judgment. He concluded that summary judgment would be premature on the current evidentiary record. The Master recommended, however, that the Court grant partial summary judgment to Nebraska to clarify that Nebraska is entitled to 75% of the natural flow in the Whalen-to-Tri-State section without regard to the beneficial use requirements of the individual canals. Second Interim Rep. 18-19, 89-100.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Nebraska initiated this action to enforce its rights and to obtain injunctive relief under the North Platte Decree, which apportions the flow of the North Platte River between Wyoming and Nebraska. The Special Master had prepared thorough reports discussing the parties' motions for summary judgment on four central issues in this case. Nebraska, Wyoming, Colorado, and amicus curiae Basin Electric Power Cooperative have filed exceptions to the Special Master's determinations. Wyoming raises the principal objections. It contends that the Special Master's analysis "rests on a fundamental misconception of the Decree and the nature of this lawsuit" (Wyo. Br. 26; see *id.* at 26-37), and it objects to each of the Special Master's specific recommendations on the motions for summary judgment (*id.* at 31-74). The United States is in substantial agreement with the Special Master's recommendations. We respond first to Wyoming's contention that the Special Master misconceived the nature of the lawsuit and the underlying Decree. We then examine the Special Master's determinations in light of the specific exceptions lodged by Wyoming and the other parties.

I. Wyoming's assertion that the Special Master misunderstood the nature of these proceedings is entirely unfounded. The Special Master expressly recognized that his primary responsibility "is to interpret the 1945 Decree from the original proceedings and then apply that interpretation to resolve the various issues presented by the motions." Second Interim Rep. 13. As his thorough reports demonstrate, he has followed exactly that course. Wyoming's assertion that the Special Master has misread the Decree

as the source of, rather than as a limitation on, Wyoming's authority to divert water, rests on Wyoming's own misreading of the Special Master's analysis. Wyoming's argument that the Special Master has systematically neglected principles of finality and repose simply reflects Wyoming's disagreement with the Master as to what specifically was decided in the original proceedings.

II. The Special Master has recommended a proper disposition of the pending motions for summary judgment. As he explains, the Court should enter summary judgment affirming that the Inland Lakes are entitled to continued diversions of 46,000 acre-feet of North Platte water during the non-irrigation season. Those diversions were a "vital underpinning" of the Court's apportionment, and Wyoming waived its right to object to the adequacy of the Bureau of Reclamation's state water permits by failing to raise that challenge in the original proceedings. The motions for summary judgment on the Laramie issues should be denied, because those motions are based on incorrect interpretations of the North Platte and Laramie Decrees. The motions for summary judgment on the Deer Creek issues should be denied because material facts are in dispute, while the motions for summary judgment on the below-Tri-State issues are for the most part premature. The Court should clarify, however, that Nebraska's apportionment is not limited by the estimated water requirements of specific canals.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY UNDERSTOOD THE NATURE OF THESE PROCEEDINGS AND THE NORTH PLATTE DECREE

Wyoming contends that the Special Master "misconceived" his role in three respects. According to Wyoming, the Special Master failed to recognize that: (a) this is an action to interpret and enforce the North Platte Decree; (b) the Decree is not the source, but only a limitation, on Wyoming's authority to use water within its borders; and (c) the Decree finally resolved matters that were litigated in the original proceedings. See Wyo. Br. 26-31; see also Basin Elec. Amicus Br. 6-11. Those assertions are baseless.

Wyoming's first contention, that the Special Master misunderstood the nature of these proceedings (Wyo. Br. 26-28), finds no support in the Special Master's reports. Indeed, the Special Master accurately explained the nature of the proceedings at the outset of the Second Interim Report. He first described the physical characteristics of the North Platte Basin (Second Interim Rep. 1-3), this Court's entry of the 1945 Decree (*id.* at 3-4), and the proceedings that have culminated in the current motions for summary judgment (*id.* at 4-10). The Special Master then correctly articulated the standards for granting a motion for summary judgment (*id.* at 10-13) and explained the substantive basis for his decision (*id.* at 13-16). The Special Master expressly recognized:

> In ruling on the pending summary judgment motions, my primary task is to interpret the 1945 Decree from the original proceedings and then apply that interpretation to resolve the various issues presented by the motions.

Id. at 13. Thus, the Special Master clearly understood that the core purpose of these proceedings is to interpret and apply the Decree to the specific issues identified by the parties.

Wyoming's underlying objection seems to be that the Special Master should not be allowed to suggest modifications of the North Platte Decree, because Nebraska initiated this lawsuit only "to enforce" Nebraska's apportionment. See Wyo. Br. 26-28.[7] That argument, however, overlooks the character and purpose of the Decree. The Court apportioned the North Platte River through its decision in *Nebraska* v. *Wyoming*, *supra*. The Decree was formulated by the parties "to carry this opinion into effect." 325 U.S. at 657. As the Special Master recognized, if the plain language of the Decree does not resolve the issues before him, he may look beyond that implementing document to the Court's underlying decision and determine whether the Court has resolved the issues presented. Second Interim Rep. 14. See *Wyoming* v. *Colorado*, 286 U.S. 494, 508 (1932) ("Certainly the limited injunction which was granted does not warrant any inference that it marks the limits of what was intended to be decided.").

If the Master determines that the Court's prior decision resolves an issue that the Decree does not specifically address, he may recommend modifications to the Decree that clarify the Court's decision or apply that decision to the matters in dispute in this case. See, *e.g.*, Second Interim Rep. 110 (recommending an addition to the North Platte Decree clarifying the

---

[7] Nebraska's petition sought an order "enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree." Neb. Pet. 3-4.

status of the Inland Lakes). If neither the Decree nor the Court's underlying decision resolves some of the matters in dispute, or if an appropriate resolution would require relief beyond what Nebraska requested in its petition, the Special Master may conclude that this case requires action beyond the scope of the Court's reference. In that situation, he may so state, and the parties may seek to expand the Court's reference to the Special Master. But the Special Master should be allowed to make that determination in the first instance, after he has narrowed and identified for this Court the precise issues in dispute. See generally *United States* v. *Louisiana*, 485 U.S. 88, 91-93 (1988).

Wyoming's second contention, that the Special Master misconceived the North Platte Decree as the source of Wyoming's general right to divert and use water rather than as a limitation on the State's sovereign powers (Wyo. Br. 28-29), also finds no support in the Special Master's reports. The Special Master accurately recounted the formulation and contents of the Decree, which he described as "constrain-[ing]" the parties. See Second Interim Rep. 3-4, 14-15. The only example that Wyoming offers of the Special Master's supposed "misconception" is a single sentence, which Wyoming takes out of context and which in any event provides scant support for Wyoming's contention. See Wyo. Br. 28.[8]

---

[8] Wyoming cites the Special Master's conclusion that "the Decree does not grant the right to Wyoming * * * to dewater the Laramie." Second Interim Rep. 39. Contrary to Wyoming's suggestion, that statement does not reflect any misconception that the North Platte Decree was the original source of Wyoming's rights. The Special Master was simply responding to *Wyoming's* claim that "by virtue of the state-

Wyoming's third contention, that the Special Master failed to accord finality to previously litigated matters (Wyo. Br. 29-31), is also unfounded. As we explain below with reference to his specific recommendations, the Special Master recognized and applied principles of finality and repose. Wyoming simply disagrees with the Special Master's specific determinations as to what was actually decided in the previous litigation with respect to the "Laramie" and "below-Tri-State" disputes. See Wyo. Br. 30-31. As is true of Wyoming's other contentions of systemic error, the Special Master did not have any "fundamental misconception of the Decree and the nature of this lawsuit." Wyo. Br. 26. Instead, he prepared thoughtful and comprehensive recommendations on the matters pending before him.

II. THE SPECIAL MASTER HAS RECOMMENDED A PROPER RESOLUTION OF THE PENDING MOTIONS FOR SUMMARY JUDGMENT

The Special Master has recommended that the motions filed by Nebraska and the United States for summary judgment on the Inland Lakes dispute should be granted and that Nebraska's motion for summary judgment on the below-Tri-State issues should be granted in part, but that all other motions for summary judgment should be denied. The United States largely agrees with the Special Master's recommendations. The exceptions filed by Wyoming, Colorado, and Basin Electric Cooperative are without merit. Although Nebraska raises a significant issue with respect to the Special Master's interpretation of

---

ment in the 1945 North Platte Decree * * * she may with impunity dewater the Laramie River." *Id.* at 36. See discussion, pp. 23-36, *infra.*

the Decree's "municipal use" provision, that matter can be revisited in future proceedings.

A. The Inland Lakes Dispute

Nebraska and the United States moved for summary judgment affirming that the Bureau of Reclamation is entitled to continue its historic practice of delivering water from the North Platte River at Whalen Dam, through the Interstate Canal, to the Inland Lakes in Nebraska during the non-irrigation season, in order to meet the water requirements of the North Platte Project.[9] The Special Master correctly concluded that those motions should be granted, because the undisputed facts show that the Bureau's practice is an "essential element" of the North Platte Project and a "vital underpinning" of the Court's apportionment, and because Wyoming failed to raise its objection at the time of that apportionment. Second Interim Rep. 32-35.

As the Special Master explained, from the time the North Platte Project commenced operations in 1913, the Bureau has delivered North Platte water to the Inland Lakes for storage during the non-irrigation season. Second Interim Rep. 19-20. That practice increases both hydropower production and downstream water availability, while reducing North Platte diversions to Nebraska during the irrigation season. Wyoming accepted that practice for many years. It precipitated the current dispute in 1986 by bringing suit against the United States to enjoin the Bureau from continuing those interstate transfers unless it first

---

[9] During the irrigation season, water diverted through the Interstate Canal is used to supply the Pathfinder Irrigation District in Nebraska. See Second Interim Rep. 23.

obtained a Wyoming state permit expressly allowing the diversion. See Second Interim Rep. 20-21.[10]

The Special Master observed that the Bureau had obtained Wyoming state water permits at the turn of the century for the North Platte Project, but "[a]pparently no Wyoming permit was issued that specifically mentioned the Bureau's contemplated non-irrigation season diversions through the Interstate Canal for storage in the Inland Lakes." Second Interim Rep. 20; see also *id.* at 24-25. The Special Master also observed, however, that the Bureau's Inland Lakes were a recognized component of the North Platte Project when this Court apportioned the North Platte, *id.* at 25-26, see 325 U.S. at 595, 633, and that "[t]he use and requirements of the Inland Lakes were litigated by Colorado, Wyoming, Nebraska and the United States during the original proceedings," Second Interim Rep. 26. Indeed, the Court's apportionment, based on Special Master Doherty's report, was explicitly premised on the expectation that Nebraska's water requirements during the irrigation season could be reduced by storing 46,000 acre-feet of North Platte water in the Inland Lakes during the non-irrigation season. *Id.* at 26-28; see 325 U.S. at 646. That practice has continued to the present day. Second Interim Rep. 28-29.

---

[10] At the time Wyoming brought that suit, it was preparing environmental documentation for the proposed Deer Creek Project. Second Interim Rep. 29 n.44, 33 n.51. That documentation indicated that the yields from the Deer Creek Project could be improved if the Project's priority could be established as senior to the Inland Lakes. The United States removed Wyoming's suit to federal court, where it was dismissed without prejudice in light of Nebraska's original action in this Court. See *Wyoming ex rel. Christopulos* v. *United States*, No. C86-0370-B (D. Wyo. Aug. 31, 1990).

Relying on that undisputed record, the Special Master correctly concluded that the North Platte Decree should be amended to state explicitly that the Bureau's Inland Lakes diversion shares the same 1904 priority date as other North Platte Project operations (including the Interstate Canal, see Second Interim Rep. 24; 325 U.S. at 649) and that the Bureau is entitled to continue diverting 46,000 acre-feet of North Platte water to the Inland Lakes during the non-irrigation season. Second Interim Rep. 32-35, 109-111. The Special Master considered Wyoming's objections, *id.* at 30-32, and properly rejected them, *id.* at 32-35.

Wyoming first contends that the Special Master erred, because, in its view, "it is undisputed that the Inland Lakes have no water storage right under state law" (Wyo. Br. 51)—by which Wyoming means that the Bureau does not have a permit specifically referring to storage in the Inland Lakes (see *id.* at 51-54). As the Special Master noted, that argument "beg[s] the critical question," because "[t]he issue is not whether Wyoming issued to the Inland Lakes separate, identifiable permits." Second Interim Rep. 32. "The key material fact is that since 1913 the Inland Lakes have been used for storage of natural flows during the non-irrigation season." *Id.* at 32.

The Inland Lakes "were an integral component of the North Platte Project from the outset"—a fact that Wyoming has never disputed, see Second Interim Rep. 25—and they "have been treated throughout the century as having a December 6, 1904 priority." *Ibid.* "It is clear that [Special Master Doherty] recommended and the Court recognized in the Decree a right to store in the Inland Lakes 46,000 acre feet of natural flow during the non-irrigation season," and this was "a vital underpinning of the ultimate

apportionment." *Id.* at 33. Furthermore, the "North Platte Project components continue to depend upon the right of the Inland Lakes to store water and thus upon a priority commensurate with the other components." *Ibid.*

Given that history, the Special Master was entirely justified in concluding that if the Bureau was required to obtain a separate state permit for the Inland Lakes, "the time for Wyoming to have challenged the alleged lack of individual permits for the Inland Lakes was certainly no later than during the original proceedings." Second Interim Rep. 34. The Bureau's use of the Inland Lakes is a central feature of the historic administration of the North Platte River, and to change that feature now "would violate [this] Court's admonition in *Nebraska* v. *Wyoming* that to the extent possible, 'established uses should be protected.' " *Id.* at 34-35. Simply put, Wyoming's current complaint about the adequacy of the Bureau's state permits comes nearly half a century too late. Cf. *Arizona* v. *California*, 460 U.S. 605, 619-626 (1983); *Wyoming* v. *Colorado*, 286 U.S. at 507.

Wyoming nevertheless argues that the Special Master erred in recognizing a 1904 priority for the Inland Lakes, because the Decree does not expressly state that the Inland Lakes are entitled to such a priority. Wyo. Br. 54-56. The Decree, however, provides injunctive relief only as to matters that were in dispute. The Decree does not contain a specific priority date for the Inland Lakes because no one challenged that diversion. Second Interim Rep. 26. To the contrary, as the Special Master explains (and Wyoming ultimately acknowledges, Wyo. Br. 56), both Wyoming and Colorado advocated increasing the Bureau's non-irrigation season diversions to the Inland Lakes as a predicate for reducing Nebraska's

apportionment of water available during the irrigation season—an apportionment for lands that concededly had a 1904 priority date. Second Interim Rep. 26-28. See 325 U.S. at 595, 646, 649 n.2; Doherty Rep. 60-61.

As this Court explained in interpreting the Laramie Decree, the Court provides injunctive relief only to the extent that the parties request and demonstrate a need for such relief. *Wyoming* v. *Colorado*, 286 U.S. at 508. Accordingly, the mere fact that the Court's Decree itself is silent in some respects "does not warrant any inference that it marks the limits of what was intended to be decided." *Ibid.* "Such an inference would be inconsistent with other parts of the decree and with the opinion and the findings therein." *Ibid.* In this case, there was no need for the Decree specifically to address the validity and priority of the Inland Lakes diversion, because no one disputed that it would continue, and indeed Nebraska's apportionment rested on the premise that it would. Now that Wyoming does dispute the Bureau's practice—nearly 80 years after it began and nearly 50 years after the entry of the Decree—the Special Master has appropriately concluded that what is clear from the Court's opinion should be made explicit in the Decree. See Second Interim Rep. 109.

Wyoming also argues that the Special Master erred in recommending summary judgment on the Inland Lakes issue, because he cited "equitable concerns" that, according to Wyoming, raise questions of disputed material fact. Wyo. Br. 56-62. Wyoming, however, misreads the Special Master's analysis. The Special Master did not consider "whether in equity the Decree should be modified to create an Inland Lakes storage right." Wyo. Br. 57. He simply recognized that principles of finality rest in part on "equi-

table concerns" and that Wyoming's encouragement of the Inland Lakes diversion in the original proceedings implicated those concerns. Second Interim Rep. 33-34. If the Inland Lakes require a separate state permit now, they required a separate state permit then. Wyoming should therefore have raised its permit objection in the original proceedings, rather than relying on the Inland Lakes diversions to reduce Nebraska's irrigation season apportionment. *Id.* at 34-35. The Special Master correctly concluded that Wyoming's election of the latter course was dispositive and rendered Wyoming's various issues of fact immaterial. *Id.* at 32, 36.

Finally, Wyoming challenges the Special Master's determination that protection for the historic operations of the Inland Lakes should include the Bureau of Reclamation's longstanding practice of temporarily storing Inland Lakes water in Glendo and Guernsey Reservoirs. Wyo. Br. 62-63. Wyoming contends that the Special Master's recommendation is improper because the practice "has no basis in the original proceeding" and the United States has not sought congressional or state approval for the practice. *Ibid.* Those contentions are without merit.

The Special Master recognized that the Court's 1945 apportionment is premised, in part, on the actual delivery of 46,000 acre-feet of water to the Inland Lakes during the non-irrigation season. The Bureau of Reclamation employs the Guernsey and Glendo Reservoirs to accomplish that delivery. As former Bureau Project Manager David Wilde explained, the Bureau uses those reservoirs for temporary winter storage of water destined for the Inland Lakes, until weather conditions allow delivery of the water through the Interstate Canal. Second Interim Rep. 24, 31; First Wilde Aff. ¶ 35. The Spe-

cial Master properly concluded that the Bureau's practice is essential to the apportionment, even though those particular uses of Guernsey (and later Glendo) Reservoir were not discussed in the earlier proceedings. See Second Interim Rep. 35.[11]

Wyoming suggests, without support, that the temporary storage of water in the two federal reservoirs requires either congressional or state authorization. Wyo. Br. 63. As Mr. Wilde's affidavit explains, the Bureau of Reclamation's routine operations include the temporary storage of water belonging to one reservoir in another, which maximizes the generation of hydroelectric power. First Wilde Aff. ¶ 31. Guernsey Reservoir was used for temporary storage before Glendo was completed and both reservoirs have been used for that purpose since 1960. *Id.* ¶¶ 25-28. Wyoming has failed to show that the Bureau's Glendo and Guernsey operations are unlawful or otherwise inappropriate. See 43 U.S.C. 373 (granting the Secretary broad authority to operate projects to carry out statutory purposes).[12]

---

[11] Wyoming's reference (Wyo. Br. 63 n.29) to this Court's refusal to authorize joint operation of federal projects in the earlier proceedings is inapposite. See 325 U.S. at 632-633. The question in those proceedings was whether the United States could operate the projects without regard to priorities in order to achieve greater efficiencies. The temporary storage of Inland Lakes water does not disregard the Inland Lakes priority, but rather implements and protects it, while respecting other rights as well.

[12] The Glendo Reservoir's reclamation and power operations are governed by the reclamation laws pursuant to Section 9(c) of the Flood Control Act of 1944, ch. 665, 58 Stat. 891. Significantly, the Glendo planning documents explained that Glendo Reservoir would be operated to maximize generation of power and that releases of temporarily stored water belong-

B. The Laramie River Dispute

Wyoming and Nebraska filed competing motions for summary judgment resolving Wyoming's right to develop water resources on the Laramie tributary of the North Platte River. Wyoming contended that this Court's Laramie and North Platte Decrees allowed it to divert all water in the Laramie and denied Nebraska any right to Laramie contributions to the North Platte River, while Nebraska contended that its North Platte apportionment includes a share of the Laramie flows that have historically reached the North Platte River. See Second Interim Rep. 36-37. The Special Master correctly rejected both arguments in their extreme form and denied both motions for summary judgment. At the same time, he properly concluded that Nebraska had equities to be considered based on contributions that the Laramie had made and continues to make to the Whalen-to-Tri-State section of the North Platte River. *Id.* at 63-64, see generally *id.* at 41-63. The Master additionally concluded that any objections by Nebraska to the Grayrocks Project and the proposed Corn Creek Project based on such equitable (yet unquantified) interests would not necessarily require resolution at this time. *Id.* at 38-41.

---

ing to other ownerships would be a principal source of hydropower. Bureau of Reclamation Definite Plan Report for the Glendo Unit, at 3, 15, 21-22 (Dec. 1952) (attached to Third Wilde Aff.). Wyoming acceded to that understanding when it agreed to obtain legislation for the operation of Glendo Reservoir in "substantial conformity" with the Bureau of Reclamation Definite Plan and when it joined in the 1953 request for amendment of the Decree. 345 U.S. at 983. See note 4, *supra*. Furthermore, as Wyoming acknowledges, its officials have consented to the temporary storage of Inland Lakes water in Glendo and Guernsey Reservoirs as part of the annual operating agreements. Wyo. Br. 63.

1. Wyoming and Amicus Basin Electric except to the Special Master's denial of Wyoming's motion for summary judgment. See Wyo. Br. 65-69; Basin Elec. Amicus Br. 20-26. They contend that summary judgment is compelled by the plain language of paragraph XII(d) of the North Platte Decree, which states that the Decree "shall not affect":

> The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River.

Second Interim Rep. B8. See Wyo. Br. 64-67; Basin Elec. Amicus Br. 24. They also rely on the Court's statement in *Nebraska* v. *Wyoming* that the Laramie River apportionment is "in no way affected by the decree in this case." 325 U.S. at 592 n.1. See Wyo. Br. 65; Basin Br. 23.

The Special Master correctly rejected those arguments. He recognized that the Court's *Nebraska* v. *Wyoming* decision and paragraph XII(d) of the North Platte Decree's clearly provide that the North Platte apportionment would leave undisturbed the Laramie River apportionment. Second Interim Rep. 49. But he also recognized that this limitation would not affect rights in any unapportioned part of the Laramie River's flow. *Ibid.* The Special Master reviewed the record of the Laramie Decree and concluded that this Court had apportioned the flow of the Laramie River only down to and including the Wheatland Project. *Id.* at 41-42 & n.60. See *Wyoming* v. *Colorado*, 259 U.S. at 488 ("the diversion for the Wheatland District (the lowest diversion we are to consider)"). Thus, paragraph XII(d) has no application to the Laramie accretions below Wheatland, which make a substantial contribution to the

North Platte's flow in the critical Whalen-to-Tri-State region. See Second Interim Rep. 52, 59-60.[13]

Wyoming and Basin Electric contend that the Special Master's interpretation of the Laramie Decree is incorrect, suggesting that the Laramie Decree gives Wyoming control over the entire flow of the Laramie River not specifically apportioned to Colorado under that Decree. They rely, however, on a provision of the 1957 Laramie Decree, entered by joint motion of Wyoming and Colorado, that grants Wyoming "the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado." *Wyoming* v. *Colorado*, 353 U.S. at 953. See Wyo. Br. 66-67; Basin Elec. Amicus Br. 21-22. The 1957 Laramie Decree is inapposite here. Paragraph XII(d) of the North Platte Decree preserves only the "apportionment heretofore made" between Wyoming and Colorado—in other words, the Court's apportionment in the 1922 Laramie Decree—and the 1922 apportionment did not deter-

---

[13] As the Special Master explained, his conclusion is consistent with the treatment the Laramie flows received in the original proceedings. See Second Interim Rep. 49-58. This Court and Special Master Doherty included Laramie contributions in determining the North Platte water supply available for apportionment in this case. *Id.* at 48, 54. Wyoming had advocated the addition of Laramie River inflows to the total supply available for apportionment between Nebraska and Wyoming, and Special Master Doherty had included Laramie inflows in his discussion of tributary contributions to the Whalen-to-Tri-State reach, in his summary of each party's water supply exhibits, in his determination of the long-term supply, and in his calculation of supply for apportionment. *Ibid.* See Doherty Rep. 22, 63. In short, "an assumption was made: the Laramie was one of the sources of water for the North Platte, and it would continue to be so." Second Interim Rep. 60.

mine rights below the Wheatland District. See 259 U.S. at 458. Thus, if we assume *arguendo* that the 1957 Laramie Decree did determine Wyoming's rights vis-à-vis Colorado to the below-Wheatland flows, that determination still would not be part of the "apportionment heretofore made," and it would not in any event absolutely bar Nebraska from asserting its claims, since it was not a party to that (or the 1922) Decree. Cf. *City of Vicksburg* v. *Henson*, 231 U.S. 259, 269 (1913) ("It is well settled * * * that a decree is to be construed with reference to the issues it was meant to decide.").[14]

2. Nebraska objects, for a different reason, to the Special Master's treatment of the Laramie flows. Nebraska argues that the North Platte Decree apportioned part of those flows to Nebraska. Neb. Br. 18-32. Nebraska reasons that the Laramie inflows were "an express and integral part of" Special Master Doherty's "apportionment fund" (*id.* at 15-16), and the Court's specific inclusion of Spring Creek, another

---

[14] Wyoming and Basin Electric also rely on a statement in this Court's 1936 opinion enforcing the 1922 Decree. See *Wyoming* v. *Colorado*, 298 U.S. 573 (1936). See Wyo. Br. 66-67; Basin Elec. Amicus Br. 23 n.22. The Court therein described the 1922 Decree as establishing "the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries in virtue of appropriations prior in time and right to the tunnel appropriations in Colorado." 298 U.S. at 578. That summary description of the 1922 Decree did not extend the Court's 1922 apportionment to the section below Wheatland. In any event, the Court's description of the 1922 Decree referred only to Wyoming's rights with respect to appropriations that were "prior in time and right" to Colorado's appropriations. Wyoming and Basin Electric omit that portion of the quotation. See Wyo. Br. 66; Basin Elec. Amicus Br. 23 n.22.

tributary entering the Whalen-to-Tri-State reach of the North Platte, confirmed this Court's intent to unalterably fix the rights to this stretch of the River (*id.* at 16). The Special Master correctly rejected Nebraska's position. Second Interim Rep. 39. Based on his review of the record, he concluded that neither this Court nor Special Master Doherty ever made any precise disposition of the Laramie inflows. *Id.* at 59.

The Special Master's conclusion is consistent with this Court's basic approach in the original proceedings, wherein it refused to resolve speculative disputes. As we have explained, the Court defined rights and imposed restraints only where there was a concrete threat to an over-appropriated water supply. See p. 3, *supra*. Where there was no concrete threat, the Court deferred decision, recognizing that an actual factual situation would sharpen the inquiry and allow "the delicate adjustment of interests which must be made." 325 U.S. at 618. See, *e.g.*, *id.* at 622-623, 624-625, 628-629, 632-633, 637. Cf. 325 U.S. at 658 (Roberts, J., dissenting) ("No State may play dog in the manger and build up reserves for future use in the absence of present need and present damage."). At the time of the original proceedings in this case, Wyoming and Nebraska apparently believed that Laramie inflows would be available for apportionment without immediate threat to depletion. The Court accordingly had no reason to impose any restraint on their use.

3. In addition to addressing the general question of restraints on Laramie River flows, Special Master Olpin also addressed Wyoming's motion for summary disposition of Nebraska's ultimate challenges to Wyoming's Grayrocks Project and its Proposed Corn Creek Project. The Grayrocks Project, a Basin Elec-

tric power plant, periodically releases water to the river pursuant to the 1978 settlement of earlier litigation. Second Interim Rep. 65. The issue presented here is whether Wyoming may allow those releases to be appropriated, thereby depriving Nebraska of the benefit of its settlement. The Corn Creek Project is a proposed irrigation development at the confluence of the Laramie and the North Platte, which could cause further depletions of the water supply. *Id.* at 69.

a. The Special Master concluded that the Grayrocks Project currently poses no concrete threat to Nebraska. Second Interim Rep. 65-69. Nevertheless, the Special Master concluded:

> In view of Wyoming's refusal to assure that she will support the 1978 Settlement Agreement, her insistence that the depletion of Grayrocks releases by new appropriators could be permitted under Wyoming law despite the terms of the 1978 Settlement Agreement, and her lack of participation in the Grayrocks proceedings—an equitable consideration—I recommend that paragraph XIII of the Decree be amended to make relief available at the foot of the Decree.

Id. at 68-69 (footnotes omitted), 110 (proposed amendment). In short, the Special Master correctly concluded that resolution of this issue should be deferred, preserving the opportunity of the United States and Nebraska to return to Court for relief in the event that a more concrete threat of depletion develops. That approach is consistent with the Master's determination that the Laramie inflows constitute an important contribution to the North Platte River flows that are available for apportionment during periods of dependable flow. It is also consistent

with this Court's recognition that protection of established uses and senior priorities was a primary objective of the equitable apportionment. 325 U.S. at 617-618.

Wyoming's principal objection to the Master's Grayrocks decision is based on a misreading of it. Wyoming mistakenly interprets the proposed amendment to the Decree as "subject[ing] Wyoming to a suit in the original jurisdiction in aid of enforcement of that Settlement Agreement." Wyo. Br. 71. Although the proposed amendment does refer to the settlement agreement, it does not specifically call for enforcement; rather it contemplates potential relief based on the "effect" of depletion of the Grayrocks releases. Thus, the proposed provision is similar to other provisions of the North Platte Decree's "reopener" provision. See Second Interim Rep. B8-B9.[15]

b. The Master also correctly decided to defer resolution of the Corn Creek issues pending further pretrial proceedings. Second Interim Rep. 70-71. His decision was appropriately based on representations by counsel for Wyoming that the Corn Creek Project was sufficiently concrete to present a threat to the apportionment. *Id.* at 70. Wyoming objects to that decision, arguing that Nebraska and Basin Electric

---

[15] Wyoming and Basin Electric also argue that the Grayrocks claim should be dismissed because Nebraska's petition asserted that Wyoming was "[d]epleting the flows of the North Platte River by the operation of Greyrocks Reservoir," Neb. Pet. ¶ 3(a), and not that Wyoming was allowing depletion of Grayrocks releases. Wyo. Br. 71 n.31; Basin Elec. Amicus Br. 17. Nebraska, however, has clarified in the proceedings before the Special Master that it is concerned that Wyoming would allow diversion of the Grayrocks releases before they reach the apportioned section of the river. See also Neb. Pet. Reply Br. 11.

resolved the Corn Creek Project's effects in the 1978 Grayrocks settlement agreement. See Wyo. Br. 73-74; Basin Elec. Amicus Br. 17-20. The Master concluded, however, that factual uncertainties had arisen in connection with the Project's effects and its relationship to the Grayrocks settlement. Second Interim Rep. 71. He therefore properly concluded that summary disposition at this juncture would be inappropriate. If his further inquiry reveals no relevant issue of material fact in dispute, the Special Master may resolve the Corn Creek issue without trial. *Ibid.* At this juncture, however, it would be premature for the Court to decide the appropriateness of doing so.

C. The Deer Creek Dispute

1. Wyoming moved for summary judgment dismissing Nebraska's objections to Wyoming's proposed Deer Creek Project. That project would result in construction of a storage reservoir on the Deer Creek tributary, which enters the North Platte River between Pathfinder and Guernsey Reservoirs. Wyoming contended that Nebraska had failed to make an adequate showing of threatened injury and that, in any event, the Deer Project is exempted from challenge under the North Platte Decree's paragraph X, which provides:

> This Decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

Second Interim Rep. B7; see *id.* at 73-74. The Special Master has properly recommended that this Court deny Wyoming's motion. *Id.* at 74.

As the Special Master noted, Nebraska has challenged the Deer Creek Project under paragraph XIII(c) of the Decree, wherein the Court retained jurisdiction to consider the "question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." Second Interim Rep. B9. See *id.* at 71-72 & n.97. The Special Master correctly concluded that the "question of the effect" of the Deer Creek Project could not be resolved summarily because of outstanding issues of material fact. *Id.* at 77, 88.

The Special Master determined that the evidence proffered by Nebraska, which indicated that the Deer Creek Project would have substantial effects on federal projects and other established uses, was legally sufficient to counter Wyoming's contention that the Project would have no significant impact. Second Interim Rep. 75-77. He also concluded that a "municipal exemption" could not be summarily accorded to the Deer Creek Project without factual resolution of material disputes concerning the project's municipal character and operation. *Id.* at 83-87. He indicated, however, that, if the Deer Creek Project is shown as a matter of fact to qualify as an "ordinary and usual" municipal use within the meaning of paragraph X of the decree, it ought not be subject to paragraph XIII(c)'s "effect" analysis. *Id.* at 74 n.99, 77.

Wyoming excepts to portions of the Special Master's Deer Creek recommendation, arguing that: (1) summary judgment is appropriate as a matter of law because the issue of development on tributaries like Deer Creek was raised in the earlier litigation, but resulted in no limitation in the decree; (2) Nebraska has not presented sufficient evidence that the Deer

Creek Project would actually deprive Nebraska canals of necessary water; and (3) issues of municipal administration identified for trial would inappropriately involve this Court in intrastate water administration. Wyo. Br. 38-50.

Wyoming's first argument, that the Deer Creek claim should be summarily resolved based on the absence of a specific prohibition in the Decree (Wyo. Br. 38-39), is without merit. Although the Court did consider tributary development in the original proceedings, it expressly deferred consideration of "[t]he question of the effect" until a concrete threat appeared. Decree ¶ XIII(c) (Second Interim Rep. B9). See 325 U.S. at 624-625 ("We find no evidence of any present threat to the water supply from this source. If such threat appears and it promises to disturb the delicate balance of the river, application may be made at the foot of the decree for an appropriate restriction."). Thus, there is no basis for Wyoming's contention that this Court's prior decision finally determined the matter.

Wyoming's second argument, that Nebraska has failed to provide sufficient evidence to defeat summary judgment (Wyo. Br. 38-43), is also without merit. That argument rests largely on Wyoming's theory, rejected by the Special Master in a later portion of his report (Second Interim Rep. 98-99), that the only legally cognizable evidence of injury sufficient to defeat summary judgment would be injury to the Nebraska canals diverting from the Whalen-to-Tri-State reach of the river, not below the Tri-State Dam. See pp. 36-40, *infra*.[16] Moreover, the

---

[16] Wyoming admitted that operation of the Deer Creek Project would deplete natural flows in the mainstem of the North Platte River. Second Interim Rep. 75.

Special Master found that evidence submitted by Nebraska describing the threat that the Deer Creek Project posed to the water supply of the federal reservoirs and the Inland Lakes was sufficient to establish a genuine issue of material fact requiring resolution. First Interim Rep. 30-31; Second Interim Rep. 75-77 (quoting Becker Aff. ¶¶ 2, 3). That evidence, standing alone, is sufficient to support the Special Master's denial of summary judgment.

Wyoming's third argument, that the Deer Creek Project's municipal character bars Nebraska's challenge (Wyo. Br. 43-50), is similarly without merit. The Special Master correctly concluded that material issues of fact preclude a summary determination of the Deer Creek Project's qualification as an "ordinary and usual" municipal use within the meaning of paragraph X of the Decree. The municipal character of the project is in question, because it was not designed solely as a municipal project, and only a portion of its 60,000-acre-feet capacity would be devoted to municipal uses, none of which would be immediately needed. See First Interim Rep. 28; Second Interim Rep. 71, 83-85.[17]

Material factual issues also exist as to how the Deer Creek Project would be operated vis-à-vis other established uses on the North Platte River, Second Interim Rep. 86, which is a matter of significant concern with respect to the water supply for the Inland Lakes and the federal projects. Affidavits submitted by the United States explain that Deer

---

[17] Although Deer Creek enters the North Platte downstream of Casper, Wyoming contends that the Project would be operated to furnish Casper and other communities with municipal water through a water exchange. Second Interim Rep. 78.

Creek is an important source of the Inland Lakes' North Platte water supply, especially during years of low flow or drought, when the federal projects have needed all of the Deer Creek inflows to satisfy project ownerships and meet irrigation requirements. Wilde Aff. ¶¶ 64-72.[18]

Although Wyoming objects (Wyo. Br. 48-49) to the Special Master's decision to take evidence on how the Deer Creek Project will be administered in relation to other more senior rights on the North Platte River, that evidence is necessary to evaluate the project's municipal character. Second Interim Rep. 85-87. Moreover, if Wyoming should operate the Deer Creek Project out of priority, it would present a threat to senior water rights on the North Platte River similar to that posed by the Kendrick Project, which was a precipitating factor for the apportionment in the earlier proceedings. See 325 U.S. at 599, 624-627. Thus, contrary to Wyoming's assertions, questions about the administration of the project go directly to "the question of the effect" of the construction of Deer Creek Reservoir, bringing them squarely within paragraph XIII of the Decree.[19]

---

[18] In its application for a Clean Water Act permit, Wyoming provided two sets of analyses of the Deer Creek project impacts—one operating the project senior to the Inland Lakes and one operating the project junior to the Inland Lakes. In response to interrogatory requests posed by the United States, Wyoming has refused to commit to operate the project junior to the federal projects. Wyoming's Response to United States Interrogatory 2 (Docket Entry No. 79). Thus, the "spectre that Wyoming might operate Deer Creek Reservoir * * * in some manner that is inconsistent with the Decree" (Wyo. Br. 48-49) is not idle speculation.

[19] See also, *e.g.*, 325 U.S. at 622 ("Nor can we see how existing projects can be protected on the basis of the 1931-

2. Nebraska excepts to the Special Master's conclusion (Second Interim Rep. 74, 77, 78, 85-86) that if the Decree's paragraph X exemption for municipal uses applies to the Deer Creek Project, it would entirely override paragraph XIII(c)'s provision for evaluation of "effects" of actual or threatened construction. Neb. Br. 32-54. Nebraska argues that the Special Master's reading of paragraph X is at odds with its plain language (*id.* at 35-37), conflicts with the record in the original proceedings (*id.* at 37-41), and creates numerous problems for resolution of the Deer Creek issues (*id.* at 47-54). Although the United States has not excepted to the Special Master's denial of summary judgment motions on the Deer Creek issues, we agree with Nebraska that his interpretation of paragraph X is problematic.

It seems doubtful that this Court intended paragraph X of the Decree, which governs "use or diversion of water" for "ordinary and usual" municipal uses, to carve out a complete exemption for large tributary storage projects, like the proposed Deer Creek Project, from paragraph XIII(c)'s provision for further review. A more plausible reading of paragraph X is that it was intended to exempt the small municipal diversions then in existence from the injunctive provisions of the decree. See Doherty Rep. 180. That interpretation is supported by the casual way in which the provision was adopted, see Neb. Br. 38-41, in contrast to the fierce competition among the States to protect relatively small quantities of water in other contexts. See, *e.g.*, Second Interim

---

1940 supply if additional projects in Colorado are permitted.").

Rep. 79; 325 U.S. at 620-623 (discussion of additional irrigation in Colorado); *id.* at 648 (addition of 2855 acre-feet contribution of Spring Creek to apportionment fund).[20]

As a practical matter, a definitive reconciliation of paragraphs X and XIII(c) should await the resolution of the pertinent factual issues identified by the Special Master. See Second Interim Rep. 88-89. On the one hand, Wyoming has in the past indicated that it might not operate the project in priority with all of the more senior rights on the river. That action could place the project outside of paragraph X's "ordinary and usual" municipal use category. See *id.* at 72 n.98, 86-87. On the other hand, operation of the Deer Creek Project in priority with those uses may eliminate any detrimental "effect" under paragraph XIII(c) to the extent that all senior users on the North Platte River are protected. For this reason, we have found it unnecessary to challenge the Special Master's interpretation of paragraph X at this time.

D. The Below-Tri-State-Dam Issues

Wyoming and Colorado moved for summary judgment limiting Nebraska's evidentiary presentation to claims of injury above the Tri-State Dam, arguing that "evidence of instream uses and uses supplied by diversions below Tri-State Dam is immaterial to proof of violation of Nebraska's apportionment under the Decree." Second Interim Rep. 93. The Special Master recommended that this Court deny those mo-

---

[20] Wyoming's compilation of water rights in the earlier proceedings revealed only small municipal uses at the time. There were no municipal storage projects similar to the proposed Deer Creek Project diverting water from the North Platte River. See Wyo. Exhs. 4-6, 47.

tions, concluding that summary disposition of that issue would be "premature" at this juncture of the litigation. *Id.* at 92. The Special Master concluded that "there is nonetheless one subsidiary question that can be answered now: I recommend that the Court rule that the Decree does not impose absolute ceilings for Nebraska's diversions in the Whalen to Tri-State section on a canal-by-canal basis." *Ibid.* Wyoming, Colorado, and Basin Electric take exception to the Special Master's recommendations. Wyo. Br. 31-37; Colo. Br. 3-13; Basin Elec. Amicus Br. 27-28.

The Special Master correctly concluded that it would be improvident at this stage of the proceedings to issue a legal ruling "advising Nebraska on how she may develop her case and the propositions for which her evidence will be deemed material." Second Interim Rep. 94. The Master explained:

> To rule on such questions now would be to issue an advisory opinion that Wyoming and Colorado cannot unlawfully injure Nebraska's downstream of Tri-State interests except by actions that will violate the Decree with respect to her upstream of Tri-State apportionment.

Ibid. In concluding that "there is no wisdom in ruling on that question in the abstract," *ibid.*, the Master was influenced by the interrelationship of the various sections of the river. As he explained, if the upstream development Nebraska challenges alters the water supply below Tri-State, the Court's factual predicate for providing no apportionment below Tri-State—that below-Tri-State uses were adequately met by local supplies and return flows—could be eliminated. *Id.* at 94-95. Thus, the Special Master was entirely justified in deciding "to proceed cau-

tiously until Nebraska has developed her factual case." *Id.* at 94.

The Special Master's approach is consistent with this Court's preference for a fully developed factual record upon which to resolve such disputes among the States. See 325 U.S. at 617-618, 627, 645. In this instance, the North Platte River stood in "delicate balance" at the time of the 1945 apportionment, and the Court recognized that new development could potentially upset that balance. *Id.* at 625. The Special Master correctly declined to preclude below-Tri-State evidence at the threshold, before he has seen what that evidence is and how it may relate to the apportionment. To do otherwise could deny this Court an adequately developed factual record at later stages of the litigation.

Wyoming suggests that further development of the record would be unnecessary if this Court were to sustain Wyoming's contention that "the requirements of Nebraska's canals in the Whalen to Tri-State Dam section are the measure and limit of Nebraska's existing apportionment." Wyo. Br. 34-35. As the Special Master explained, that contention is incorrect and "should be resolved now." Second Interim Rep. 95. "The uncontradicted facts do not establish Wyoming's claim; instead, they lead to the opposite conclusion, requiring a ruling in favor of Nebraska on this question." *Ibid.*

The apportionment of the Whalen-to-Tri-State reach of the North Platte River, which grants Nebraska 75% and Wyoming 25% of the natural flow in that reach, was fashioned in rough proportion to the respective needs of the Nebraska and Wyoming canals diverting out of that section of the river. 325 U.S. at 641, 646. This Court, however, specifically

declined to adopt Nebraska's canal requirements as a measurement of, or limit to, Nebraska's entitlement to water. *Id.* at 628, 655. Instead, the Court adhered to Special Master Doherty's approach, which used the canal requirements to arrive at an appropriate proportional division of the natural flow between the States. See Second Interim Rep. 95.

As Special Master Olpin explained, Special Master Doherty addressed this matter with "particular care." Second Interim Rep. 95. Master Doherty concluded that it was appropriate to use Nebraska canal requirements to ascertain the relative equities between the States, but he doubted his power "to fix such limitations upon individual canals." Doherty Rep. 160-161, quoted in Second Interim Rep. 96-97. Master Doherty concluded:

> Consequently, the findings herein as to requirements cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree.

Ibid. This Court followed Special Master Doherty's approach when it adopted his proportional division of the natural flow, 325 U.S. at 627, 637-654, and when it denied both the United States' request for a quantification of Nebraska's apportionment, *id.* at 628, and Wyoming's similar request for a mass allocation of Nebraska's entitlement, *id.* at 642, 655. See Second Interim Rep. 90-91, 97-98. Wyoming gives no reason why the earlier rejection of a fixed limit on Nebraska's entitlement should be abandoned now.[21]

---

[21] Wyoming contends that the quantification she seeks is supported by paragraph IV of the Decree (Second Interim

As Special Master Olpin explained, Special Master Doherty's report, the Court's opinion and the North Platte Decree are clear: "The beneficial use requirements for the canals determined by Special Master Doherty in the original proceedings do not constitute decreed ceilings for diversions for each of those canals." Second Interim Rep. 99. Nebraska is therefore entitled to a ruling that the "1945 equitable apportionment did not restrict diversions or irrigated acreages of Nebraska appropriators on a canal-by-canal basis." *Id.* at 100.

Rep. B2-B3), which allows certain Nebraska canals to satisfy requirements identified in the Decree by obtaining water in priority over federal reservoirs. See Wyo. Br. 35-37. Special Master Olpin evaluated that argument and correctly concluded that paragraph IV limits the extent to which the Nebraska canals may stop federal reservoirs from storing water, but does not place any "absolute ceilings" or other restrictions on the quantities of water those canals may actually divert. Second Interim Rep. 98-99. Wyoming also asks for a legal ruling to "clarify that the federal reservoirs are not required to bypass natural flow to a senior Nebraska canal under Paragraph IV when that canal is exceeding the diversion limits or seasonal limits fixed in Paragraph IV." Wyo. Br. 36. Such a ruling, however, would be advisory in the absence of a showing that those canals have made calls on the federal reservoirs in violation of paragraph IV. Wyoming has not made such a showing.

CONCLUSION

The exceptions to the First and Second Interim Reports of the Special Master should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

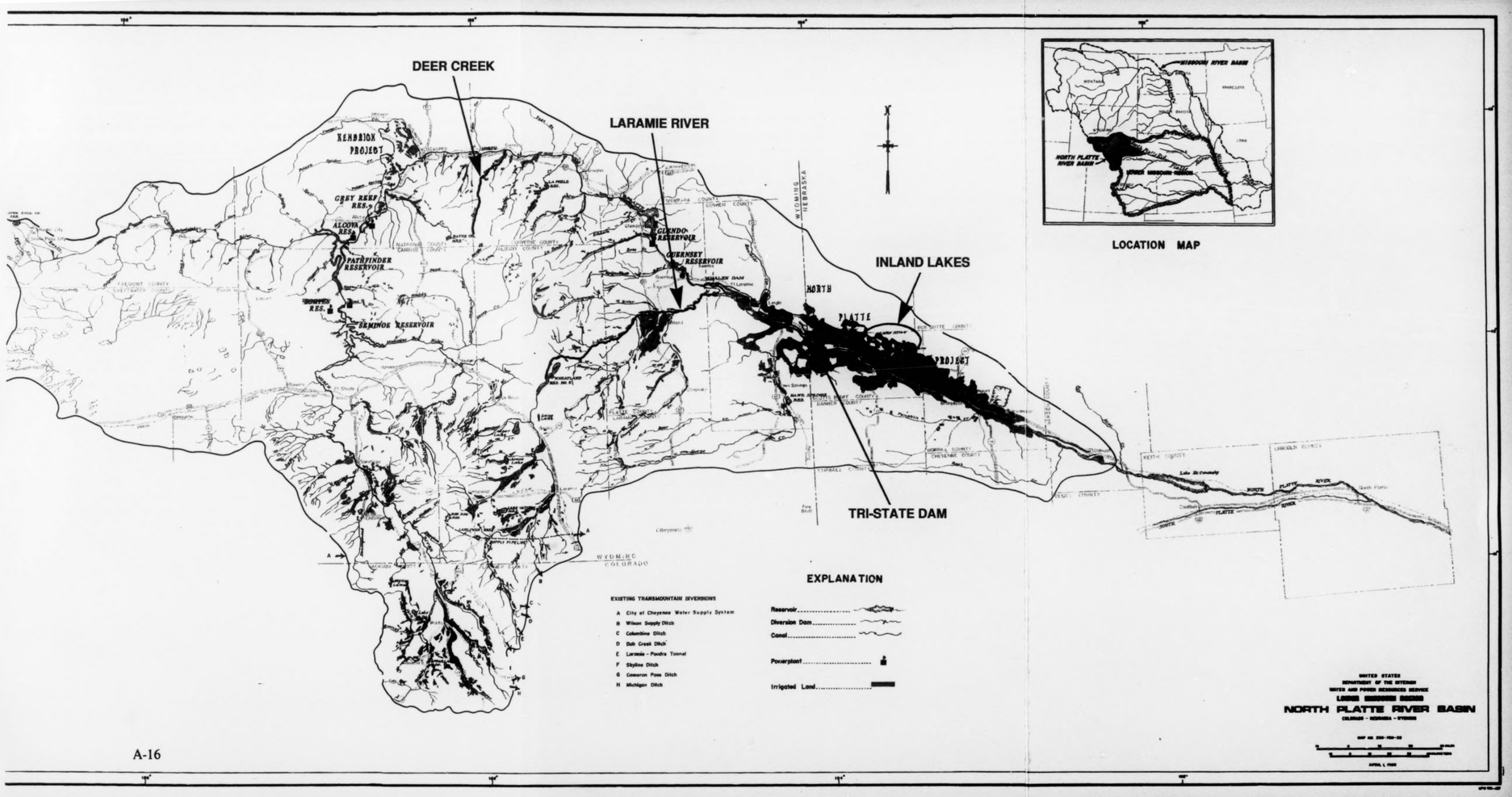
EDWIN S. KNEEDLER
Assistant to the Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

AUGUST 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 49557


DEER CREEK
LARAMIE RIVER
INLAND LAKES
TRI-STATE DAM
KENDRICK PROJECT
GREY REEF RES.
ALCOVA RES.
PATHFINDER RESERVOIR
SEMINOE RESERVOIR
GLENDO RESERVOIR
GUERNSEY RESERVOIR
NORTH PLATTE PROJECT
WYOMING
COLORADO
NEBRASKA
EXPLANATION
EXISTING TRANSMOUNTAIN DIVERSIONS
A City of Cheyenne Water Supply System
B Wilson Supply Ditch
C Columbine Ditch
D Bob Creek Ditch
E Laramie - Poudre Tunnel
F Skyline Ditch
G Cameron Pass Ditch
H Michigan Ditch
Reservoir
Diversion Dam
Canal
Powerplant
Irrigated Land
LOCATION MAP
MISSOURI RIVER BASIN
NORTH PLATTE RIVER BASIN
UNITED STATES
DEPARTMENT OF THE INTERIOR
WATER AND POWER RESOURCES SERVICE
NORTH PLATTE RIVER BASIN
COLORADO - NEBRASKA - WYOMING

Supreme Court, U.S.
FILED
SEP 18 1992
OFFICE OF THE CLERK

No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant,

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

WYOMING MOTION FOR LEAVE TO FILE A REPLY BRIEF AND WYOMING BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES OPPOSING EXCEPTIONS

JOSEPH B. MEYER
Attorney General of Wyoming
DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

September 15, 1992

No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

WYOMING MOTION FOR LEAVE TO FILE A REPLY BRIEF

The State of Wyoming requests leave of the Court to file the accompanying brief replying to the Brief for the United States Opposing Exceptions. The grounds for this motion are:

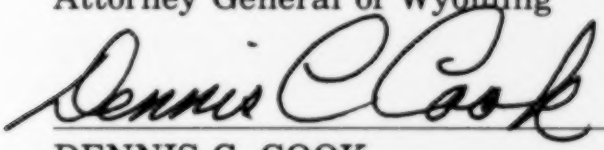
The United States filed no exceptions to the Special Master's reports and therefore filed no opening brief. The United States first set forth its positions on the matters covered in the Special Master's reports in the Brief for the United States Opposing Exceptions. Consequently, Wyoming has not had an opportunity to reply to the United States's arguments.

Wyoming's reply brief is tendered for filing within the time limits provided by SUP.CT.R. 25.3.

Wyoming's reply brief corrects misstatements of fact in the United States' brief and provides a more complete statement of the facts regarding the United States' involvement in this case. Wyoming respectfully submits that an application of those additional facts to the United States' arguments on the merits of Wyoming's exceptions will show why those arguments provide no basis for overruling Wyoming's exceptions.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

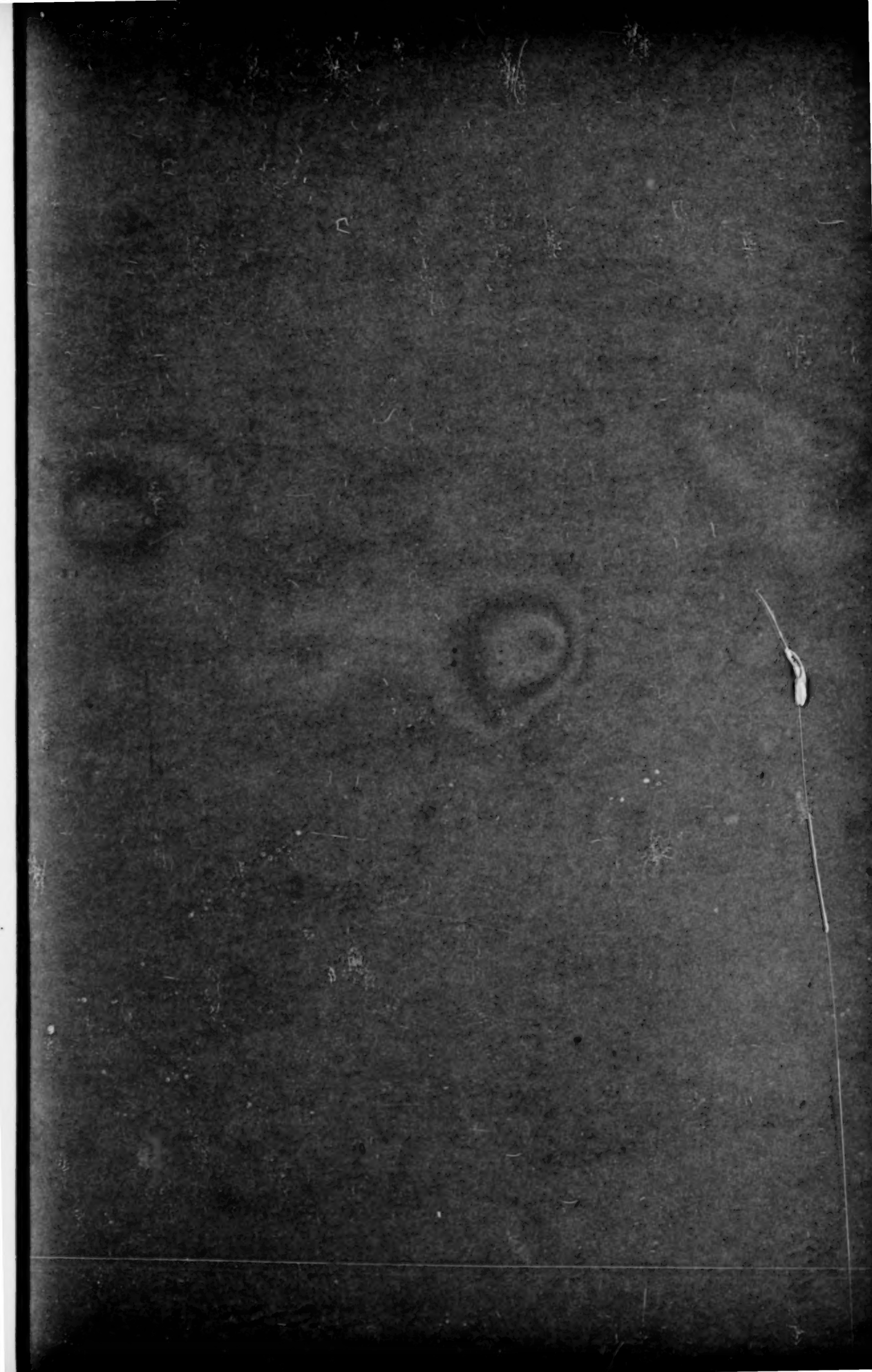


DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782



No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

WYOMING BRIEF IN REPLY TO BRIEF FOR THE UNITED STATES OPPOSING EXCEPTIONS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTRODUCTION AND STATEMENT OF FACTS .. 1

The Original Proceeding 1
Inland Lakes 2
Deer Creek Reservoir 4
The Laramie River 6

ARGUMENT 7

I. THE PARTIES SHOULD NOT BE COMPELLED TO LITIGATE MATTERS BEYOND THE SCOPE OF THE PLEADINGS REFERRED BY THE COURT TO THE SPECIAL MASTER 7

II. IT IS NOT PREMATURE TO DEFINE AS A MATTER OF LAW THE EXTENT OF NEBRASKA'S DECREED APPORTIONMENT 9

III. THE UNITED STATES IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE INLAND LAKES ISSUE 12

A. The Summary Judgment Recommended by the Special Master Would Result in Internal Conflicts in the Decree and Would Contravene Federal and State Law 12

B. If Storage of Water in the Inland Lakes is a "Vital Underpinning" of the Apportionment, Then the Determined Water Requirements are the Measure of Nebraska's Equitable Apportionment 14

C. The Reliance of the United States on Principles of *Res Judicata* is Misplaced ...15

IV. WYOMING IS ENTITLED TO SUMMARY JUDGMENT DENYING NEBRASKA'S CLAIMS THAT THE GRAYROCKS RESERVOIR OR CORN CREEK PROJECT VIOLATE THE APPORTIONMENT 17

V. WYOMING IS ENTITLED TO SUMMARY JUDGMENT THAT DEER CREEK RESERVOIR WILL NOT VIOLATE NEBRASKA'S APPORTIONMENT UNDER THE DECREE 19

CONCLUSION 21

TABLE OF AUTHORITIES

Pages

CASES

Arizona v. California,
460 U.S. 605 (1983) 9

California v. United States,
438 U.S. 645 (1978) 1, 13

Celotex Corporation v. Catrett,
477 U.S. 317 (1986) 19

Hernandez v. City of Los Angeles,
624 F.2d 935 (9th Cir. 1980) 17

Jess v. West,
Civ. No. 88-L-308 (D. Neb.
Complaint filed August 1, 1988) 5

Nebraska v. Wyoming,
295 U.S. 40 (1935) 1, 13

Nebraska v. Wyoming,
304 U.S. 545 (1938) 1

Nebraska v. Wyoming,
325 U.S. 589 (1945) ..... *passim*

Nevada v. United States,
463 U.S. 110 (1983) 9

United States v. Louisiana,
485 U.S. 88 (1988) 7, 8

Vermont v. New York,
417 U.S. 270 (1974) 9

Wyoming v. Colorado,
259 U.S. 419 (1922) 6

Wyoming v. Colorado,
286 U.S. 494 (1932) 8

Wyoming v. Colorado,
298 U.S. 573 (1936) 6

Wyoming v. Colorado,
353 U.S. 953 (1957) 6

STATUTES

Clean Water Act, § 404,
33 U.S.C. § 1344 (1990) 4

Endangered Species Act,
16 U.S.C. § 1531-1543 (1990) 4

National Environmental Policy Act,
42 U.S.C. § 4321-4370 (1990) 4

Reclamation Act of 1902, § 8,
43 U.S.C. §§ 372, 383 (1990) 1, 11

MISCELLANEOUS

5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1261 (1990) 16

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4420 (1981 & Supp. 1992) 17

INTRODUCTION AND STATEMENT OF FACTS

The purpose of this reply brief is to correct misstatements of fact in the Brief for the United States Opposing Exceptions[1] and to apprise the Court of significant facts omitted by the United States concerning the United States' involvement and interest in this dispute. The United States' extensive involvement in the matters that are in dispute demonstrates that it is not so disinterested and objective as it would have the Court believe.

The Original Proceeding

The Court's first decision concerning the United States in the original proceeding[2] was the denial of Wyoming's motion to dismiss the Nebraska complaint for failure to join the United States. The Court held that the United States was a Wyoming appropriator and that Wyoming would represent the government's interest as *parens patriae*. *Nebraska v. Wyoming*, 295 U.S. 40 (1935). The United States later was granted leave to file a petition in intervention which claimed federal ownership of all the unappropriated water in the North Platte River. *Nebraska v. Wyoming*, 304 U.S. 545 (1938). The Court rejected the United States' theory of ownership of the unappropriated water on the ground that the United States was a Wyoming appropriator and was bound by section 8 of the Reclamation Act of 1902 to acquire water rights pursuant to state law. *Nebraska v. Wyoming*, 325 U.S. 589, 611-16, 629 (1945); 43 U.S.C. § 383 (1990). *See*

1. The Brief for the United States Opposing Exceptions is referred to herein as "U.S. Brief". Wyoming's Brief in Support of Exceptions to the First and Second Interim Reports of the Special Master is referred to as "Wyo. Brief on Exceptions".
2. *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

also California v. United States, 438 U.S. 645 (1978). The documentary record discussed in Wyoming's briefs before the Special Master shows that one of the primary reasons that the United States pursued its theory of ownership of the unappropriated water was its recognition that it had not obtained a water storage priority for the Inland Lakes under Wyoming law. Wyoming Brief on Exceptions at 52 n.21; Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 47-87 (Docket No. 334) and citations to the record.

Inland Lakes

The United States mischaracterizes the 1953 stipulation modifying the Decree as well as the significance of the 1952 Glendo Unit Definite Plan Report ("DPR"). The United States is wrong when it claims that the reference to the DPR in Paragraph XVII of the Decree ratified an historical operation of the Inland Lakes including temporary storage of Inland Lakes water in Guernsey and Glendo Reservoirs. U.S. Brief at 22-23 n.12. The sole reference to the DPR in Paragraph XVII of the Decree related to storage of natural flow in Glendo Reservoir for the initial filling of a dead storage pool to maintain a power head "with water that is surplus to the requirements of the North Platte River at or above the Tri-State Dam." That reference had nothing to do with any plan or proposal to store Inland Lakes water in Glendo Reservoir.

Glendo Reservoir is located on the main stem of the North Platte River between Pathfinder Reservoir, which is the major storage facility for the North Platte Project, and the downstream North Platte Project canals. Storage water released from Pathfinder Reservoir for power

generation during the winter is restored in Glendo Reservoir for later delivery to the North Platte Project canals during the irrigation season. DPR at 3; Decree, ¶ XVII(b). Like the DPR, Paragraph XVII(b) of the Decree is very specific in describing the allowable uses of Glendo Reservoir. The only reference to temporary storage in Glendo for other ownerships is the reference to restorage of water "originally stored in Pathfinder Reservoir." The United States offers no explanation for its assertion that what was admittedly an annual agreement among the states and the United States to temporarily store Inland Lakes water in Glendo for administrative convenience has now ripened into an enforceable interstate water right under the Decree.

The government's discussion of the DPR also omits the fact that the DPR's list of water right priorities for the reservoirs on the North Platte, including smaller, off-channel reservoirs,[3] excluded the Inland Lakes. DPR at 124-25, Table 15, Third Affidavit of David G. Wilde, U.S. Motion for Summary Judgment (Docket No. 297). Further, the government's argument that water supply studies conducted for the DPR assumed continued non-irrigation season deliveries to the Inland Lakes is unconvincing when it is pointed out that some of those very studies assumed no deliveries or modified deliveries to the Inland Lakes. See Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 70-72 and Appendix C-193 to C-212 (Docket No. 334).

3. The Sutherland and Sutherland Regulator reservoirs are not located on the main stem of the North Platte but, like the Inland Lakes, are filled by diversions through a canal diverting from the North Platte.

Any suggestion that there has been a consistent historical practice with respect to operation of the Inland Lakes is unsupported by the record. In fact, the 46,000 acre-feet used by Special Master Doherty was an adjusted average volume of non-irrigation season diversions by the Interstate Canal during 1928-1939 that excluded 1934, 1935 and 1939 diversions of 17,000, 0, and 15,900 acre-feet respectively. Doherty Report at 60. Since 1945, the annual non-irrigation season diversions by the Interstate Canal have fluctuated widely from 16,000 acre-feet to nearly 84,000 acre-feet. Affidavit of Bern S. Hinckley, Table 1, Page 1, Wyoming Second Motion for Summary Judgment (Docket No. 294).

Deer Creek Reservoir

The United States Army Corps of Engineers granted a permit pursuant to section 404 of the Clean Water Act, 33 U.S.C. § 1344 (1990), for the construction of Deer Creek Reservoir.[4] The Corps conducted an extensive, three-and-a-half year study of the impacts of Deer Creek Reservoir on other uses of water in Wyoming and Nebraska for compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1990), and the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1990), and in fulfillment of the Corps' public interest review under section 404 of the Clean Water Act. The Corps concluded that, even under a "worst case" scenario with Deer Creek Reservoir operating with a priority senior to the Inland Lakes, there would be no significant impact on the North Platte Project, the Inland Lakes, or the irri-

4. Deer Creek Reservoir is proposed to be constructed with Wyoming state and local funding only. There is no federal financial involvement.

gation supplies that make up Nebraska's natural flow apportionment. Final Environmental Impact Statement for Regulatory Permits, Deer Creek Dam and Reservoir ("FEIS") at 4-21, Record of Decision at 11-12, 16-17, Supplemental Information Document at 16, 23 (Docket No. 84a). In addition, the Corps determined that Deer Creek Reservoir is the least damaging, practical alternative to provide a flexible, long-term municipal water supply to the City of Casper, Wyoming. Record of Decision at 17 (Docket No. 84a).[5]

Nebraska has challenged the Corps' issuance of the section 404 permit for Deer Creek Reservoir in the federal district court. *Jess v. West,* Civ. No. 88-L-308 (D. Neb., Complaint filed August 1, 1988, Order Staying Proceedings December 19, 1989). The amended complaint in *Jess v. West* alleges that, in issuing the section 404 permit, the Corps "failed to balance the benefits of the project against its reasonably foreseeable detriments," that issuance of the permit was "contrary to the public interest," and that there were "practical alternatives available which would have less of an adverse impact than the Deer Creek Project." First Amended Complaint for Declaratory and Injunctive Relief, ¶¶ 109, 111 and 112, *id.* The United States specifically denies each of those allegations and affirmatively alleges that the "federal defendants lawfully fulfilled their statutory obligations in complying with the Endangered Species Act, the National Environmental Policy Act, the Clean Water Act, the Administrative Procedures Act, and the regulations promulgated

5. The United States Department of Interior, Bureau of Land Management, and the United States Fish and Wildlife Service were cooperating agencies in the preparation of the FEIS. The United States Bureau of Reclamation also participated in and commented on the studies conducted by the Corps. FEIS at 6-2, 6-3, F-1 to F-19 (Docket No. 84a).

under each." Answer to First Amended Complaint for Declaratory and Injunctive Relief at 19, Defenses ¶ 2, *id.*

The Laramie River

The United States' witnesses in the original proceeding testified that the usable contribution of the Laramie River during the irrigation season was too small to be of any importance. Testimony of Andrew Weiss, Record at 20911-20912; Testimony of Harold Conkling, Record at 21549, excerpts reproduced in Appendix C to Wyoming Brief in Support of Second Motion for Summary Judgment (Docket No. 294).

The United States unsuccessfully asserted a claim to ownership of the waters of the Laramie River in *Wyoming v. Colorado,* 259 U.S. 419 (1922). The United States did not appear or assert any claim in the subsequent Laramie River litigation and never raised any objection to the plain statements of the Court that Wyoming is entitled to all the Laramie River flows remaining after Colorado's allowed use. *Wyoming v. Colorado, 298 U.S. 573, 578 (1936); id.,* 353 U.S. 953 (1957).

The United States has been involved with Grayrocks Reservoir since it was initially conceived as a potential Bureau of Reclamation reservoir. U.S. Response to Wyoming's Fifth Set of Interrogatories, Nos. 21-23 (Docket No. 290b). Since the early planning stages of Basin Electric Power Cooperative's ("Basin") Grayrocks Reservoir, the Army Corps of Engineers was involved in federal permitting and the Rural Electrification Administration (REA) was involved in federal loan guarantees for the project. When Nebraska sued the United States

over Grayrocks, the United States defended the project and became a party to the settlement agreement that ended the suit.

ARGUMENT

I. THE PARTIES SHOULD NOT BE COMPELLED TO LITIGATE MATTERS BEYOND THE SCOPE OF THE PLEADINGS REFERRED BY THE COURT TO THE SPECIAL MASTER.

Wyoming does not dispute that the purpose of the Decree was to carry out the Court's 1945 decision and that the Special Master might recommend injunctive relief to give effect to the apportionment determined in the original proceeding. *See* U.S. Brief at 13. For example, Wyoming's counterclaim requests the Court to enjoin wasteful practices in Nebraska to give effect to the Court's decision that equity "does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628 (1945). But the United States goes too far when it says that the Special Master may force the parties to litigate matters beyond the enforcement claims in Nebraska's petition so that he can determine in the first instance whether to recommend that the Court expand the reference to include such matters. U.S. Brief at 14.

United States v. Louisiana, 485 U.S. 88 (1988), does not support the government's position that the Special Master may require the parties to litigate matters beyond those referred to him by the Court. *Louisiana* was a boundary case in which the parties submitted proposed

decrees to carry out the Court's 1985 decision determining the interstate boundary in the vicinity of Mississippi Sound. The United States, Mississippi and the Special Master had recommended that the Court also determine portions of Mississippi's seaward boundary south of Mississippi Sound despite the Special Master's acknowledgment that such a matter would be beyond the scope of the reference to the Special Master. 485 U.S. at 90. The Court declined to determine the Mississippi boundary beyond the area covered in the original pleadings.[6]

Wyoming, as the defendant in this case, has a right to have Nebraska's allegations of Decree violations decided. She also has a right not to be forced into a lengthy and expensive trial on matters over which the Court has not exercised its original jurisdiction. Similarly, Wyoming has a right to expect that the unambiguous injunctions and other provisions of the Decree mark the limits of Wyoming's interstate obligations on the North Platte River, especially when those provisions of the Decree are amply supported by the Court's opinion and the underlying record.[7]

---

6. In *Louisiana*, the parties agreed that the dispute over the boundary south of Mississippi Sound was appropriate for resolution. Therefore, the Court simultaneously granted leave to the parties to file a complaint putting that dispute before the Court. 485 U.S. at 93.
7. The United States mischaracterizes *Wyoming v. Colorado*, 286 U.S. 494 (1932), by citing it as authority for the Special Master to resort to an underlying record to add content to the Court's previous opinion and Decree. U.S. Brief at 13, 20. There Colorado argued that an isolated provision of the decree was all that enjoined Colorado's behavior with respect to Laramie River diversions. The Court found Colorado's contention to be inconsistent with the rest of the decree as well as the underlying record.

II. IT IS NOT PREMATURE TO DEFINE AS A MATTER OF LAW THE EXTENT OF NEBRASKA'S DECREED APPORTIONMENT.

The United States begs the question of the extent of the decreed apportionment that Nebraska seeks to enforce in this case. Without explanation, the United States says it is "premature" to define the extent of Nebraska's existing apportionment. U.S. Brief at 37.

To accept the government's view of this case would be to realize the dissenting justices' fear that the Court will "become a continuing umpire or a standing Master to whom the parties must go at intervals for leave to do what, in their sovereign right, they should be able to do . . . ." *Nebraska v. Wyoming,* 325 U.S. at 658 (J. Roberts, dissenting). *See also Vermont v. New York,* 417 U.S. 270, 274-77 (1974). The track on which the government and the Special Master would set this case would call upon the Court to weigh the interstate equities anew each time a new use of water is proposed in any of the three states. The demands on the resources of the parties and the Court would be substantial. But even more importantly, there would be no finality or certainty in the determination of rights between the states, and planning the development of new water supplies would be frustrated. *See Arizona v. California,* 460 U.S. 605 (1983); *Nevada v. United States,* 463 U.S. 110 (1983).

In the original proceeding, the Court determined that Nebraska was not entitled to demand direct flow water from Wyoming for use below Tri-State Dam. *Nebraska v. Wyoming,* 325 U.S. at 628-29, 654-55. In fact, the United States urged the Court to issue an express injunction limiting diversions by the Nebraska canals in order

to give effect to that determination. *Id.* at 628. The Court saw no need for that injunction at the time but confirmed that the apportionment was intended to protect the supply for specific irrigation uses on specific lands served by diversions between Guernsey Dam and Tri-State Dam. *Id.* at 628-29. The requirements of the canals in that section were the very basis of the apportionment; they were fully litigated and were expressly determined by the Court. *Id.* at 627, 637-51.[8]

The United States now cautions that to limit Nebraska to her determined requirements might reduce historical return flows below Tri-State Dam, thereby eliminating "the factual predicate for providing no apportionment below Tri-State." U.S. Brief at 37. Such caution is entirely misplaced. Special Master Doherty's and the Court's conclusion regarding the adequacy of the supply below Tri-State Dam was based on evidence of return flows during the drought period. Doherty Report at 94-95. The average annual drought period diversions above Tri-State Dam that resulted in the return flows below were

8. The Court should not be misled by the false assertion that the determined water requirements were based on reduced, drought period supplies. Neb. Response to Wyoming's . . . Exceptions . . . at 97 n.159. In fact, Special Master Doherty's determination of the Nebraska water requirements was generously based on conditions of full supply. For example, the evidence that Special Master Doherty relied on in fixing the water requirement for the Fort Laramie Canal "was arrived at by investigation and study rather than upon the basis of any historic record" or was based on "years of normal or close to normal water supply." Doherty Report at 200-01. Doherty adopted a figure of 1.66 acre-feet per acre whereas the 1931-1940 average delivery had been only 1.37 acre-feet per acre. *Id.* at 202-03. Likewise, for the Interstate Canal, Special Master Doherty adopted a figure of 1.8 acre-feet per acre, which he described as "liberal" in comparison to the 1.66 acre-feet shown by a United States study based on a 1930-1939 average that excluded the drought years of 1934-1936. *Id.* at 210. *See generally Id.* at 76-79, Tables VII-XIV.

less than the requirements that were determined as the measure of Nebraska's apportionment. Doherty Report at 76-79, Tables VII through XIV. Elaborating on his conclusion regarding the adequacy of drought period return flows below Tri-State Dam, Special Master Doherty cited Wyoming Exhibit No. 180 which showed that return flows would provide a sufficient local supply downstream even if there were no direct flow water passing Tri-State Dam.[9] Doherty Report at 95-96; *Nebraska v. Wyoming,* 325 U.S. 589, 655 (noting that water passing Tri-State Dam was "in addition to the local supplies which even during the drought period were adequate to meet the needs of the canals without calling upon up-river water"). Therefore, if the diversions by the Nebraska canals above Tri-State were limited to the determined requirements and no flow were allowed to pass Tri-State Dam, the resulting return flows still would be greater than the drought period return flows which the Court found adequate.

The United States apparently would concede Nebraska's overreaching assertion that she has a right under the existing Decree to continue inefficient and wasteful practices in order to maintain excess flows for uses that have no claim to an apportionment of flow under the Court's 1945 decision.[10] The United States fails to discern the difference between Nebraska's intrastate autonomy and her limited interstate apportionment. While the Court chose not to restrict the states' intrastate autonomy any more than was necessary to effect the

9. A copy of Wyoming Exhibit No. 180 is reproduced in Appendix C to Wyoming Second Motion for Summary Judgment (Docket No. 294).

10. The United States' involvement in delivering federal project storage water to canals in excess of their beneficial use requirements also violates the Reclamation Act's express beneficial use limitation. 43 U.S.C. § 372 (1990).

apportionment, the Court did limit Nebraska's interstate apportionment to the uses supplied by canals diverting at or above Tri-State Dam. Thus, while a Nebraska canal may be free to divert more than its determined requirements as against another Nebraska canal, it has no such right as against the federal reservoirs under Paragraph IV of the Decree or as against new uses in Wyoming.

III. THE UNITED STATES IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE INLAND LAKES ISSUE.

A. The Summary Judgment Recommended by the Special Master Would Result in Internal Conflicts in the Decree and Would Contravene Federal and State Law.

The government's oversimplified argument with respect to the Inland Lakes fails to apprise the Court of all the facts and fails to recognize the consequences of adopting the Special Master's recommendation.

The Special Master's recommended modification of the Decree would conflict with Paragraph III of the Decree ordering the priority of storage in the federal reservoirs. The new Paragraph XVIII would enjoin Wyoming from interfering with storage in Glendo and Guernsey Reservoirs under a 1904 Inland Lakes priority. Second Interim Report at 110. At the same time, existing Paragraph III would enjoin Wyoming from permitting storage in Glendo Reservoir ahead of any of the other main stem reservoirs or in Guernsey Reservoir ahead of Pathfinder. Thus, Paragraph III and the new Paragraph XVIII would impose conflicting obligations on Wyoming.

The proposed new Paragraph XVIII would also conflict with Paragraph XVII which enjoins storage in Glendo Reservoir except for the allowed annual 40,000 acre-feet of natural flow for irrigation purposes, temporary flood control, dead storage and restorage of Pathfinder Reservoir water.

Such conflicts with the existing Decree negate the argument that the Special Master's recommendation only carries out what was previously determined by the Court. Surely the Court would not have adopted Paragraphs III and XVII as written if it had intended also to confirm a 1904 priority for the Inland Lakes.

Since the United States did not comply with Wyoming law in obtaining a storage priority for the Inland Lakes (Second Interim Report at 30-32), the relief that the Special Master has recommended — modifying the Decree to establish a 1904 priority for storage in the Inland Lakes — can be granted only by disregarding and overriding state law. The Master's recommendation also disregards section 8 of the Reclamation Act requiring compliance with state law and contravenes the longstanding congressional and judicial policy of deference to state law in the allocation of water resources. 43 U.S.C. § 383 (1990); *see California v. United States,* 438 U.S. 645 (1978); *Nebraska v. Wyoming,* 295 U.S. 40, 43 (1935). The simple resolution of the Inland Lakes matter has always been to require the United States to comply with the Reclamation Act and to obtain a state water right for natural flow diversions to the Inland Lakes.[11]

11. The government's inertia against obtaining a state water right in large part stems from an unsubstantiated fear of an adverse impact on the irrigation deliveries through the Interstate Canal. That fear

B. If Storage of Water in the Inland Lakes is a "Vital Underpinning" of the Apportionment, Then the Determined Water Requirements are the Measure of Nebraska's Equitable Apportionment.

Wyoming has demonstrated that the key facts relied upon by the Special Master in recommending a disposition of the Inland Lakes issue are in dispute and require a trial. Wyo. Brief on Exceptions at 59-62. The United States has failed to address those disputed issues of fact but, in effect, asserts without support that the Special Master correctly found certain facts without a trial. U.S. Brief at 16-19.

The only facts relevant to the Inland Lakes that are undisputed are that the Inland Lakes historically stored available natural flow gains below Alcova and that Special Master Doherty reduced the Interstate Canal's irrigation season apportionment by the average amount of such historical, non-irrigation season storage in the Inland Lakes. Wyoming acknowledges that, by urging Special Master Doherty and the Court to reduce Nebraska's irrigation season apportionment by the amount of water that could be stored in the Inland Lakes during the non-irrigation season, Wyoming waived any

---

is dispelled by the Army Corps of Engineers' conclusion that a present-day priority for the Inland Lakes would not adversely impact the lakes or the North Platte Project. Record of Decision at 12, 16-17 (Docket No. 84a). The operation of the Inland Lakes to store available gains below Alcova has not interfered with any other existing water users in Wyoming. Fourth Affidavit of Gordon W. Fassett, Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States (Docket No. 334). However, such interference would occur if the Court overrides state law and adopts a 1904 Inland Lakes priority as recommended by the Special Master.

argument that such otherwise unpermitted, "free river" diversions to the Inland Lakes is illegal. But to conclude that Wyoming thereby agreed to a specific priority enforceable against Wyoming uses that had never before been affected by the Inland Lakes is a leap that is without support in the record.

The government's argument that it is entitled to summary judgment determining a priority for storage of water in the Inland Lakes without a state water right rests on the proposition that the ability of the Inland Lakes to store 46,000 acre-feet of water each non-irrigation season is a "vital underpinning" of the equitable apportionment. U.S. Brief at 16-19. The government explains, "[t]he Court's apportionment, based on Special Master Doherty's Report, was explicitly premised on the expectation that Nebraska's water requirements during the irrigation season could be reduced by storing 46,000 acre-feet of North Platte water in the Inland Lakes during the non-irrigation season." U.S. Brief at 17. However, in the next breath, the government denies that the water requirements determined for the Interstate Canal and the other canals in the Guernsey Dam to Tri-State Dam section were intended to be the limit of Nebraska's apportionment. U.S. Brief at 38-40. The United States cannot have it both ways.

C. The Reliance of the United States on Principles of *Res Judicata* is Misplaced.

The United States argues that Wyoming should have disputed the claimed 1904 priority for the Inland Lakes in the original proceeding. U.S. Brief at 19. The simple answer is that no party presented a claim for determination of a 1904 priority for the Inland Lakes and, there-

fore, there was nothing for Wyoming to dispute. Even if the pleadings in the original proceeding were broad enough to encompass the issue of an Inland Lakes priority, the record shows that the issue was not litigated and that Wyoming had no burden to litigate it. See Wyoming Supplemental Brief Regarding Summary Judgment at 3-10 (Docket No. 374). In the original proceeding, Wyoming's proposal for a mass allocation did not depend on priorities. Doherty Report at 100-101. Wyoming therefore had no duty to present evidence of specific priorities in her case-in-chief. Nor did Wyoming, as the defendant, have a duty to contravene the government's general allegation of compliance with state law beyond the general denial in Wyoming's answer to the United States' petition of intervention.[12] Wyoming Answer to U.S. Petition of Intervention at 15, ¶ 2; also at 7, ¶ 7, Appendix to Wyoming's Supplemental Brief at A6, A7 (Docket No. 374). A defendant's general denial apprises the plaintiff of those allegations in the complaint that are contested and will require proof for the plaintiff to prevail. 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1261 at 383 (1990). Thus, once Wyoming denied the United States' allegation of compliance with state law, the burden was on the United States to prove compliance

12. In the context of addressing the United States' claim that it owned all of the unappropriated water of the North Platte River by reason of federal land withdrawals for the reclamation projects, the Court noted that the United States had proceeded under state law to obtain water rights for the North Platte Project. *Nebraska v. Wyoming*, 325 U.S. at 613-15. The acknowledgment that the United States had elected to seek water rights under state law rather than to rely on its reservation theory when it began construction of the North Platte Project has nothing to do with a claimed 1904 priority for the Inland Lakes because such a priority was not asserted in the original proceeding.

with state law for the Inland Lakes if it wanted to pursue that issue.[13]

The "burden is on the party asserting preclusion to show actual decision of the specific issues involved . . . . 'To sustain this burden a party must produce a record sufficient to reveal the controlling facts and pinpoint the exact issues litigated in the prior action.' " 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4420 at 185 n.11 (1981 & Supp. 1992) (citing *Hernandez v. City of Los Angeles,* 624 F.2d 935, 937 (9th Cir. 1980)). The United States has failed to meet that burden.

IV. WYOMING IS ENTITLED TO SUMMARY JUDGMENT DENYING NEBRASKA'S CLAIMS THAT THE GRAYROCKS RESERVOIR OR CORN CREEK PROJECT VIOLATE THE APPORTIONMENT.

The United States, like the Special Master, acknowledges that "neither this Court nor Special Master Doherty ever made any precise disposition of the Laramie inflows." U.S. Brief at 27; Second Interim Report at 59. Whether the Court accepts the government's characterization of the Court's 1945 decision as leaving the Laramie River flows unapportioned[14] or accepts

13. The government's failure to present a claim for a specific priority for the Inland Lakes is contrasted with the specificity of its claims for storage priorities based on state law water rights in the other federal reservoirs. Doherty Report at 136-138.

14. Had the Court intended to "defer decision" on Nebraska's requested apportionment because "there was no concrete threat", as the government argues (U.S. Brief at 27), it could have included a provision in Paragraph XIII of the Decree for that purpose. Paragraph XIII(c) applies only to tributaries between Pathfinder and Guernsey Reservoirs, not to the Laramie River.

Wyoming's view that the 1945 decision in effect denied Nebraska's claim to an apportionment of the Laramie River, the result in the present case should be the same. Wyoming is entitled to summary judgment disposing of Nebraska's claims that Wyoming is violating or threatening to violate the existing apportionment by the operation of Grayrocks Reservoir or the proposed construction of the Corn Creek Project.

However, the government is not content to close the Laramie River chapter of this lawsuit at that point. Rather, although it has filed no claims of its own in this case, the government argues that the Special Master may recommend relief beyond the enforcement action that Nebraska has pleaded and argues that the Master may require Wyoming to proceed to trial on a new weighing of the equities with respect to the Laramie River.

The United States offers nothing to support the Special Master's recommendation that the Court retain jurisdiction to enforce Nebraska's rights under the Grayrocks Settlement Agreement. The government's protestation that the recommended new injunction would not be "in aid of enforcement of the settlement agreement" (U.S. Brief at 29) is contradicted by its own characterization of the issue as "whether Wyoming may allow those releases [required of Basin under the settlement agreement] to be appropriated, *thereby depriving Nebraska of the benefit of its settlement.*" U.S. Brief at 28 (emphasis added).

The United States wants an "opportunity . . . to return to Court for relief in the event that a more concrete threat of depletion develops." U.S. Brief at 28. As a party to the Grayrocks Settlement Agreement, the United States is

no more entitled to such an opportunity than is Nebraska. Both the United States and Nebraska agreed to the construction and operation of the Grayrocks Reservoir. Both Nebraska and the United States agreed to the 22,500 acre-feet of additional diversions by the Corn Creek Project from the Laramie River, provided Basin would secure and make available to the North Platte River 11,250 acre-feet of water from other sources in the North Platte basin in accordance with paragraph 5 of the settlement agreement. Finally, as Nebraska and the United States agreed, the federal district court retained jurisdiction to interpret and enforce the settlement agreement. *See* Appendix A-33 to A-36 to Wyoming Brief in Opposition to Motion for Leave to File Petition (Docket No. 2).

V. WYOMING IS ENTITLED TO SUMMARY JUDGMENT THAT DEER CREEK RESERVOIR WILL NOT VIOLATE NEBRASKA'S APPORTIONMENT UNDER THE DECREE.

The United States argues that there are facts in the record showing that Deer Creek Reservoir will have impacts either on the amount of carryover storage held in the federal reservoirs or on the amount of excess natural flow passing Tri-State Dam. U.S. Brief at 32-34. Even if those facts are accepted as true, they would not establish a clear and convincing case of substantial injury to Nebraska's natural flow apportionment for the canals diverting in the Guernsey Dam to Tri-State Dam section. Since Nebraska could not prevail at trial on the facts she has proffered, summary judgment should be granted for Wyoming. *Celotex Corporation v. Catrett,* 477 U.S. 317 (1986). *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 87-101 (Docket No. 294); Wyoming Reply Brief in Support of Second Motion for Summary Judgment at 55-61 (Docket No. 352).

The United States argues that a showing of an impact on storage levels in the federal reservoirs would itself be enough to avoid summary judgment on the Deer Creek Reservoir issue. U.S. Brief at 32-33. However, the United States, through the Army Corps of Engineers, also has concluded that any reduction in storage levels in the federal reservoirs as a result of Deer Creek Reservoir would not significantly affect the supply of irrigation water to the canals dependent on those reservoirs. Record of Decision at 11-12, 16-17, Supplemental Information Document at 16, 23 (Docket No. 84a).

Moreover, the United States has no separate apportionment under the Decree. *See Nebraska v. Wyoming,* 325 U.S. at 629. Nor has the United States brought any claims for relief in this case. The allegation of the United States that Deer Creek Reservoir might not respect the priorities of the federal reservoirs is unfounded in light of the unequivocal statements by Wyoming's State Engineer that Deer Creek Reservoir will be administered according to Wyoming law, including regulation in priority for the senior storage rights of Guernsey and Glendo Reservoirs. First Affidavit of Gordon W. Fassett, Wyoming [First] Motion for Summary Judgment at 8 (Docket No. 23); Deposition of Gordon W. Fassett, Volume I at 116-17, 126-27, 137-38 (Docket No. 310). Nevertheless, as a Wyoming appropriator, the United States has remedies under state law and need not look to the Supreme Court for redress of every speculative concern about how Deer Creek Reservoir may be operated or administered in the future.[15]

15. The United States has availed itself of Wyoming law and water administration in recent years by placing a "call" for regulation of junior water rights for the senior storage priorities of Pathfinder and Guernsey Reservoirs. The Wyoming State Engineer responded by regulating junior Wyoming water rights. Fourth Affidavit of Gordon W. Fassett, Wyoming Brief in Response (Docket No. 334).

The refusal of the United States to focus on the real issue — the potential injury to Nebraska's Guernsey Dam to Tri-State Dam apportionment — is rooted in the inability to show any real harm. There is no dispute that Nebraska's canals in the Guernsey Dam to Tri-State Dam section have increasingly diverted more than the determined requirements and that return flows below Tri-State Dam have increased correspondingly since 1945.[16] Against that backdrop of increased diversions and increased return flows, the United States joins Nebraska's attack on the 9600 acre-feet average annual yields of Deer Creek. With those facts, it is little wonder that no harm can be shown to Nebraska's existing apportionment that would justify additional restrictions on Wyoming's modest proposal to increase depletions for municipal use.

CONCLUSION

The Court should sustain Wyoming's exceptions to the Special Master's Report and grant summary judgment for Wyoming.

---

16. Nebraska protests that the average annual amount of such excess diversions since entry of the Decree is less than 5% of the determined requirements. Neb. Response at 27. Yet Nebraska has admitted that the "average post-Decree diversions" for those canals has exceeded the determined requirements by 41,000 acre-feet — more than four times the average annual yield of the proposed Deer Creek Reservoir. Neb. Response at 23, 27. In addition to admitting excess diversions, Nebraska admits that post-Decree return flows below Tri-State have averaged 736,000 acre-feet annually of which 393,600 acre-feet returned during the irrigation season. Neb. Response at 28. The comparable average drought season return flows relied upon by Special Master Doherty were 592,800 acre-feet per year of which 249,100 acre-feet returned during the irrigation season. Wyoming Exhibit No. 178, Doherty Report at 94-95. That amounts to increased irrigation season return flows of 144,500 acre-feet over those considered adequate by Special Master Doherty.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming



DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

No. 108 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S REPLY TO NEBRASKA'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

August 14, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:	Page
Ide v. United States, 263 U.S. 497 (1924)	6
Nebraska v. Wyoming, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953)	2,5,6,7
Ramshorn Ditch Co. v. United States, 269 F. 80 (8th Cir. 1920)	6
United States v. Haga, 276 F. 41 (D. Idaho, 1921)	6
United States v. Tilley, 124 F.2d 850 (8th Cir., 1941), *cert. den.*, 315 U.S. 691 (1942)	6
Wyoming v. Colorado, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957)	2
MISCELLANEOUS:	
Lewis Carroll, *Through The Looking-Glass*, ch. 6 (1872)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

BASIN ELECTRIC POWER COOPERATIVE'S REPLY TO NEBRASKA'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

INTRODUCTION

Only the first of Nebraska's exceptions, that which relates to the Laramie River, implicates the interests of the Basin Electric Power Cooperative (Basin). Nebraska's other two exceptions involve the special master's conclusions concerning the application of ¶¶ X and XIII(c) of the decree to Wyoming's proposed Deer Creek project. Basin takes no position with respect to these exceptions.[1]

---

[1] It strikes Basin, however, that the interpretation of ¶ X urged by Nebraska is strained somewhat beyond the point of herniation and that her argument founded on XIII(c) assumes

ARGUMENT

Nebraska's exception relating to the Laramie and her argument in support are bottomed on the propositions that the water of the Laramie is not wholly apportioned between Colorado and Wyoming by the decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and replaced*, 353 U.S. 953 (1957), and that under the decree here, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *decree modified*, 345 U.S. 981 (1953), she is apportioned Laramie water because Special Master Doherty and the Court, in estimating the quantity of natural flow water available for apportionment in the section of the North Platte between Guernsey (or Whalen) and Tri-State Dams, tabulated some inflow from the Laramie.

---

that the decree is open to modification in this case. Indeed, contrary to the assurance she gave the Court at the threshold that she did "not seek to modify the Decree in any respect, but only to enforce it," Neb's Reply to Wyo's Br. in Opposition 2 (Jan. 15, 1987), Master's Docket Document Number (Doc. No.) 4, she currently characterizes her petition as one "to reopen" the decree and "to modify it as necessary by the addition of appropriate provisions." Neb's Br. on Exceptions 2-3 (July 1, 1992). The decree as it stands places no restrictions on Wyoming's use of the water of tributaries entering the North Platte in the reach of the river where the proposed Deer Creek project is located. While the Court expressly retains jurisdiction, in an action authorized for the purpose of modifying the decree, to consider "the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir," this action is authorized only for the purpose of permitting Nebraska to enforce the decree and Wyoming's proposed Deer Creek project is challengeable here only if it is in violation of the decree as it stands.

In his Second Interim Report, Special Master Olpin bases his conclusion that Nebraska has "equities" in the Laramie on the same propositions. Second Int. Rep. 64. Nebraska excepts to the special master's report for failing to recommend that she be granted summary judgment "that 75% of the flows of the Laramie was expressly apportioned to Nebraska" by the decree. Neb's Br. on Exceptions 32 (July 1, 1992). The fallacy of these propositions is shown in the briefs on exceptions filed by Wyoming and Basin. Wyo's Br. on Exceptions (July 2, 1992); Basin's Br. on Exceptions (July 1, 1992). The decree in *Wyoming v. Colorado* expressly provides that Wyoming shall have the right to divert and use all water remaining in the Laramie after Colorado's rights are satisfied and the decree here excludes the waters of the Laramie from its operation. *See* Basin's Br. on Exceptions 20-26 (July 1, 1992). The special master's conclusion that Nebraska has "equities" in Laramie water and Nebraska's contention that she has rights in Laramie water are incompatible with the plain language of the decrees.

It is undisputed that natural flow water from the Laramie and all other sources that actually gets into the section of the North Platte between Guernsey and Tri-State during the irrigation season is subject to apportionment as provided in ¶¶ IV and V of the decree. But, based on the premise that the apportionment of Laramie water made by the decree in *Wyoming v. Colorado* does not extend below the Wheatland project and the circumstance that, in estimating the quantity of natural flow in the Guernsey to Tri-State section, Special Master Doherty tabulated some inflows from the Laramie, Nebraska contends

that she is possessed of an "express" right to have all water in the Laramie below the Wheatland project flow unvexed into the North Platte. Neb's Br. on Exceptions 19, 32, 54.[2] She would thus transmogrify her apportionment of 75% of the natural flow water *in* the Guernsey to Tri-State section of the North Platte into an entitlement to call Laramie water into that section.

In aid of her contention that the inflows from various sources that were assumed in estimating the quantity of water available for apportionment were themselves apportioned or in some way dedicated and assured to reach the North Platte, Nebraska makes much of the treatment of Spring Creek. She says:

> The Court would not have expressly included the Spring Creek inflows (3% of the supply), which Doherty inadvertently left out because of an omission in Wyoming Exhibit No. 148, and have simultaneously excluded the Laramie (26% of the supply), which Doherty had expressly included. In other words, the fact that the Court bent over backwards to expressly include 3% of the apportioned supply proves that the Court necessarily recognized

---

[2] "Express" means "directly and distinctly stated or expressed rather than implied or left to inference; not dubious or ambiguous: Definite, Clear, Explicit, Unmistakable." "Expressly" means "in direct or unmistakable terms: in an express manner: Explicitly, Definitely, Directly." Webster's Third New International Dictionary 870 (1976). Seemingly, like Humpty Dumpty, when Nebraska uses a word "it means just what [she] choose[s] it to mean—neither more nor less." Lewis Carroll, *Through The Looking-Glass*, ch. 6 (1872).

> the prior inclusion of the Laramie inflows, *i.e.*, 26% of the apportioned supply.

Neb's Br. on Exceptions 30-31.[3]

Spring Creek enters the North Platte in the one-mile stretch of the river between the Wyoming-Nebraska line and Tri-State Dam. In computing the requirements of the Tri-State Canal, including the Ramshorn Canal which receives its supply through the Tri-State Canal, Special Master Doherty had deducted return flows below Tri-State Dam which were intercepted and utilized by the canal. He had not deducted the accretions from Spring Creek. The Court agreed with Wyoming that the accretions from Spring Creek should be taken into account in computing Nebraska's requirement of water from Wyoming and so provided in the decree. 325 U.S. at 648, 666.

The essential—if unarticulated—premise of Nebraska's Spring Creek argument is that the inflows estimated from Spring Creek are guaranteed to the North Platte to be available for division in accordance with the apportionment. She argues, *a fortiori*, that

---

[3] Although reluctant to take a hand in Nebraska's three-card monte game of percentages, Basin notes that Nebraska's figures were derived by excluding the estimate of the natural flow coming in from above Guernsey which, during the decade of the 1930s, averaged about 410,000 acre feet annually. Doherty Report 71, table IV (average of amounts shown in "Natural Flow" column). When the natural flow from above Guernsey is included, the estimated inflow from the Laramie amounts to about 4.6% and that from Spring Creek to less than .6% of the total natural flow water estimated to be available. Of the total supply, including storage water, estimated to be available, the inflow estimated from the Laramie, 23,230 acre feet, makes up about 2%. *Cf.* Doherty Report 67, table III.

the larger estimated inflows from the Laramie are so dedicated and assured. But the premise is patently false. None of the inflow from the various sources considered in the estimating the quantity of water that would be available for division in accordance with the apportionment is committed or guaranteed in any way. Certainly not that of Spring Creek.

As Nebraska observes, the water which finds its way into Spring Creek is drainage or return flow from lands irrigated under the Interstate Canal. Neb's Br. on Exceptions 29. The Interstate Canal is a North Platte Project canal diverting North Platte water at Whalen. It runs on the north side of the river and extends a considerable distance into Nebraska. *See* 325 U.S. at 595.

Whatever its volume, the contribution of Spring Creek tabulated in estimating the quantity of water available for apportionment is by no means committed or assured to the North Platte. The United States can cut it off any time by deciding to recapture the water for reuse on the North Platte Project. *Ide v. United States*, 263 U.S. 497 (1924); *United States v. Tilley*, 124 F.2nd 850 (8th Cir., 1941), *cert. den.*, 316 U.S. 691 (1942); *Ramshorn Ditch Co. v United States*, 269 F. 80 (8th Cir. 1920); *United States v. Haga*, 276 F. 41, 43 (D. Idaho, 1921). In *Tilley* the United States secured an injunction against Nebraska's interference with its right to collect seepage water from the irrigation of lands in the Pathfinder Division of the North Platte Project for carriage and reapplication to further beneficial use on lands in the Northport Division of the project. Applying Nebraska law, the Eighth Circuit held:

> [A]n appropriator of public waters for use under an irrigation project or canal is entitled to collect seepage waters upon any part of the lands under such project or canal, by means of drains or ditches, and to apply them to further beneficial use upon any of the lands under such project or canal.

124 F.2d at 858.

The rule of *Ide* and *Tilley* is affirmed and discussed in the decision upon which the decree here is based. 325 U.S. at 634-636.[4] Return flow water is not abandoned to the stream from which it was originally diverted before it actually gets back into the stream. Before it does, the canal owner retains control over it. *Id.* at 637. As the flows of Spring Creek are clearly not guaranteed to the North Platte, Nebraska's argument by analogy that the flows of the Laramie must be so committed is anchored in air. Just as the flows of Spring Creek before reaching the North Platte remain subject to a prior right of disposition of the United States, those of the Laramie remain subject to a prior right of disposition of the State of Wyoming.

It is undisputed that, during the irrigation season, natural flow water in the section of the North Platte from Guernsey to Tri-State, whether coming in from above or below Guernsey, is subject to apportionment

---

[4] Special Master Doherty's tabulations of priorities, acreages, and water requirements for the canals heading in the Guernsey to Tri-State section take the *Tilley* decree into account in relation to the Tri-State and Northport Canals. *See* Doherty Report 86-87, table 17, nn.1 & 3. Doherty's table is set forth in the Court's opinion. 325 U.S. at 648-49.

in accordance with ¶¶ IV and V of the decree. But upon entering this section of the river, water comprising natural flow loses its identity as Laramie water or Spring Creek water or return flow water or water from any particular source. It is simply natural flow water. The decree does not, as Nebraska would have it, *see, e.g.*, Neb's Br. on Exceptions 27, 28, apportion any flows in the North Platte or its tributaries outside of the Guernsey to Tri-State section. It apportions only natural flows *in* that section.[5]

---

[5] To be sure, it places certain restrictions on the use and storage of water in sections of the North Platte above Guernsey to procure flows into the Guernsey to Tri-State section but it neither apportions water outside of that section nor assures inflows from particular sources or in particular amounts.

Saying that "Laramie River flows are measured near its mouth and tabulated on a daily basis," Neb's Br. on Exceptions 10, Nebraska would leave the impression that inflows from the Laramie are measured to determine the amount of natural flow water in this section of the river. This is not true. The quantity of natural flow water in the section is determined without reference to inflows from particular sources. As the special master observes, the formula for calculating the quantity of natural flow water used by all the parties is:

> 1. Calculate total supply of water in section by summing all outflows from section (all diversions plus flows passing Tri-State, all measured daily);
>
> 2. Subtract from that total supply in the section the amount of storage water (adjusted for decreed evaporative losses) in river at Whalen Dam;
>
> 3. The total natural flow supply is divided (according to the decree) 75/25.

Second Int. Rep. 61.

As concerns Nebraska, inflows from the Laramie are measured only to determine whether Basin is performing her obligations under the settlement agreement.

It does not guarantee that water from the Laramie, Spring Creek, or any other source considered in estimating the quantity available for apportionment will actually reach the North Platte.

Acknowledging again that ¶¶ 3.a and 3.b of her petition relate specifically to Grayrocks and the Corn Creek project, Neb's Br. on Exceptions 11, Nebraska concedes that she no longer contends—as she pleaded—that the operation of Grayrocks constitutes a violation of her rights under the decree. She says now that her claim is that Wyoming's adherence to the legal position that Nebraska has no rights to Laramie water that does not actually reach the North Platte constitutes a violation of her rights. *Id.* at 12. This concession entitles Wyoming to summary judgment on Nebraska's Grayrocks claim.

Nebraska attempts to breathe life into her Corn Creek claim by asserting that Wyoming admitted that Corn Creek "is an active vital project" at the oral argument on March 9, 1992. *Id.* at 13. This is a flat-out misrepresentation. What Wyoming's counsel said is:

> Mr. Cook: . . . and he [former Governor of Wyoming Hathaway, counsel for Corn Creek] asked me to declare positively the Corn Creek project, in the eyes of his client, Corn Creek Irrigation District, is an active and vital project. I say no more on whether it is alive or not.

Transcript of March 9, 1992 Hearing 72 (Doc. No. 435).

Wyoming, like Basin, has shown the substantial hurdles that currently confront the Corn Creek proj-

ect. *See* Basin's Br. on Exceptions 19-20 (July 1, 1992). But the vitality of the project is immaterial in any event because the settlement agreement to which Nebraska is a party makes provision for Corn Creek's Laramie water supply should the project ever materialize. Wyoming is clearly entitled to summary judgment on Nebraska's Corn Creek count.

CONCLUSION

Nebraska's claims involving the Laramie are not sustainable and Wyoming is entitled to summary judgement accordingly.

Respectfully submitted,

EDWARD WEINBERG
Counsel of Record
RICHMOND F. ALLAN
DUNCAN, WEINBERG, MILLER & PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

MICHAEL J. HINMAN
General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

Of Counsel:

CLAIRE OLSON
Assistant General Counsel
Basin Electric Power Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

August 14, 1992

Supreme Court, U.S.
FILED
AUG 14 1992
OFFICE OF THE CLERK

No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

BRIEF OF THE STATE OF WYOMING IN REPLY TO NEBRASKA'S EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

JOSEPH B. MEYER
Attorney General of Wyoming
DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

August 14, 1992

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

JURISDICTION 1

INTRODUCTION AND STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. NEBRASKA UNDULY COMPLICATES THIS CASE WITH ARGUMENTS CONSTRUCTED ON ISOLATED PORTIONS OF A LENGTHY TRIAL RECORD 10

II. THE COURT SHOULD RULE AS A MATTER OF LAW THAT THE LARAMIE RIVER WAS EXCLUDED FROM NEBRASKA'S APPORTIONMENT UNDER THE DECREE 13

A. Whether the Decree Excludes Water in the Laramie River is a Question of Law That Should Be Decided on Summary Judgment 13

B. Paragraph V of the Decree Contains No Express or Implied Apportionment of Water in the Laramie River 14

C. The Reference to Spring Creek in Paragraph V of the Decree Has No Bearing on the Exclusion of the Laramie River From the Apportionment .. 19

III. MUNICIPAL USE OF DEER CREEK RESERVOIR IS EXEMPT FROM RESTRICTION UNDER THE DECREE 24

A. The Special Master's Interpretation of Paragraph X of the Decree Does Not Remove Deer Creek Reservoir From Operation of the Prior Appropriation System Under Wyoming Law 24

B. Paragraph X and Paragraph XIII of the Decree Must Be Construed With Reference to Each Other 29

CONCLUSION 31

APPENDIX A-1

TABLE OF AUTHORITIES

Pages

CASES

Alabama v. Arizona,
291 U.S. 286 (1934) 3

Arizona v. California,
460 U.S. 605 (1983) 11, 30

Gunn v. University Committee to End the War in Vietnam,
399 U.S. 383 (1970) 10

Hinderlider v. La Plata and Cherry Creek Ditch Co.,
304 U.S. 92 (1938) 27

Idaho v. Oregon,
462 U.S. 1017 (1983) 3

Nebraska v. Wyoming,
325 U.S. 589 (1945) ..... *passim*

Nebraska v. Wyoming,
345 U.S. 981 (1953) 1

Nebraska v. Wyoming,
479 U.S. 1051 (1987) 2

Nebraska v. Wyoming,
485 U.S. 931 (1988) 2

Nebraska v. Wyoming,
112 S.Ct. 1930 (1992) 2

Nevada v. United States,
463 U.S. 110 (1983) 11

Schmidt v. Lessard,
414 U.S. 473 (1974) 11

Wyoming v. Colorado,
259 U.S. 419 (1922), *modified*,
260 U.S. 1 (1922),
decree vacated and new decree entered,
353 U.S. 953 (1957) 8, 15, 18, 19, 23, 24

Wyoming v. Colorado,
286 U.S. 494 (1932) 11

Wyoming v. Colorado,
309 U.S. 572 (1940) 2

CONSTITUTIONS

Wyo. Const., art. 8, §3 25

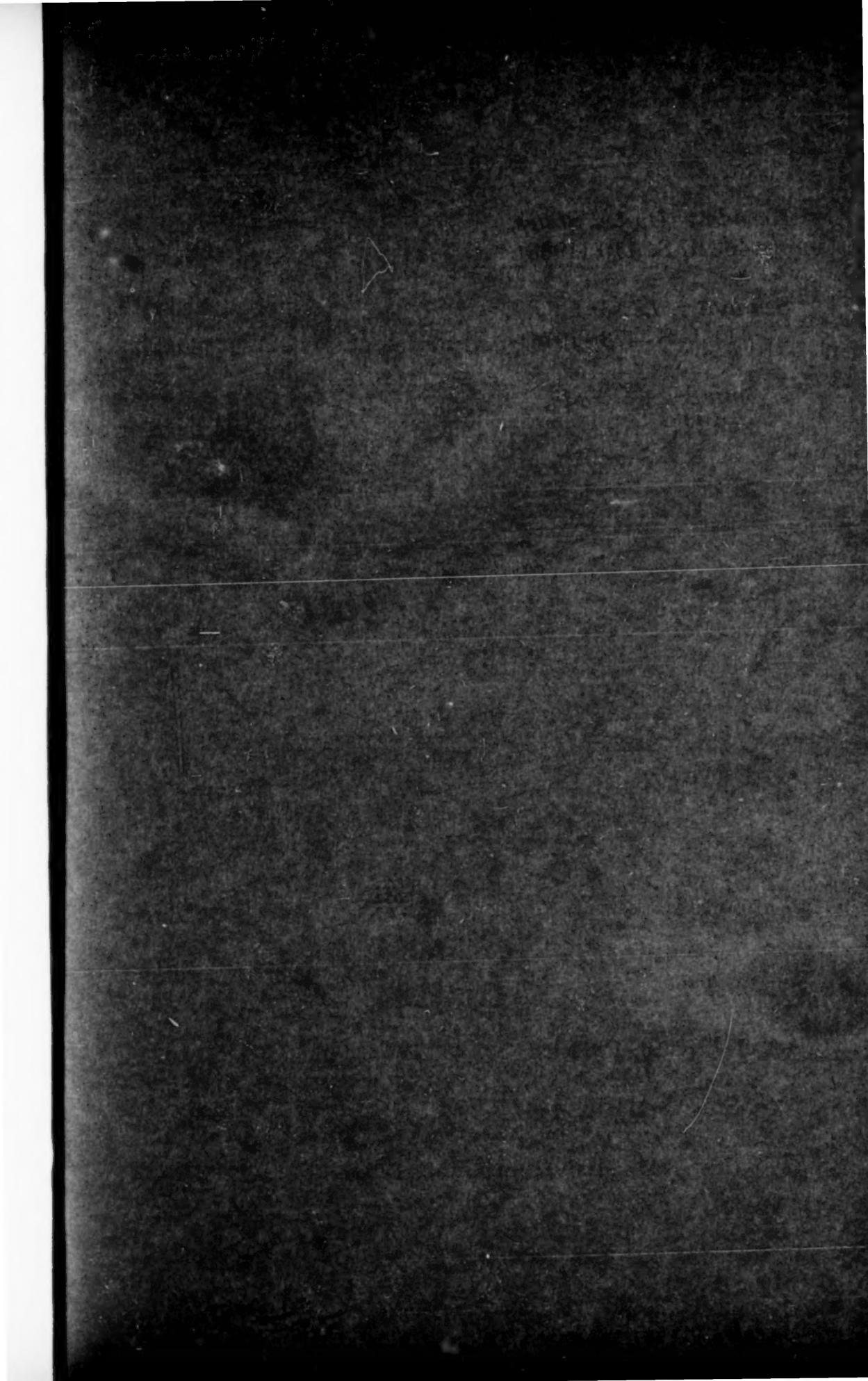
Wyo. Const., art. 13, §5 25

STATUTES

Act of July 16, 1954, ch. 532, 68 Stat. 486 8

Wyo. Stat. §41-3-102 (1977) 31

Wyo. Stat. §41-3-106 (Cum. Supp. 1991) 27



No. 108, Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

BRIEF OF THE STATE OF WYOMING IN REPLY TO NEBRASKA'S EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

JURISDICTION

Nebraska characterizes her Petition for Enforcement of Decree and for Injunctive Relief (Docket No. 1) ("petition") as seeking modification of the Decree[1] pursuant to Paragraph XIII(f) of the Decree. Nebraska Brief at 2-3.[2]

1. Unless otherwise indicated, "the Decree" refers to the Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and "original proceeding" refers to the litigation resulting in that Decree.
2. Nebraska's Brief in Support of Exceptions, July 1, 1992, will be cited in this brief as "Nebraska Brief." The Brief of the State of Wyoming in Support of Exceptions to the First and Second Reports of the Special Master will be cited in this brief as "Wyoming Brief on Exceptions."

That characterization conflicts with both the tenor of the petition and the assurance Nebraska gave the Court when seeking leave to file the petition that "Nebraska does not seek to modify the Decree in any respect, . . ." Nebraska Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 2 (Docket No. 4). Moreover, as recently as the March 9, 1992 hearing on the Special Master's Draft Second Interim Report, when pressed by the Special Master, counsel for Nebraska admitted that the petition did not contain a claim under Paragraph XIII(f) to modify or reconsider the exemption of municipal uses in the Decree. Transcript of Hearing, March 9, 1992 at 27-28 (Docket No. 435).

The Court has not exercised jurisdiction over a claim to modify or enlarge Nebraska's decreed apportionment. In fact, the Court denied Nebraska leave to file an amended petition to modify the Decree. *Nebraska v. Wyoming,* 485 U.S. 931 (1988). Nebraska's second motion for leave to amend is pending before the Court. *Id.,* 112 S.Ct. 1930 (1992). In contrast to the present petition to enforce, Nebraska's second amended petition, like the first, would expressly request modification of the Decree.

The Court granted Nebraska leave to file the present petition to enforce the Decree over Wyoming's objection that Nebraska had failed to show injury. *Nebraska v. Wyoming,* 479 U.S. 1051 (1987). The Court apparently recognized that Nebraska could be granted leave to file her claims that Wyoming is violating the injunctions in the Decree without requiring a concurrent showing of resulting injury or damage. *See Wyoming v. Colorado,* 309 U.S. 572, 581 (1940). However, to the extent Nebraska seeks to modify the Decree to add new injunctions against Wyoming's otherwise lawful use of the

North Platte and its tributaries under Wyoming's Constitution and laws, Nebraska must meet a greater burden to invoke the Court's original jurisdiction. *See Alabama v. Arizona*, 291 U.S. 286, 291-92 (1934) ("a state asking leave to sue another to prevent the enforcement of laws must allege in the complaint offered for filing facts that are clearly sufficient to call for a decree in its favor"). Further, to prevail in such a case, Nebraska "must prove by clear and convincing evidence some real and substantial injury or damage." *Idaho v. Oregon*, 462 U.S. 1017, 1027 (1983).

Since the Court assumed jurisdiction over Nebraska's petition and since Wyoming filed its first summary judgment motion, Nebraska's focus has shifted away from a strict enforcement action. Instead, Nebraska tries to recharacterize her initial petition as one to modify rather than to construe and enforce the Decree. One of Wyoming's objections to such a recharacterization is the same as Wyoming's primary objection to Nebraska's two motions to amend her petition — Nebraska is unable to articulate any threat of real and substantial injury to support modification of the Decree.

INTRODUCTION AND STATEMENT OF THE CASE

Nebraska takes exception to two legal conclusions of the Special Master: (1) that the Decree did not expressly apportion water in the Laramie River to Nebraska and (2) that municipal use of Deer Creek Reservoir is not restricted or affected by the Decree. Wyoming opposes both exceptions. The issues are simple questions of decree construction. However, Nebraska confounds those legal issues with immaterial factual disputes, out-of-context

references to the record of the original proceeding and outright misstatements of fact. Nebraska's brief contains just a sampling of Nebraska's abstruse factual arguments that the Special Master allowed to stand in the way of a definite conclusion on most of the legal questions of decree interpretation presented in the cross-motions for summary judgment.

Nebraska's brief contains several misstatements of fact that must be corrected at the outset. Throughout her brief, Nebraska tries to give the impression that every drop of water in the North Platte River has been committed to pre-1945 uses. The common thread in Nebraska's claims in this case has been the assertion that any new use in Wyoming since 1945 violates Nebraska's apportionment. Thus, the relief that Nebraska apparently seeks is the prohibition of any uses in Wyoming that did not exist when the Decree was entered in 1945.

When the Court said that the North Platte River was "over-appropriated" it meant that the demand exceeded the available natural flow during certain times of a year or during certain years — not all of the time. *Nebraska v. Wyoming,* 325 U.S. 589, 608 (1945). Despite the shortage experienced in the 1930's, Special Master Doherty and the Court found that natural flow and supplemental storage supplies approaching the long-term average would be more than sufficient to meet the demands in all three states. *Nebraska v. Wyoming,* 325 U.S. at 604-05. Moreover, Special Master Doherty recognized that a return to more normal conditions of supply than experienced during the 1930's drought might warrant relaxation of the Decree's restrictions on Wyoming and Colorado, and, for that reason, he recommended that the Court retain jurisdiction. Doherty Report at 10-11. In fact,

conditions of supply have improved since entry of the Decree in 1945. Affidavit of John W. Shields at 3, ¶7, Table 2 and Figure 3, Wyoming Second Motion for Summary Judgment (Docket No. 294). Since 1945, Nebraska's canals both above and below Tri-State Dam have taken much more water than needed to meet the requirements determined in the original proceeding. *See* Wyoming Brief on Exceptions at 8 n.6.

An example of how Nebraska has distorted the facts in an attempt to make it appear that Deer Creek Reservoir would reduce Nebraska's apportionment is found in her statement that Deer Creek Reservoir is "designed to capture the entire tributary inflow from Deer Creek above the reservoir in most years." Nebraska Brief at 33. To the contrary, the record establishes that Deer Creek Reservoir will be subject to the Wyoming law of prior appropriation and will store only water that is excess to the prior water rights on Deer Creek as well as the prior storage rights of Glendo and Guernsey Reservoirs on the North Platte River. Final Environmental Impact Statement for Regulatory Permits, Deer Creek Dam and Reservoir at 2-28 to 2-29, 4-9 (Docket No. 84a); Wyoming's Answers to United States' First Set of Interrogatories at 2-3, 6-8, Nos. 2, 10-13 (Docket No. 79); Wyoming's Response to United States Third Set of Interrogatories at 11, No. 25 (Docket No. 215); Deposition of David G. Wilde at 397-98 (Docket No. 158). The very fact that a 66,000 acre-foot reservoir is needed to provide the 6,400 to 9,600 acre-feet of annual yield[3] reflects the reality that Deer Creek will not "capture the entire tribu-

3. "Annual yield" refers to the amount of water that, based upon hydrologic analysis, can be withdrawn for use annually from the reservoir without substantial risk to the ability to make such withdrawals in the future.

tary inflow from Deer Creek" but will only store flows excess to the needs of other water rights in the plentiful years in order to conserve that supply for use in the dry years.

Nebraska also alleges that "[t]he proposed Deer Creek Project is a large scale multi-purpose project . . . ." Nebraska Brief at 14. In reality, Deer Creek's 6,400 to 9,600 acre-feet of average annual yield is quite small in comparison to the 1941-1990 average annual diversions of over one million acre-feet in the Guernsey to Tri-State section of the river. Affidavit of Bern S. Hinckley (sum of average Nebraska diversions of approximately 895,000 acre-feet from Figure 1A and average Wyoming diversions of approximately 230,000 acre-feet from Figure 2A), Wyoming Second Motion for Summary Judgment (Docket No. 294). The primary purpose of Deer Creek Reservoir is to provide a municipal supply. Any non-municipal uses either would be incidental to the municipal use and would not result in additional depletion (e.g., recreational use of the reservoir) or would be temporary, interim uses of the stored water pending full development of the municipal demand. Affidavit of Michael K. Purcell, ¶4, Wyoming [First] Motion for Summary Judgment at 27 (Docket No. 23); Second Affidavit of Michael K. Purcell, ¶11, Wyoming Second Motion for Summary Judgment (Docket No. 294).[4]

4. The ability to make such temporary or incidental uses of the reservoir is not vital to the Deer Creek Project. The administrator of the Wyoming Water Development Commission stated that Deer Creek Reservoir would be viable even if the temporary or incidental non-municipal uses were disallowed. Second Affidavit of Michael K. Purcell, ¶10, Wyoming Second Motion for Summary Judgment (Docket No. 294). Nebraska apparently asserts that Wyoming cannot "take it upon herself to limit Deer Creek to purely municipal uses." Nebraska Brief at 34. But the Wyo-

In another mischaracterization of the facts, Nebraska says, "The Laramie River flows have been included as the most significant part of the 'total Wyoming tributary inflows' and have been subject to the 75%/25% apportionment in ¶V of the Decree since 1945." Nebraska Brief at 11. In support of that broad statement, Nebraska then compares the Laramie inflows only to the Whalen to Tri-State accretions and says that such inflows amounted to 26% of the "apportioned accretions in the Whalen to Tri-State Dam section as shown in Table III of the Doherty Report." *Id.* at 10 n.12, 31 (characterizing the Laramie River as "26% of the supply").[5] Nebraska's characterization ignores the fact that the accretions in that lower section are only a small part of the total supply, most of which originates above Guernsey Dam. *See* Doherty Report at 67, Table III. The Laramie River inflows from Table III of the Doherty Report constituted about 2% of the total supply depicted in Table III and less than 5% of the average natural flow available from all sources for diversion in the Guernsey Dam to Tri-State Dam section shown in Doherty's Table IV. Doherty Report at 67, 71.[6]

---

ming Water Development Commission, an agency of the State of Wyoming, is the sole sponsor of the project and certainly can limit uses of the project water. Whether limiting the use of the project would constitute a significant change that would require modification of a federal or state permit is not an issue in this case but a matter for the agency responsible for that permit.

5. As used here, the term "accretions" means tributary inflow and return flow reaching the river in the section and does not include the lion's share of the flow that enters the section at Guernsey Dam. It is noted also that "Guernsey Dam" and "Whalen Diversion Dam" or "Whalen" are sometimes used interchangeably to denote the upstream end of the section that is apportioned in Paragraph V of the Decree.
6. There are many other misstatements of fact in Nebraska's brief. For example, Nebraska asserts that Glendo Reservoir stores water for the North Platte Project. Nebraska Brief at 5. Glendo Reservoir was authorized and constructed as a separate unit of

SUMMARY OF ARGUMENT

Nebraska's entire argument is pure sophistry aimed at obscuring the clear language of the Decree in order to effect a new apportionment of the North Platte River. At times, it depends on misstatement or mischaracterization. At other times, it depends on attenuated inferences drawn from out-of-context portions of the record in the original proceedings as an alternative to the plain language of the Court's decrees and opinions in this case and in *Wyoming v. Colorado,* 259 U.S. 419 (1922), *modified,* 260 U.S. 1 (1922), *decree vacated and new decree entered,* 353 U.S. 953 (1957). The Court should preserve the certainty provided by the clear language of its Decree and decline Nebraska's invitation to reapportion the North Platte by unduly complicating the interpretation of the Decree.

Paragraph V of the Decree simply divides the daily quantity of natural flow water *present in* the Guernsey to Tri-State section of the North Platte River. Contrary to Nebraska's argument, Paragraph V does not provide a mechanism to assure flows from any source into that section, nor does it apportion or otherwise affect the flows of any source before they reach that section.

---

the Missouri River Basin Project. Act of July 16, 1954, ch. 532, 68 Stat. 486. It has no separate right to capture and store flows for the North Platte Project. Glendo's only right to store water is for 40,000 acre-feet annually as described in Paragraph XVII of the Decree. Such storage is used by individual contractors who do not receive water from the North Platte Project. This distinction is important because the Special Master appeared to be under the same mistaken impression that Glendo Reservoir is part of the North Platte Project when he ruled that the United States has a right to store water for the Inland Lakes in Glendo Reservoir. *See* Wyoming Brief on Exceptions at 62-63.

Nebraska's request for an apportionment of water in the Laramie River was denied in the original proceeding. Yet Nebraska persists in arguing that Paragraph V contains an express apportionment of the Laramie River to Nebraska without quoting the express passage to sustain the argument. Moreover, Nebraska's argument fails to explain away the Court's clear assurance to Wyoming and Colorado that the North Platte Decree would not affect the apportionment of the Laramie River between them. Decree, ¶XII(d); *see also Nebraska v. Wyoming*, 325 U.S. at 592 n.1. Instead, Nebraska constructs an argument on an intricate calculation of the percentage of the contribution of Spring Creek that is not only irrelevant but misleading. By no stretch of logic can the Court's reference to Spring Creek flows extend the operation of the 75%/25% apportionment in Paragraph V to include the Laramie River. In context, the Court referred to Spring Creek flows for the simple purpose of assuring that such flows reaching the North Platte River below the state line would be accounted for in the apportionment.

Nebraska then makes an inane argument about the syntax of Paragraph X to suggest that Paragraph X supersedes Wyoming law. Contrary to Nebraska's assertion, the Special Master's recognition of the municipal use exemption does not upset the intrastate prior appropriation system. The Paragraph X exemption simply leaves municipal use in Wyoming to be governed by the intrastate law of prior appropriation. Nor is there any conflict between Paragraph X and Paragraph XII(a) of the Decree. Paragraph XII(a) simply confirms that relative rights intrastate are to be governed by state law. Because the proposed use of Deer Creek Reservoir for municipal purposes complies with state law, Paragraphs X and XII(a) together place such use outside the Decree.

Even if the Court were to consider the imposition of new restrictions under Paragraph XIII(c) in this case, Paragraph X puts municipal uses outside any restrictions that could be imposed under Paragraph XIII. Such a common sense construction of the Decree does not contravene Paragraph XIII. No one disputes that an action could be brought under Paragraph XIII(f) to amend the Decree if changed conditions cause the operation of the municipal exemption in Paragraph X to no longer be equitable. However, the petition the Court accepted for filing and referred to the Special Master contains no such claim.

ARGUMENT

I. NEBRASKA UNDULY COMPLICATES THIS CASE WITH ARGUMENTS CONSTRUCTED ON ISOLATED PORTIONS OF A LENGTHY TRIAL RECORD

Nebraska's brief gives the impression that this case is one of the most complicated ever to reach the Court's original docket. In reality, the pleadings raise simple issues about alleged violations of the Decree. Those issues are capable of straightforward resolution based on construction of the existing Decree.

The Decree has governed the interstate apportionment of the North Platte River for almost 50 years not with unstated injunctions implied from an underlying trial record or decisions in other cases but with clear injunctions specifying what the parties are enjoined to do or refrain from doing. Such clarity is the minimum required of any injunction in equity jurisprudence. *Gunn v. University Committee to End the War in Vietnam*, 399

U.S. 383 (1970); *Schmidt v. Lessard*, 414 U.S. 473 (1974). Such definiteness is also vital to the certainty that is the very purpose of decrees settling disputes over rights to water in the arid West. *See Arizona v. California*, 460 U.S. 605 (1983); *Nevada v. United States*, 463 U.S. 110 (1983).

If a court is called upon to interpret an ambiguous decree, it properly may look to the underlying record to define the issues that were intended to be resolved by the decree. *See Wyoming v. Colorado*, 286 U.S. 494, 506-08 (1932). But if a decree is not ambiguous, evidence taken out of context from the record cannot substitute for the plain language of the decree. While Nebraska pays lip service to the plain language of the Decree, she urges the Court to impose restrictions on Wyoming based upon inferences she would have the Court draw from isolated portions of a lengthy trial record quoted out of context or from inaccurate characterizations of the Court's decisions and decrees apportioning the Laramie River. To follow where Nebraska's arguments would lead, the Court must founder in a morass of uncertain injunctions urged as alternatives to the plain language of the Decree.

The Court should interpret and enforce its previous opinions and decrees by their terms. However, if the Court deems it necessary or desirable to delve into the underlying record with respect to the issues raised in Nebraska's exceptions, Wyoming's briefs in the record before the Special Master fully address those matters.

While Special Master Doherty's Report in the original proceeding may help to define the controversy determined by the 1945 Decree, that report must be understood in the context in which it was developed. The

litigation spanned 11 years and resulted in nearly 30,000 pages of transcribed testimony, many hundreds of exhibits, and thousands of pages of briefs. Each party had proposed a different method of apportionment and had structured its evidence to support that party's particular proposal. Special Master Doherty ultimately rejected all the proposals and recommended a system of apportionment not proposed by any of the parties. However, recognizing that his role was only to recommend, Special Master Doherty provided a full panoply of factual findings in his report to allow the Court to determine, first, whether any apportionment at all was called for and, second, what method of apportionment ought to be used.

An example of how Nebraska distorts the record by relying on isolated portions out of context is her reliance on Special Master Doherty's inclusion of Laramie River flows in his analysis of historical supplies. In context, the fact that the Doherty Report contained an analysis of historical supply including the Laramie River contributions does not, as Nebraska argues, signify that the Court intended to restrict Wyoming's use of the Laramie River. Rather, it shows only that Special Master Doherty had thoroughly reviewed the evidence presented and was fully aware of the facts when he rejected Nebraska's claim for an apportionment of water in the Laramie River and recommended the exclusion of the Laramie River from the apportionment. Doherty Report at 124, 177.

Special Master Olpin found himself unable to resolve the important questions of decree interpretation because he allowed Nebraska's references to isolated portions of the Doherty Report and the underlying record to remove his focus from the plain meaning of the opinions and

decrees. The Court should not make the same mistake. This is a suit to enforce the existing Decree, and Wyoming is entitled to judgment on Nebraska's claims that Wyoming is violating or threatening to violate the Decree.

II. THE COURT SHOULD RULE AS A MATTER OF LAW THAT THE LARAMIE RIVER WAS EXCLUDED FROM NEBRASKA'S APPORTIONMENT UNDER THE DECREE

A. Whether the Decree Excludes Water in the Laramie River is a Question of Law That Should Be Decided on Summary Judgment

Wyoming and Nebraska agree that there are no genuine issues of material fact in dispute with respect to the Laramie River and that the Court should determine as a matter of law whether the Decree apportions water in the Laramie River to Nebraska. The Special Master agrees that the facts are not in dispute and that Nebraska did not receive an express apportionment of the Laramie. Second Interim Report at 40, 59. However, he would have the Court authorize further proceedings, unspecified in nature, to determine whether there are equities that would move the Court to impose restrictions on Wyoming's use of the Laramie River in the first instance. The Special Master failed to recommend a resolution of the legal issue presented: Does the apportionment of the Guernsey to Tri-State flows in the Decree affect Wyoming's use of water in the Laramie River? After rejecting Nebraska's argument that the Decree expressly apportioned water in the Laramie, the Special Master

should have recommended summary denial of Nebraska's claims that Grayrocks Reservoir and the Corn Creek Project violate the Decree.

B. Paragraph V of the Decree Contains No Express or Implied Apportionment of Water in the Laramie River

Nebraska is less than clear about what she views as her apportionment of water in the Laramie River. At the outset, she asserts that her summary judgment motion sought only a declaration of the obvious and acknowledged point that "the inflows of the Laramie River to the North Platte River were apportioned 75% to Nebraska and 25% to Wyoming in Paragraph V of the Decree." Nebraska Brief at 18. There is no dispute that any flows from the Laramie River that reach the North Platte River during the irrigation season, like all other accretions in the section, lose their character as tributary flows and become "natural flow in the Guernsey Dam to Tri-State Dam section" of the river. Once in that section of the North Platte River, all of the natural flow water is subject to the percentage apportionment in Paragraph V of the Decree.

However, Nebraska argues that "express" in Paragraph V of the Decree is the apportionment to Nebraska of the historical level of Laramie River contributions included by Special Master Doherty in Table III of his report. Nebraska Brief at 19-27; Doherty Report at 67.[7]

7. One cannot discern from Nebraska's argument whether she asserts (1) that only the volume of Laramie River flows contained in Doherty's Table III was apportioned to Nebraska and any Laramie River flow beyond that amount may be used by Wyoming, (2) that Paragraph V, in apportioning the historical con-

Nebraska goes far out on a limb with that extreme argument. The contradiction in Nebraska's argument is patent in her conclusion:

> The record unequivocally demonstrates that 75% of the flows of the Laramie was expressly apportioned to Nebraska.

Nebraska Brief at 32. Nebraska repeatedly states that an apportionment of water in the Laramie River is "express" in Paragraph V. Yet she must resort to the record to try to demonstrate its existence. Something is not *express* in a decree if its meaning can be discerned only by inference from selected argument or evidence in the underlying record. Nebraska has failed to overcome the silence of Paragraph V with regard to the Laramie River and the plain language of the Court's opinion and Decree excluding the Laramie River from the apportionment. *Nebraska v. Wyoming,* 325 U.S. at 592 n.1, 671 (Decree, ¶XII(d)); *see also* Doherty Report at 124, 177.[8]

---

tribution of the Laramie River to Nebraska, prohibited any use of Laramie River water by Wyoming other than uses that existed in 1945, or (3) that Wyoming's uses of water in the Laramie River initiated since 1945 are to be counted as part of Wyoming's 25% of natural flow in the Guernsey Dam to Tri-State Dam section under Paragraph V. Whatever relief Nebraska is seeking, her premise that Paragraph V apportions water in the Laramie River is wrong.

8. As Wyoming demonstrated in briefs before the Special Master, the record in the original proceeding supports neither Nebraska's view that the Laramie River was apportioned to Nebraska nor the Special Master's view that the Decree rests somehow on an assumption that a certain amount of Laramie River flows would continue. Rather the record shows that initially Nebraska (1) sought to include water rights on the Laramie River in the interstate priority system she proposed, (2) attacked a number of senior Laramie River water rights which had not yet been fully developed because she feared that the full development of those

Paragraph V of the Decree quite simply calls for a 75%/25% division of whatever natural flow is present in the Guernsey Dam to Tri-State Dam section of the North Platte River during the irrigation season. Other portions of the Decree include specific injunctions limiting uses in Wyoming and Colorado and storage in the federal reservoirs above Guernsey Dam. Decree, ¶¶I-IV. The Court determined those injunctions to be adequate protection for the supply of natural flow to the apportioned section.[9] However, none of those injunctions extends to the Laramie River. The Decree imposes no monitoring

---

rights in the future would "curtail" Laramie River flows into the North Platte, (3) insisted that she was not bound by the Laramie River decree in *Wyoming v. Colorado,* and (4) sought an express apportionment of water in the Laramie River. As the case proceeded, Nebraska's focus shifted from the Laramie and she did not include Laramie River water rights in her priority administration studies. Her own witness as well as those of the United States testified that the contribution of the Laramie River was "negligible" during the ciritical period of the irrigation season. Consequently, when Nebraska developed her "out of priority study", which was the core of her claim of injury as well as her proposal for an apportionment, she did not include water rights on the Laramie River. Finally, even though Nebraska and the United States filed detailed exceptions to Special Master Doherty's report, neither took exception to Special Master Doherty's exclusion of the Laramie River from his recommended apportionment. It is impossible to find in the Decree express or implied restrictions on Wyoming's use of the Laramie when, in the final analysis, none of the parties even requested such relief. *See* Wyoming Brief in Support of Second Motion for Summary Judgment at 10-16, 23-26, 30-40, 42-47 (Docket No. 294); Wyoming Brief in Response to Summary Judgment Motions of Nebraska and the United States at 6-13, 18-21 (Docket No. 334); Wyoming Reply Brief in Support of Second Motion for Summary Judgment at 12-26 (Docket No. 352).

9. When fashioning the Decree, the Court recognized that a large part of the water supply for canals in the Guernsey to Tri-State section would come from storage water captured in the reservoirs listed in Paragraph III in the non-irrigation season. *Nebraska v. Wyoming,* 325 U.S. at 605-06, 645.

or reporting requirements on Wyoming with respect to uses on the Laramie River.

Moreover, the practical administration of the Decree since 1945 shows that the parties never thought the Decree restricted Wyoming's use of the Laramie in any way. Neither Nebraska nor the United States ever requested Wyoming to account for diversions from or uses of the Laramie River. Affidavits of Floyd A. Bishop and George L. Christopulos and Second Affidavit of Gordon W. Fassett, Wyoming Second Motion for Summary Judgment (Docket No. 294); Deposition of David G. Wilde at 365-66 (Docket No. 158); Deposition of Earl Michael at 215-18 (Docket No. 204a). The accounting procedure used to determine the natural flow in the Guernsey Dam to Tri-State Dam section has always simply included whatever Laramie River flows happened to reach the North Platte River regardless of the amount or source of such flows or the magnitude of uses of the Laramie in Wyoming. Deposition of William G. McCracken at 30-34 (Docket No. 158); Deposition of H. Lee Becker at 47-54 and Exhibit 4 (Docket No. 287); Affidavit of Floyd A. Bishop, Wyoming Second Motion for Summary Judgment (Docket No. 294).

Nebraska's current theory to support a claim to the Laramie River under Paragraph V is that the Court established a "Whalen/Tri-State apportionment fund" from Table III of the Doherty Report. Nebraska Brief at 19-27; Doherty Report at 67. In essence, Nebraska argues that she was given a mass allocation of 75% of the "apportionment fund" she says was fixed in Table III of Doherty's Report. While Table III of Doherty's Report was compiled in part from data provided by Wyoming in support of her mass allocation proposal, it is beyond ques-

tion that the Court rejected the proposal for a mass allocation.

Nebraska is reaching when she asserts that Table III of the Doherty Report "sets forth the apportionment fund in the Whalen/Tri-State reach" which is apportioned by Paragraph V. Nebraska Brief at 27. The table simply summarized a comparison of total supply, including storage water, with the determined requirements in the Guernsey Dam to Tri-State Dam section. But neither Doherty nor the Court used Table III in determining the percentage apportionment. A comparison of determined water requirements, irrigated acreages and priorities was the basis of that percentage apportionment. Doherty Report at 151-52. The percentage apportionment applies not to the quantities set out in Doherty's Table III, but to the natural flow that reaches the Guernsey to Tri-State section after operation of the various upstream injunctions in the Decree.

The Court's opinion refers to the data from Table III once. That reference was only in the context of reviewing Doherty's overall analysis of historical water supply in comparison to requirements. *Nebraska v. Wyoming*, 325 U.S. at 604 n.9. The Court cannot reasonably infer from that single footnote reference in the opinion that the Decree thereby fixed a specific amount of Laramie River contributions as part of Nebraska's apportionment or restricted Wyoming's future use of water in the Laramie River.[10]

10. It is not clear whether Nebraska is returning to an argument she made before the Special Master, and later abandoned, that the Laramie River decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), had effectively limited Wyoming's use of the Laramie River. Nebraska argued that the Laramie River decree allocated a finite amount of Laramie River water to Wyoming for water

C. The Reference to Spring Creek in Paragraph V of the Decree Has No Bearing on the Exclusion of the Laramie River From the Apportionment

Urging upon the Court a profound *non sequitur,* Nebraska argues that Paragraph V's express reference to Spring Creek, combined with its silence as to the Laramie River, translates into an "express" apportionment of water in the Laramie River to Nebraska. Nebraska reaches that conclusion circuitously by mischaracterizing the context in which Spring Creek came to be specifically mentioned in Paragraph V.

The simple answer is that, under the plain language of Paragraph V, accretions from Spring Creek, like those from the Laramie River or any other tributary source in the Guernsey to Tri-State section, become natural flow in the Guernsey to Tri-State section only after they have reached the North Platte River. Thus, Nebraska's Spring

---

rights upstream of Wheatland with priorities senior to the Colorado diversion that had precipitated the dispute in that case. Nebraska Brief at 21-22; Nebraska's Post-Hearing Brief on Nebraska's, Wyoming's, Colorado's, and the United States' Motions for Summary Judgment at 14 n.7 (Docket No. 375). The argument fails because it ignores the existence of the large number of water rights on the Laramie River downstream of Wheatland and junior to the disputed Colorado diversion. *Wyoming v. Colorado,* 259 U.S. at 488, 495-96; Affidavit of Francis A. Carr, Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States (Docket No. 334). It also conflicts with the very basis of the *Wyoming v. Colorado* decision which avoided limiting Wyoming's diversions and recognized that Wyoming would have to construct and use new storage facilities to realize the "dependable supply" that the Court had found necessary for the uses above Wheatland. *Wyoming v. Colorado,* 259 U.S. at 471-72, 484-86. For an in-depth analysis of Nebraska's argument, *see* Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 6-12 (Docket No. 334).

Creek argument proves nothing. However, Wyoming addresses Nebraska's references to the briefs in the original proceeding in order to demonstrate the danger in relying on Nebraska's characterization of isolated portions of the record to add content to the Decree.

Wyoming raised the issue of Spring Creek twice in her brief on exceptions to Special Master Doherty's Report. The first reference was in the context of urging her proposed apportionment by mass allocation. Wyoming simply pointed out that the contribution of Spring Creek, being available in the river above the Tri-State Canal and the Ramshorn Canal but below the state line, should be accounted for in the volumes proposed to be allocated to each state. Brief of Defendant, State of Wyoming at 62-63 (January 29, 1945), Appendix to Nebraska Brief at A-41 to A-42. This is the reference that Nebraska quotes in her present brief. Nebraska Brief at 30. However, the Court did not address that reference in the opinion. The Court had rejected Wyoming's proposed mass allocation theory and, therefore, there was no reason to separately address Wyoming's argument that Spring Creek should be included in the mass allocation.

Wyoming's other reference to Spring Creek was in the context of excepting to Special Master Doherty's inclusion of the Ramshorn Canal requirements among the uses entitled to protection by the recommended apportionment. Brief of Defendant, State of Wyoming at 75-76 (January 29, 1945) (excerpt reproduced in Appendix to this brief at A-1). There, Wyoming simply pointed out that, when comparing historical supply with water requirements in Table III, Special Master Doherty had included a requirement of approximately 3,000 acre-feet for the Ramshorn Canal, which historically diverted

downstream of Tri-State Dam, but had not included the 2,855 acre-feet of supply from Spring Creek. As Wyoming had explained earlier in her brief, the omission of Spring Creek in Table III had resulted from Special Master Doherty's use of figures from Wyoming's Exhibit 148 in a column entitled "Whalen State Line Usable Net Accretions", which did not include the Spring Creek accretions below the state line.[11] See footnote to Wyoming Exhibit 150, Appendix to Nebraska Brief at A-34. Wyoming simply pointed out that, if the Ramshorn requirement was to be considered, the supply available from Spring Creek should also be considered. For simplicity, Wyoming suggested eliminating the Ramshorn Canal requirement in order to compensate for the exclusion of the Spring Creek accretions.

Nebraska fails to acknowledge the later reference by Wyoming to the Spring Creek flows, although that reference was clearly what the Court was responding to when it said the Spring Creek "accretion should be taken into account in computing Nebraska's requirement of water from Wyoming . . . ." *Nebraska v. Wyoming,* 325 U.S. at 648; Nebraska Brief at 30. Contrary to Nebraska's assertion, the Court did not "adjust" the figures in Doherty's Table III, but simply agreed with Wyoming's point that

11. Contrary to Nebraska's assertion, there was no error in the Wyoming exhibits used by Special Master Doherty in Table III. Nebraska Brief at 10, 28. The Wyoming exhibits had divided the sections at the state line, rather than at Tri-State Dam. Therefore, the Spring Creek accretions below the state line were included in the state line to Bridgeport section of the Wyoming exhibits. Special Master Doherty used the flows from the Whalen to state line section of the Wyoming exhibits, but purported to analyze the reach from Whalen to Tri-State Dam. Wyoming merely pointed out that, because Special Master Doherty had extended the reach from the state line to Tri-State Dam, the Spring Creek accretions should be taken into account.

if the Ramshorn Canal requirement was to be included in the apportionment, the Spring Creek supply also should be considered. Instead of removing the Ramshorn requirement from the analysis as Wyoming proposed, the Court assured that any flow reaching the river from Spring Creek would be accounted for as part of the natural flow to be apportioned.

Thus, it was the fact that Spring Creek came into the North Platte below the state line that caused the Court to mention Spring Creek expressly. The Court's reference to Spring Creek in the opinion and in the Decree was merely to confirm that any obligation that Wyoming would have to pass water at the state line under the apportionment would be partially offset by the Spring Creek accretions below the state line.[12] However, the requirement in Paragraph V of the Decree that the accounting for the 75%/25% division of natural flow should include any contribution of Spring Creek does not change the fact that the percentage apportionment applies to water *present in* the Whalen to Tri-State section. The Decree imposes no restriction on Wyoming's use of water in the Laramie River. Moreover, Paragraph V does not assure a fixed quantity of inflows from any source in the section.

---

12. The accounting procedure agreed upon by the parties since at least 1960 calculates the natural flow in the Guernsey to Tri-State section by adding all of the diversions from the section to the flow passing Tri-State Dam and subtracting the amount of storage water entering the section. Affidavit of Floyd A. Bishop, ¶¶6-9, Wyoming Second Motion for Summary Judgment (Docket No. 294). Thus, the express reference to Spring Creek accretions in Paragraph V turned out to be unnecessary because all accretions in the section are automatically included in the accounting subsequently developed by the parties to implement the Decree.

As shown in Wyoming's Brief on Exceptions, the Court could not adopt Nebraska's argument that a specific quantity of water in the Laramie River was included in Nebraska's apportionment without creating irreconcilable conflicts with its existing decrees and opinions in both *Nebraska v. Wyoming* and *Wyoming v. Colorado*, 259 U.S. 419 (1922), *modified*, 260 U.S. 1 (1922), *decree vacated and new decree entered*, 353 U.S. 953 (1957). Nebraska's careless assertion that "[t]he Laramie Decree makes no mention whatsoever of Wyoming's asserted entitlement to 'all the remaining' waters of the Laramie" is wrong. Nebraska Brief at 22. The 1957 decree in *Wyoming v. Colorado* could not be clearer:

> The State of Wyoming, or anyone recognized by her as duly entitled thereto, shall have the right to divert and use all water flowing and remaining in the Laramie River and its tributaries after such diversion and use in Colorado.

353 U.S. at 953.

Nebraska was not a party to *Wyoming v. Colorado* apportioning the Laramie River. Special Master Doherty recognized that Nebraska was not bound by the Laramie River decree in the strict sense of *res judicata*. He therefore allowed Nebraska to litigate her claim for an apportionment of the Laramie River in *Nebraska v. Wyoming* over Wyoming's and Colorado's objections that the Laramie had been fully apportioned between them. However, after considering all of the evidence, Special Master Doherty recommended, and the Court agreed, that Nebraska's equities did not warrant restrictions on Wyoming's use of the Laramie. Doherty Report at 124. The Court's exclusion of water in the Laramie River from

Nebraska's apportionment in *Nebraska v. Wyoming* certainly binds Nebraska as a matter of *res judicata*. Decree, ¶XII(d). In all her convoluted reasoning, Nebraska offers no explanation to overcome the plain language of the Court recognizing that "[t]he waters of the . . . Laramie were previously apportioned . . . ." *Nebraska v. Wyoming*, 325 U.S. at 592 n.1. Nor does she explain how the Court could have adjusted the Laramie River apportionment in 1957 without reference to any Nebraska equities or alleged apportionment. *Wyoming v. Colorado*, 353 U.S. 953 (1957). The significance of the 1957 Laramie River decree is that it followed the North Platte Decree and confirmed that there was no restriction on Wyoming use of the water remaining in the Laramie River after the use allowed Colorado under that decree.

III. MUNICIPAL USE OF DEER CREEK RESERVOIR IS EXEMPT FROM RESTRICTION UNDER THE DECREE

A. The Special Master's Interpretation of Paragraph X of the Decree Does Not Remove Deer Creek Reservoir From Operation of the Prior Appropriation System Under Wyoming Law

Nebraska's attack on the Special Master's conclusion that municipal uses of Deer Creek Reservoir are exempt from the decreed apportionment rests upon a mischaracterization of that conclusion. Nebraska argues that, in recognizing the exemption of municipal uses under Paragraph X of the Decree, the Special Master mistakenly reads Paragraph X as saying that "*nothing* shall affect or restrict . . ." municipal uses. Nebraska Brief at 37. Nebraska then concludes:

> This interpretation gives municipal uses an absolute superiority over irrigation uses, directly upending the law of priority of appropriation in Wyoming.

Id. at 41.

Contrary to Nebraska's assertion, the Special Master never ruled that municipal uses are exempt from the intrastate law of priority under Paragraph X. In fact, he acknowledged just the opposite when he noted that municipal water rights in Wyoming "are properly administered in priority with other Wyoming water rights . . ." and "[t]here is no decree provision that specifically calls for a contrary administration of municipal water rights." Second Interim Report at 72 n.98.[13] Curiously, it was Nebraska who urged the Special Master to interpret Paragraph X as removing municipal uses from the intrastate priority system within Wyoming, as well as from the interstate apportionment under the Decree.

---

13. The law of prior appropriation is established in the Wyoming Constitution:

> Priority of appropriation for beneficial uses shall give the better right.

Wyo. Const., art. 8, § 3. With regard to municipal water rights under the law of prior appropriation, the Wyoming Constitution provides:

> Municipal corporations shall have the same right as individuals to acquire rights by prior appropriation and otherwise to the use of water for domestic and municipal purposes, and the legislature shall provide by law for the exercise upon the part of incorporated cities, towns and villages of the right of eminent domain for the purpose of acquiring from prior appropriators upon the payment of just compensation, such water as may be necessary for the well being thereof and for domestic uses.

Wyo. Const., art. 13, § 5.

Nebraska's Post-Hearing Brief on Nebraska's, Wyoming's, Colorado's and the United States' Motions for Summary Judgment at 5, 7 ("because ¶X is part of Wyoming's apportionment, ordinary and usual diversions to municipalities in Wyoming and Colorado cannot be curtailed by in-state senior users") (Docket No. 375). Nebraska made that argument in an aborted attempt to prove that Deer Creek Reservoir was not needed as a municipal project because Paragraph X gave municipalities complete superiority over other intrastate as well as interstate water rights. Nebraska later recanted that interpretation of Paragraph X. Transcript of Hearing, March 9, 1992 at 29 (Docket No. 435). Either Nebraska is being duplicitous by urging one interpretation upon the Master and later attacking him as if he accepted that interpretation when in fact he rejected it, or Nebraska simply is confused.

A vestige of Nebraska's argument that Deer Creek Reservoir is not a municipal project apparently has survived Nebraska's change of position with respect to the intrastate effect of Paragraph X. Nebraska still argues that the delivery of water by exchange to municipalities, as proposed for Deer Creek Reservoir, is not an ordinary and usual municipal use. Nebraska Brief at 51-52 and n.35. Wyoming answered that argument in her brief on exceptions at 46 n.17. However, Nebraska has added a new twist to the argument by claiming that the exchange by which Deer Creek Reservoir water would be used to replace municipal depletions would "alter priorities intrastate, contrary to the express prohibition in ¶XII(a)." Nebraska Brief at 52.

Paragraph XII(a) of the Decree simply states that the relative rights of users under state law are unaffected

by the Decree, except where the Decree expressly provides otherwise.[14] In other words, the intrastate Wyoming law of prior appropriation is left intact.

Wyoming law specifically provides for exchanges in the interest of "better conservation and utilization of the state's water" and in order to "economically convey [water] to its point of use." Wyo. Stat. § 41-3-106 (Cum. Supp. 1991). Such exchanges are not in contravention of, but in full harmony with, the priority system because they may be permitted only upon a finding that other appropriators would not be adversely affected. *Id.* Such exchanges are commonly practiced within the priority system. Second Affidavit of Gordon W. Fassett at 3, ¶7, Wyoming Second Motion for Summary Judgment (Docket No. 294). Because the Wyoming law of prior appropriation allows water stored in priority in Deer Creek Reservoir to be delivered by exchange to Casper and other municipalities, Paragraph XII(a) simply confirms that the Decree shall not affect such an operation. Contrary to Nebraska's argument that Wyoming's reading of Paragraph X conflicts with Paragraph XII(a), those two provisions of the Decree together provide that any municipal use of Deer Creek Reservoir water by exchange allowable under Wyoming law is not to be restricted under the Decree.

The fact that Wyoming's law of prior appropriation was left intact by the Decree is also one reason that Nebraska has been unable to show any injury to her

14. An example of a provision in the Decree that has an effect on intrastate water rights is the determination of the diversion limits for the Nebraska State Line Canals in Paragraph IV of the Decree. *See* Wyoming Brief on Exceptions at 35-37; *Nebraska v. Wyoming*, 325 U.S. at 627 (citing *Hinderlider v. La Plata and Cherry Creek Ditch Co.*, 304 U.S. 92, 106-08 (1938)).

apportionment from Deer Creek Reservoir, regardless of the ultimate use of the stored water. Deer Creek Reservoir will store only when in priority as to existing water rights on Deer Creek as well as the storage rights of Glendo and Guernsey Reservoirs.[15] Final Environmental Impact Statement for Regulatory Permits, Deer Creek Dam and Reservoir at 2-28 to 2-29, 4-9 (Docket No. 84a); Wyoming's Answers to United States' First Set of Interrogatories at 2-3, 6-8, Nos. 2, 10-13 (Docket No. 79); Wyoming's Response to United States Third Set of Interrogatories at 11, No. 25 (Docket No. 215); Deposition of David G. Wilde at 397-98 (Docket No. 158). Consequently, Nebraska's bare allegation that Deer Creek Reservoir will interfere with flows from Deer Creek to the North Platte River that were apportioned to Nebraska is without any factual basis.

15. Nebraska has argued that similar priority protection is needed to assure the historical supply to the Inland Lakes. However, it has been established that neither state law nor the Decree creates a priority storage right for the Inland Lakes. Wyoming Brief on Exceptions at 51-56. Any question of the effect of non-municipal uses of Deer Creek Reservoir on the supply to the Inland Lakes is only a component of the larger question of the effect on the supply for the requirements of the Nebraska canals in the Guernsey to Tri-State section, including the Interstate Canal. Nebraska has failed to produce facts to show a threat to her Guernsey to Tri-State apportionment. Wyoming Brief on Exceptions at 38-43.

Similarly, the Special Master's suggestion that the Inland Lakes or the Interstate Canal could have an "interstate priority" under the Decree conflicts with the very heart of the Decree which established the percentage apportionment *in lieu of* the interstate priority system that Nebraska sought in the original proceeding. *See* Second Interim Report at 86 n.104. As proposed by the Special Master, an Inland Lakes "interstate priority" of December 6, 1904, in addition to being senior to four of the five federal reservoirs in Paragraph III, would also be senior to the majority of municipal water rights on the North Platte that Deer Creek Reservoir is designed to supplement and would curtail those municipal water rights in the event of a call for regulation.

B. Paragraph X and Paragraph XIII of the Decree Must Be Construed With Reference to Each Other

Nebraska's attempt to use the terms of Paragraph XIII(c) of the Decree to affect a municipal use conflicts with Paragraph X. The Special Master's reading of Paragraphs X and XIII of the Decree is the only common sense construction that gives effect to both paragraphs. The Decree defining the apportionment leaves municipal uses to be governed by state law. Nothing could be simpler or more straightforward.

Nebraska again looks to the record to impeach the plain meaning of Paragraph X. Nebraska Brief at 37-41. To the extent the parties' briefs and proposed decrees in the record of the original proceedings are relevant to the meaning of Paragraph X, that record discredits Nebraska's present argument. Nebraska's contemporaneous interpretation of Paragraph X was as follows:

> Nebraska Paragraph X makes a *blanket exception from the Decree for all purposes,* of water for ordinary and usual domestic, municipal and stock watering purposes.[16]

Objections of State of Nebraska to Joint Proposal for Decree . . . at 3, Appendix to Nebraska Brief at A-63 (emphasis added). The bottom line is that the Court and the parties agreed that the equities presented in the litigation did not warrant any restriction on ordinary and usual municipal uses.

---

16. Nebraska's proposed Paragraph X was nearly identical to the Paragraph X that was adopted. Complainant's Proposed Form of Decree . . . at 9-10, Appendix to Nebraska Brief at A-53 to A-54.

Should Nebraska desire to modify the Decree so that it could interfere with municipal uses, Nebraska must bring an action for that purpose. The Special Master and Wyoming both acknowledge that the Court retained jurisdiction under Paragraph XIII(f) of the Decree to consider such an action. However, it is undisputed that Nebraska's petition does not seek modification or reconsideration of the municipal use exemption under the Decree. Transcript of Hearing, March 9, 1992 at 27-28 (Docket No. 435); Second Interim Report at 74 n.99. Should Nebraska bring such an action, she would face a heavy burden to convince the Court that it should exercise its retained jurisdiction to relitigate the matter of municipal use in Wyoming and Colorado. *See Arizona v. California*, 460 U.S. 605, 619-20 (1983).

The Special Master has treated Nebraska's petition as an action under Paragraph XIII(c) to consider whether new restrictions on Wyoming's use of Deer Creek are necessary to protect Nebraska's apportionment under the Decree. Paragraph X provides unequivocally that the Decree shall not affect municipal use. Unless Paragraph X is modified or deleted from the Decree, no relief that the Court might find warranted under Paragraph XIII(c) could affect municipal use. Recognizing Paragraph X as a "blanket exception" from the Decree is the only construction that gives effect to both Paragraph X and Paragraph XIII.

The Special Master recommends a trial where none is necessary because he fails to recognize that the established body of law in Wyoming's system of prior appropriation will govern the use of Deer Creek Reservoir.[17] The

17. Even Nebraska notes that there is no basis for the Special Master's fear that the application of the Wyoming law of preference for domestic and municipal use will somehow be inequita-

Special Master correctly recognized that any municipal use of Deer Creek Reservoir is exempt under the Decree by reason of Paragraph X. His error was in letting Nebraska's circular logic create in his mind unresolved factual questions about how Deer Creek Reservoir might be operated or administered in the future. *See* Wyoming Brief on Exceptions at 47-49. The factual questions perceived by the Special Master are immaterial to the legal conclusion that the Decree exempts ordinary municipal uses.

CONCLUSION

For the foregoing reasons, the Court should overrule Nebraska's Exceptions to the First and Second Interim Reports of the Special Master.

---

ble to Nebraska users. Nebraska concludes that application of Wyoming's preference would result in "no taking or impairment of rights in Nebraska." Nebraska Brief at 50. *See* Wyo. Stat. § 41-3-102 (1977). *See also* footnote 13, *supra*.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming

Dennis C Cook

DENNIS C. COOK
Senior Assistant Attorney General
Counsel of Record
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

RAPHAEL J. MOSES
CHARLES N. WOODRUFF
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

APPENDIX

EXCERPT FROM BRIEF OF DEFENDANT, STATE OF WYOMING (January 29, 1945)

(page 75)

* * *

Ramshorn Canal

An allotment for the Ramshorn Canal of 3,000 acre feet is included in the Master's Whalen-Tri-State Dam requirement (M.R pp. 59 and 245). The Tri-State Dam headgate is one mile below the Wyoming-Nebraska State line (M.R. p. 53). The headgate of the Ramshorn is 4.4 miles below the state line, as shown by Wyoming exhibit 177. Therefore, the distance between the Tri-State and Ramshorn head-

(page 76)

gates is three miles or more. This fact is confirmed by the map facing page 57 of the Master's Report. While the Master has included the Ramshorn canal as within the Whalen-Tri-State Dam section, in comparing supply with requirement, as disclosed in Table III at page 67 of his report, he has failed to take into account the supply entering the stream below the Wyoming-Nebraska state line and above Tri-State Dam, since in the tabulation only the accretion to the state line is included. Spring Creek is a tributary entering the stream below the Wyoming-Nebraska state line and above Tri-State Dam as disclosed by Wyoming exhibit 150, and the testimony concerning same at pages 27387 to 27389 of the record. The exhibit, which is self-explanatory, is at page 77 of the Appendix.

Therefrom it appears that the average May-September run-off of Spring Creek is 2,855 acre feet, as compared with the Ramshorn requirement of 3,000. While there is undoubtedly additional invisible return to the stream between the Wyoming-Nebraska line and the headgate of the Ramshorn, the measured accretion of Spring Creek is almost the equivalent of the Ramshorn requirement. Since this canal can be supplied by accretion below the Wyoming-Nebraska state line which the Master has not included in the supply for the Whalen-Tri-State Dam section, its requirement should be eliminated.

No. 108, Original

IN THE

Supreme Court of the United States
OCTOBER TERM 1986

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant.

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

REPLY BRIEF OF NATIONAL AUDUBON SOCIETY AND PLATTE RIVER WHOOPING CRANE CRITICAL HABITAT MAINTENANCE TRUST

NATIONAL AUDUBON SOCIETY
*PETER A.A. BERLE
JOHN D. ECHEVERRIA
* Counsel of Record
950 Third Avenue
New York, New York 10022
(212) 546-9100

PLATTE RIVER WHOOPING
CRANE CRITICAL HABITAT
MAINTENANCE TRUST
ABBE DAVID LOWELL
MAX HATHAWAY
SUE ELLEN RUSSELL
Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

August 17, 1992

TABLE OF CONTENTS

page

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTRODUCTION AND SUMMARY 2
ARGUMENT

I. The Special Master Properly Recommended Denial of the Upstream States' Motions for Summary Judgment on the Downstream of Tri-State Issues 4

II. The Upstream States' Motions for Summary Judgment on Below Tri-State Issues Also Should Be Rejected Because Resolution of the Deer Creek and Corn Creek Issues May Require New Injunctive Relief, Including Protection of Nebraska Equities Below Tri-State 7

III. There is No Basis for Further Limiting *Amici's* Future Participation in This Case 14

CONCLUSION 16

TABLE OF AUTHORITIES

	Page
Nebraska v. Wyoming, 325 U.S. 589 (1945)	5, 6, 12
Nebraska v. Wyoming, 485 U.S. 931 (1988)	11
First Interim Report of the Special Master, (June 14, 1989)	9, 11
Second Interim Report of the Special Master, (April 9, 1992)	5, 6, 12, 14

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

STATE OF NEBRASKA,

Plaintiff

v.

STATE OF WYOMING,

Defendant.

UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER

REPLY BRIEF OF NATIONAL AUDUBON SOCIETY AND PLATTE RIVER WHOOPING CRANE CRITICAL HABITAT MAINTENANCE TRUST

National Audubon Society ("Audubon") and Platte River Whooping Crane Critical Habitat Maintenance Trust (the "Trust") respectfully submit

this reply brief in response to the Exceptions filed by the States of Wyoming and Colorado to the First and Second Interim Reports filed by Special Master Owen Olpin in this case. This reply brief focuses on the Special Master's recommendations to deny the motions of the upstream States relating to the downstream of Tri-State dam issues.

INTRODUCTION AND SUMMARY

Audubon and the Trust have participated in this case as amici curiae to represent wildlife interests that will be affected by the outcome of this case. The Platte River in central Nebraska is one of the nation's most important migratory bird staging areas and provides habitat for half a dozen threatened and endangered species. In this case Nebraska is challenging the proposed construction in Wyoming of two projects, the Deer Creek and Corn Creek projects, that, among other things, threaten the downstream bird habitat. More generally, the resolution of this dispute over the interstate allocation of the North Platte River is of interest to Audubon and the Trust because it may affect the total quantity of water available in Nebraska for irrigation, wildlife, and other purposes.

The States of Wyoming and Colorado contend that the Special Master erred in refusing at this stage of the case to bar the State of Nebraska from introducing evidence relating to water uses in Nebraska downstream from Tri-State dam in support of her claims. In fact, the Special Master correctly concluded that the downstream from Tri-State dam issue cannot be resolved in favor of the upstream States as a matter of law, given the present posture of the case and the substantial arguments advanced by Nebraska that she has protected rights in below Tri-State flows under the 1945 decree.

While both the Special Master and the parties address the downstream of Tri-State issues and the issues relating to the proposed Corn Creek and Deer Creek projects separately, in fact these issues are closely intertwined. A primary thrust of the upstream States' effort to bar evidence of below Tri-State uses is to limit the scope of Nebraska's claims respecting these two projects. For the reasons explained below, resolution of Nebraska's claims respecting Corn Creek and Deer Creek call upon the Court to consider the need for further relief pursuant to its reservation of jurisdiction in Paragraph XIII of the decree. Accordingly, these claims, including the relevance of evidence of injury to Nebraska interests below Tri-State that would result from the construction of these

projects, cannot be resolved as a matter of law based solely on the language of the existing decree.

Finally, Audubon and the Trust strongly object to the proposal by the upstream States that the limited role of Audubon, the Trust, and other amici in these proceedings be further circumscribed.

ARGUMENT

I. THE SPECIAL MASTER PROPERLY RECOMMENDED DENIAL OF THE UPSTREAM STATES' MOTIONS FOR SUMMARY JUDGMENT ON THE DOWNSTREAM OF TRI-STATE ISSUES.

Wyoming and Colorado contend that the Special Master erred in not recommending that Nebraska be barred from introducing evidence concerning water uses below Tri-State in support of her claims. Contrary to the arguments of the upstream States, the Special Master properly recommended denial of their motions for summary judgment on this issue.

Wyoming has filed a counterclaim on the downstream of Tri-State issue alleging that Nebraska is violating the decree. But Wyoming has not moved for summary judgment on that claim.

Instead, Wyoming (and Colorado) have selected the convoluted course of filing motions requesting that the Court bar Nebraska from introducing evidence concerning downstream of Tri-State uses in support of her claims. The Special Master understandably and correctly concludes that the upstream States' arguments on the below Tri-State issue, so presented, have not "crystallized the issues such that they are presently postured -- i.e. ripe -- for resolution." Second Interim Report at 92.

The Special Master's recommendation on the Tri-State issue also is supported by the "important point" that return flows serving uses below Tri-State undeniably formed a "predicate" of the Court's 1945 decree. Second Interim Report at 94. While the Court in 1945 did not make a specific apportionment to Nebraska below Tri-State dam, the Court's decision not to do so was expressly based on the premise that Nebraska canals below Tri-State "are adequately supplied from return flows and other local sources." Nebraska v. Wyoming, 325 U.S. 589, 655 (1945). Especially in view of the Court's broad reserved authority to adopt appropriate supplemental relief in this case, see Section II infra, it is appropriate to assess carefully exactly what below Tri-State uses were considered at the time of the original decree and to what extent the premise of that decision is valid.

There is ample reason for the Special Master's decision to "proceed cautiously" on this issue.

Finally, there is no basis for the upstream States' argument that the extent of Nebraska's rights under the decree is defined by limitations on allowable diversions into specific canals above and below the Tri-State dam. The Court apportioned the flows in the Whelan to Tri-State section of the river during the irrigation season 25% to Wyoming and 75% to Nebraska. Special Master Dougherty calculated the flows in certain canals serving Nebraska that were senior to upstream reservoirs in Wyoming, and these calculations are reflected in Paragraph V of the decree. However, as the Special Master explains in his Second Interim Report (at 97), referring to the Court's original opinion, see 325 U.S. at 625, the Court accepted the determination of the relative seniority of these canals only for a "limited purpose" -- as an aid in fixing the proper percentage allocation of river flow as between the States of Nebraska and Wyoming. Neither Special Master Dougherty nor the Court intended for flows into these specific canals to define the measure of Nebraska's rights and thereby dictate the intrastate administration of each State's apportionment.

II. THE UPSTREAM STATES' MOTIONS FOR SUMMARY JUDGMENT ON BELOW TRI-STATE ISSUES ALSO SHOULD BE REJECTED BECAUSE RESOLUTION OF THE DEER CREEK AND CORN CREEK ISSUES MAY REQUIRE NEW INJUNCTIVE RELIEF, INCLUDING PROTECTION OF NEBRASKA EQUITIES BELOW TRI-STATE.

The Special Master's recommendation to deny the upstream States' motions for summary judgment on the below Tri-State issues also should be accepted because any future proceedings on the merits of the Deer Creek and Corn Creek issues will entail consideration of the effects of these projects on Nebraska interests below Tri-State. The upstream States assume that the Court in this case may not consider evidence concerning the below Tri-State effects of these two projects, ostensibly because the 1945 decree granted Nebraska no rights below Tri-State. For the reasons discussed in Section I, we believe the upstream States are mistaken on this point, and at a minimum it would be premature to rule in their favor on this issue at this time. But even if they were correct that the present decree provides Nebraska no rights in

water downstream from Tri-State, the effect of Corn Creek and/or Deer Creek on flows below Tri-State would still be relevant to the Court's determination under Paragraph XIII of the decree whether and how to fashion new relief with respect to these projects.

Deer Creek.

Wyoming requests that the Court dismiss as a matter of law Nebraska's request for an injunction against the construction of the Deer Creek project. In support of her request, Wyoming contends that the resolution of Nebraska's Deer Creek claim should turn on whether Nebraska can show that operation of this project would violate Nebraska's apportionment for uses diverting at or above Tri-State. Wyoming Exceptions at 40. This contention ignores the language of the 1945 decree and the specific nature of the Deer Creek claim.

From the time Nebraska filed its proposed petition with the Court on October 6, 1986, it has been apparent that Nebraska could not possibly obtain the relief she seeks with respect to the Deer Creek project based on the apportionment and injunctions in the existing decree. This is so for the simple reason that the 1945 decree does not specifically restrict development on Deer Creek and other tributaries between Pathfinder Reservoir and Guernsey Reservoir. In invoking the Court's jurisdiction on the Deer Creek issue, Nebraska

expressly invoked Section XIII of the decree in which the Court "[r]etained jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter of the controversy," including "(c) [t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." By allowing Nebraska to file its petition, the Court authorized the Special Master not merely to enforce the decree but also to fashion appropriate new relief to address the Deer Creek project.

While Wyoming has now apparently abandoned the argument, at the outset of the case she repeatedly sought dismissal of the Deer Creek claim on the theory that this claim was outside the scope of this "enforcement" action. See Wyoming Brief in Opposition to Motion for Leave to File Petition (December 16, 1986), at 19-21; Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion (Sept. 11, 1987), at 93; see also First Interim Report, at 29-30. Wyoming contended, both before the Court and the Special Master, that Nebraska should not be permitted to go forward on the Deer Creek issue because development on Deer Creek is not restricted under

the present decree. As Wyoming now acknowledges, this argument was rejected, precisely because Paragraph XIII(c) of the Decree, which Nebraska invoked at the outset of the case, authorizes the Court (and in turn the Special Master) to fashion new relief beyond the scope of the existing decree. Wyoming Exceptions at 38. While Wyoming now characterizes this conclusion as "incorrect" (Wyoming Exceptions at 39), neither she nor Colorado specifically except to the Special Master's determination that, under the language of the decree, Nebraska's Deer Creek claim is entitled to due consideration. Under Paragraph XIII(c) of the decree, the Deer Creek claim can only be resolved through a factual evaluation of the need for a supplementary or other appropriate order.

The specific injunctions and other language in the present decree do not limit the Court's or the Special Master's ability in this case to fashion appropriate relief to address Deer Creek based on the circumstances as they now exist. The Court retained jurisdiction for the purpose of entering "any supplementary decree." The Court is not limited simply to enforcing the injunctions already in the decree, as the upstream States suggest, or required only to consider the equities as presented and understood fifty years ago. To the contrary, the Court in Paragraph XIII retained jurisdiction to grant such relief "that may at any time be deemed

proper in relation to the subject matter in controversy." This comfortably would include any appropriate injunctive relief with respect to the Deer Creek project to prevent injury to established uses and equities below Tri-State, whether or not those uses are specifically protected by the existing apportionment and injunctions in the 1945 decree.[1]

In sum, by allowing Nebraska to include the Deer Creek issue in its petition, recognizing that resolution of this claim in Nebraska's favor would necessarily involve fashioning new relief under Paragraph XIII(c), the Court authorized the Special Master to consider all relevant equitable factors bearing on the need for an injunction against the Deer Creek project, including injury to uses in Nebraska below the Tri-State dam.

Corn Creek

---

[1] In seeking to cut off further proceedings relating to the downstream of Tri-State dam issues, the upstream States make much of the fact that the Court denied, without explanation, Nebraska's previous motion to the Court to amend her petition for an apportionment of the North Platte below Tri-State. See Nebraska v. Wyoming, 485 U.S. 931 (1988). The Special Master has interpreted this decision to mean that he is barred from considering the need for a new apportionment below Tri-State, but that he is entitled to consider uses and equities below Tri-State in considering the need for new equitable relief to supplement the 1945 decree. First Interim Report at 36-37. That interpretation of the scope of the Special Master's charge properly reconciles the Court's decision to allow Nebraska to invoke Paragraph XIII of the existing decree when she filed her petition, with the Court's 1988 decision denying Nebraska's motion to amend her petition.

Like the Deer Creek issue, the Corn Creek issue cannot be resolved as a matter of law in Wyoming's favor at this stage of the proceedings. Nebraska is entitled to present her full case demonstrating that the project will disturb the "delicate balance" of the river, 325 U.S. at 625, and cause injury to Nebraska interests below Tri-State dam.

The Special Master concluded, based on an exhaustive analysis of the earlier decrees and the parties' subsequent course of conduct, that the flows of the Laramie river were not fully apportioned to Colorado and Wyoming. Second Interim Report at 59. On the other hand, he concluded that the 1945 decree made no specific apportionment to Nebraska. Instead, he concluded that Laramie waters are part of the water supply to the North Platte and that Nebraska "has equities to be considered respecting the Laramie's contribution to the mainstem." Second Interim Report at 64. Audubon and the Trust do not now dispute this conclusion.

Given the conclusion that the waters of the Laramie have not been fully apportioned, the Special Master has no option in resolving the Corn Creek issue other than to consider the need for appropriate supplemental relief under Paragraph XIII of the decree. Wyoming objects that this means that a trial may in effect be required for "an

apportionment" of the Laramie River. Wyoming Exceptions at 73. Whether or not a recommendation for a new apportionment would actually be required, the need to fashion new relief that supplements the 1945 decree is merely the unsurprising and natural result of the Special Master's rejection of the competing claims of Nebraska and Wyoming that the waters of the Laramie had already been fully apportioned. How the unapportioned waters of the Laramie should now be apportioned, and how Wyoming's potential uses of these waters might affect Nebraska's interests, including uses and equities below Tri-State, are squarely part of this case as pleaded by Nebraska and as it has evolved based on the Special Master's resolution of the parties conflicting claims to Laramie waters.

Contrary to the position of the upstream States, the prior apportionment of the Whelan to Tri-State section under the 1945 decree does not limit or affect the Court's ability to fix an apportionment for the Laramie and fashion appropriate equitable relief to protect the equities in each State as they currently exist. In fashioning appropriate relief to address the Corn Creek project under Paragraph XIII, the Court is not limited either by the geographic scope of the original 1945 decree or by the specific uses and equities as they existed or were understood at the time.

III. THERE IS NO BASIS FOR FURTHER LIMITING AMICI'S FUTURE PARTICIPATION IN THIS CASE.

Wyoming and Colorado urge the Court to insert itself into the details of the trial procedure before the Special Master by limiting the role of amici, including Audubon and the Trust in this case.[2] Wyoming Exceptions at 10 n. 7; Colorado Exceptions at 5 n. 6. This request is unwarranted and the Court should reject it.

First, further restrictions on the amici's opportunities to participate in this case are unnecessary. The Special Master has recommended in his Second Interim Report that amici's motions to intervene be denied. Neither Audubon nor the Trust has filed exceptions to that recommendation. As described in the Special Master's Second Interim Report (at 104), he has "granted all amici the privilege to present affidavits, file briefs, and, 'upon a showing of good cause,' participate more fully respecting key matters in the proceedings." (Emphasis added) Thus, the Special Master has assigned a limited role to amici and granted them no responsibility for shaping the future scope or

---

[2] The other active amici in this case are Basin Electric Power Cooperative and Central Nebraska Public Power and Irrigation District.

direction of these proceedings. Furthermore, Audubon and the Trust have carefully confined their participation in this case to the below Tri-State issues. Given the present limited role of the amici, there is no justification for asking that their role be even further circumscribed.

Second, the proposal to require the Special Master to limit future participation by amici would interfere with the exercise of his responsibilities to the Court. As the Special Master states in his Second Interim Report (at 104), "I have always seen the amici as potential sources of expertise and will continue to do so." While the Special Master states that he intends to rely principally on the United States, a party to this case, to represent environmental and wildlife interests, the United States represents a wide variety of sometimes divergent agency interests in these proceedings. To limit the Special Master's ability to invite Audubon or the Trust, for example, to present evidence on environmental and wildlife issues might well prejudice the Special Master's ability to compile as complete and as accurate a record as he deems appropriate. There is simply no reason for limiting the Special Master's discretion to gather relevant evidence that he needs to discharge his duty to the Court.

CONCLUSION

For the foregoing reasons, Audubon and the Trust request that the Court reject the Exceptions filed by the States of Wyoming and Colorado respecting the downstream of Tri-State issues.

Respectfully submitted,

Peter A. A. Berle
Counsel of Record
John D. Echeverria
National Audubon Society
950 Third Avenue
New York, New York 10022
(212) 546-9100

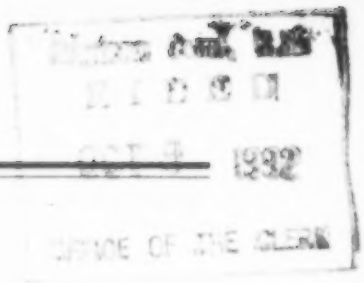
Abbe David Lowell (S.P.)
Abbe David Lowell
Max Hathaway
Sue Ellen Russell

Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Attorneys for Platte River
Whooping Crane Critical Habitat
Maintenance Trust

August 17, 1992.

No. 108, Original



IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S MOTION FOR LEAVE TO FILE HER SUR-REPLY TO WYOMING'S REPLY TO THE UNITED STATES' BRIEF OPPOSING EXCEPTIONS AND BRIEF IN SUPPORT OF MOTION

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

October 9, 1992

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

NEBRASKA'S MOTION FOR LEAVE TO FILE HER SUR-REPLY TO WYOMING'S REPLY TO THE UNITED STATES' BRIEF OPPOSING EXCEPTIONS

The State of Nebraska hereby moves for leave to file her sur-reply to Wyoming's reply to the United States' response to Wyoming's exceptions. As grounds therefor, Nebraska states:

1. The Court's order of May 18, 1992, established the schedule for the filing of exceptions and replies thereto:

> The second Interim Report of the Special Master is received and ordered filed. Exceptions to this Report and the first Interim Report of the Special Master, with supporting briefs, may be filed by the Parties within 45 days. Replies thereto, if any, may be filed within 30 days. The *amici curiae* may file Exceptions and replies within the time allowed the parties. Further consideration of the motion of Nebraska for leave to file an amended petition is deferred to consideration of the Exceptions and replies.

Nebraska v. Wyoming, ___ U.S. ___, 112 S.Ct. 1930 (1992) (Docket No. 477). The Court did not require that the filing of a reply to the exceptions of a party or *amici curiae* was contingent on the replying party's prior filing of its own exceptions;

2. Wyoming's motion for leave to file a reply was based on the tacit view that a party could not respond to another

party's exceptions without first having filed its own exceptions;

3. Each party and the *amici* were given the opportunity to respond to exceptions filed by other parties or the *amici*. *Id.* The Court's order of May 18, 1992, did not contemplate replies to the responses. *Id.*;

4. On September 21, 1992, counsel of record for the State of Nebraska received a copy of Wyoming's motion for leave to file her reply to the United States' brief opposing Wyoming's exceptions. Because of two operations, hospitalization between September 10, 1992, and September 28, 1992, and related medication, counsel of record was unable to review Wyoming's motion for leave to file her reply until September 28, 1992;

5. On October 5, 1992, the Court granted the State of Wyoming's motion for leave to file her reply;

6. While ostensibly replying only to the United States' brief, Wyoming's reply also addresses positions taken by the State of Nebraska; and

7. In the guise of correcting "misstatements of fact in the United States' brief," Wyoming herself distorts important facts which bear on the resolution of the issues directly affecting the State of Nebraska.

Wherefore, Nebraska requests that the Court grant Nebraska's motion for leave to file her sur-reply to Wyoming's reply.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN

Simms & Stein, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

NEBRASKA'S SUR-REPLY TO WYOMING'S REPLY TO THE UNITED STATES' BRIEF OPPOSING EXCEPTIONS

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
Conclusion	7

TABLE OF AUTHORITIES

Page

CASES

Jess v. West, civ. No. 88-L-308 (D. Neb. filed Aug. 1, 1988) 7

Nebraska v. Wyoming, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953) 2, 3, 5

Nebraska v. Wyoming, ___ U.S. ___, 112 S. Ct. 1930 (1992) 1

CONSTITUTION AND STATUTES

U.S. CONST. art. III, § 2, cl. 2 6

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

NEBRASKA'S SUR-REPLY TO WYOMING'S REPLY TO THE UNITED STATES' BRIEF OPPOSING EXCEPTIONS

ARGUMENT

The Court's order of May 18, 1992, provided the parties and the *amici curiae* 45 days within which to file exceptions to the first and second interim reports of the Special Master and 30 days thereafter within which to file replies. *Nebraska v. Wyoming*, ___ U.S. ___, 112 S. Ct. 1930 (1992) (Docket No. 477). On July 1-2, 1992, Nebraska, Wyoming, Colorado, and Basin Electric filed exceptions. On August 14-17, 1992, Nebraska, Wyoming, the United States, Basin Electric, the National Audubon Society, and the Platte River Whooping Crane Critical Habitat Maintenance Trust filed replies.

Wyoming filed her motion for leave to file an additional reply brief on September 15, 1992.[1] The Court granted the motion on October 5, 1992. While Wyoming's reply brief is ostensibly directed to the United States' "opposition" or reply to Wyoming's exceptions, Wyoming's brief is also a reply to Nebraska's response to Wyoming's exceptions, both

[1] *See* Wyoming Motion for Leave to File a Reply Brief and Wyoming Brief in Reply to Brief for the United States Opposing Exceptions (Sept. 15, 1992) ("Wyoming's Reply Brief").

explicitly and indirectly. *See, e.g.*, Wyoming's Reply Brief (Sept. 15, 1992) at 10 n.8, 21 n.16. Instead of responding to all of Wyoming's arguments in her reply brief, Nebraska will only address the misleading or patently inaccurate assertions of fact.

First, Wyoming attempts to equate the Special Master's recommended resolution of the Inland Lakes' priority with her argument that the Court placed diversion and irrigated acreage limitations on individual Nebraska canals in the Whalen/Tri-State reach of the North Platte River. *Id.* at 15. Wyoming contends that if the Inland Lakes' right to store 46,000 acre feet of natural flow during the non-irrigation season is a "vital underpinning" of the Decree, it must necessarily follow that limitations were placed on individual canals. *Id.* The Court's apportionment of the use of the Inland Lakes to Nebraska, however, is not comparable to the "limitations" on individual canals in Nebraska.

In 1945 the Court determined the Inland Lakes' non-irrigation season storage right in order to equitably apportion the natural flow of the North Platte River between Nebraska and Wyoming during the irrigation season. *Nebraska v. Wyoming*, 325 U.S. 589, 646 (1945); Doherty Report at 60-61, 86-87 (Table XVII n.2). As Wyoming has admitted, the Court deducted water from Nebraska's irrigation season apportionment because of the apportionment of the storage of non-irrigation season flows in the Inland Lakes. Wyoming's Reply Brief (Sept. 15, 1992) at 14. The Court contemplated that the Inland Lakes would continue to store natural flow during the non-irrigation season as an explicit part of Nebraska's apportionment, and the parties' countervailing equities were fixed accordingly. Had the Inland Lakes not been available to store natural flow during the non-irrigation season, Nebraska's irrigation season apportionment would have been greater and Wyoming's would have been less. While the United States has stated that the Inland Lakes are a "vital underpinning" of the total apportionment, it is more accurate to state, as Special Master Doherty, the Court, and Special Master Olpin have,

that the use of the Inland Lakes is an express part of Nebraska's equitable apportionment. Second Interim Report (Apr. 9, 1992) (Docket No. 463) at 32-35.

In contrast to Nebraska's apportionment of the use of the Inland Lakes, each canal's water "requirement" was derived from data used to determine irrigation demands in Nebraska and Wyoming. Special Master Doherty compared the cumulative irrigation demands in Nebraska with the cumulative irrigation demands in Wyoming to arrive at the proper allocation of natural flow between the states.[2] As Master Doherty noted, the dependable natural flow was able to meet only 48 percent of the requirements in the Whalen/Tri-State reach of the river. Doherty Report at 72. With an inadequate water supply the question became how to equitably allocate the natural flow between the states. When the Court accepted Master Doherty's recommendation to apportion the flows to the North Platte River in the Whalen/Tri-State reach 75% to Nebraska and 25% to Wyoming, the canal requirements had no further significance than to explain, in part, how the allocation was achieved. *See* Second Interim Report (Apr. 9, 1992) (Docket No. 463) at 95-99. The diversion requirements were not substantive elements of the equitable apportionment. On the contrary, Master Doherty recommended and the Court held that the so-called diversion requirements were not limitations on individual canals. 325 U.S. at 628-29; Doherty Report at 54, 115, 149-50, 160-61.

Second, Wyoming states that there has been no consistent operational practice for the Inland Lakes since the Decree

---

[2]Wyoming contends that each canal's water "requirements" were "generously based on conditions of full supply." Wyoming's Reply Brief (Sept. 15, 1992) at 10 n.8. To the contrary, canal requirements were based on historical uses during the most extreme drought of the century. For example, Master Doherty reduced permitted irrigated acreage to acres actually irrigated and based average headgate diversions on years during the drought. Doherty Report at 58, 196-267. The average river flow between 1931 and 1940 was only 63 percent of the previous long-term average. *Id.* at 39-40.

was entered in 1945. Wyoming's Reply Brief (Sept. 15, 1992) at 4. Wyoming cites inapposite evidence of the non-irrigation season diversions into the Interstate Canal to support her position.

The operating and accounting procedures agreed upon by Nebraska, Wyoming, and the United States since the Decree was entered in 1945 reaffirm that the Inland Lakes have the right to accrue 46,000 acre feet of natural flow during October, November, and April with a priority of December 6, 1904. This water is often temporarily stored in Glendo or Guernsey reservoirs. Neither the Inland Lakes storage right nor the method or practice of accrual has changed in any significant way since the Decree was entered.

Contrary to what Wyoming implies, variance in non-irrigation season diversions into the Interstate Canal does not equate to inconsistency of operation of the Inland Lakes. Water years are highly variable. For example, the computed annual runoff at Pathfinder Reservoir has ranged from 2,159,300 acre feet to 566,700 acre feet between 1960 and 1990. Wyoming Second Motion for Summary Judgment and Brief in Support (Feb. 22, 1991) (Docket No. 294) (Affidavit of John W. Shields, Table II). During the same period, the October, November, and April accretions below Alcova Reservoir have varied from 22,800 acre feet to 137,300 acre feet. Response of the United States to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 81) (Affidavit of David G. Wilde, Table 10). In low flow years, the Inland Lakes are unable to receive their full entitlement — 46,000 acre feet — because there is not enough water in the system. Conversely, in high flow years, the Inland Lakes store water in excess of their rights rather than allow excess water to escape the system unused, a common practice in the arid West. Accordingly, variations in the Interstate Canal non-irrigation season diversions do not result from different operational practices for the Inland Lakes, but rather to the fluctuations in and attempts to make maximum beneficial

use of the annual water supply. The Inland Lakes operational practice has not changed at all.

Third, Wyoming contends that the Glendo Definite Plan Report ("DPR") is insignificant in relation to the right to store 46,000 acre feet of natural flow in the Inland Lakes during the non-irrigation season and to the temporary storage of Inland Lakes' water in Guernsey and Glendo reservoirs. Wyoming's Reply Brief (Sept. 15, 1992) at 2-3. The DPR was prepared to describe the integration of a new reservoir — Glendo Reservoir — into the system-wide operation of the pre-Decree federal reservoirs and prior appropriators. Wyoming attempts to minimize the role that the DPR had in relation to the parties' approval of the Glendo Project and the related stipulation amending the Decree. *Nebraska v. Wyoming*, 345 U.S. 981 (1953). The parties stipulated to the post-Decree construction of Glendo Reservoir on the condition that it would not interfere with prior existing rights on the North Platte River except in specifically stated quantities. The DPR showed that the Inland Lakes comprised a prior existing right which was entitled to fill ahead of Glendo during the non-irrigation season. Bureau of Reclamation Definite Plan Report (Dec. 1952) at 23, 24 (columns 45-51), 126-27 (attached to the Third Affidavit of David G. Wilde — United States Motion for Summary Judgment on the Inland Lakes (Mar. 4, 1991) (Docket No. 297)). The DPR also reflects that water is temporarily stored in Guernsey Reservoir. *Id.*

The Definite Plan Report was not incorporated into the Decree. Rather, the Decree makes reference to general operational provisions for Glendo as set forth in the DPR. This does not nullify the importance of the Glendo Definite Plan Report or the fact that the parties relied on the findings in the Report when stipulating to the construction of Glendo Dam and Reservoir. The DPR is not a source of rights for parties, but evidence of what the parties and the post-Decree administrators recognized their rights were.

Finally, Wyoming states that when the U.S. Army Corps of Engineers ("Corps") reviewed the proposed Deer Creek

Project to determine whether to grant a § 404 permit under the Clean Water Act, the Corps determined that the project would have "no significant impact on the North Platte Project, the Inland Lakes, or the irrigation season supplies that make up Nebraska's natural flow apportionment." Wyoming's Reply Brief (Sept. 15, 1992) at 4-5. Wyoming's assertion is wrong for three reasons. First, issues relating to impacts on a state's equitable apportionment can only be heard by the Court. *See* U.S. CONST. art. III, § 2, cl. 2. The Corps never undertook this responsibility. In this original action, the affidavits of record demonstrate that the construction and operation of the proposed Deer Creek Project will adversely impact Nebraska's apportionment and the water supply of the North Platte Project. *See* Nebraska's Response to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 81) ([First] Affidavit of H. Lee Becker); Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ([Third] Affidavit of H. Lee Becker); Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment (Apr. 25, 1991) (Docket No. 335) ([Fourth] Affidavit of H. Lee Becker); Response of the United States to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 81) (Affidavit of David G. Wilde). These affidavits constitute the relevant record for the Court's consideration. The Corps' administrative record relates to a different and decidedly limited issue, *i.e.*, the potential adverse impacts on downstream wildlife habitat. Second, the Court is reviewing Master Olpin's first and second interim reports, not the Corps' administrative record. Master Olpin found that there are genuine issues of material fact relating to the impacts of the proposed Deer Creek Project which preclude summary judgment. First Interim Report (June 14, 1989) (Docket No. 140) at 30-31; Second Interim Report (Apr. 9, 1992) (Docket No. 463) at 75-77. This is the issue before the Court, not an evaluation of the issues before the Corps. Third, while the issue of whether the Corps' analysis was based on a contrived and faulty computer model is being

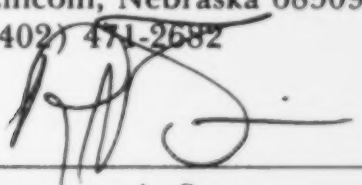
litigated on appeal from the Corps' decision, even the computer model utilized by the Corps in the § 404 proceedings shows that depletions occurred in North Platte Project ownerships and to water which historically had been divided between Nebraska and Wyoming. *Jess v. West*, Civ. No. 88-L-308 (D. Neb. filed Aug. 1, 1988); Supplemental Information Document, Deer Creek Final EIS (Apr. 1988) p. 4, 23.

CONCLUSION

Wyoming's reply brief consists in large part of misstatements of fact directed against Nebraska. Wyoming makes baseless allegations of inefficiency and wasteful irrigation practices in Nebraska acquiesced to by the United States. These allegations arise from Wyoming's counterclaim and her attempt to limit Nebraska's evidence of successive uses of apportioned water expressly recognized by the Court in 1945. Wyoming's effort to "define" Nebraska's apportionment solely in terms of the first diversions of apportioned natural flow is nothing more than a hidden attempt to preclude evidence comprehending Special Master Doherty's and the Court's reliance on return flows below Tri-State Dam in effectuating the apportionment in 1945.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682



RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN

Simms & Stein, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

JOINT MOTION TO REFER MOTIONS FOR LEAVE TO FILE AMENDED PLEADINGS TO THE SPECIAL MASTER FOR HIS RECOMMENDATION

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

DENNIS C. COOK
Special Assistant Attorney General
Counsel of Record

COOK & HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

February 18, 1994

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

BEST AVAILABLE COPY

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

JOINT MOTION TO REFER MOTIONS FOR LEAVE TO FILE AMENDED PLEADINGS TO THE SPECIAL MASTER FOR HIS RECOMMENDATION

The States of Nebraska and Wyoming hereby move that the Court refer the motions for leave to file amended pleadings filed herewith to the Special Master for his recommendations to the Court. In support hereof, Nebraska and Wyoming state:

1. By order of April 26, 1993, the Court referred Counts II and III of Nebraska's motion of October 9, 1991, for leave to amend petition, to the Special Master. 113 S.Ct. 1941 (1993).

2. As a consequence of changed circumstances and the Court's decision of April 20, 1993, the State of Nebraska is effectively withdrawing Count III of the amended petition of October 9, 1991, and has incorporated the elements of Count II into the proposed amended petition filed herewith.

3. As a consequence of changed circumstances and the Court's decision of April 20, 1993, the State of Wyoming is requesting leave of the Court to amend its Counterclaim, as reflected in the proposed amended pleadings filed herewith.

4. The Special Master's familiarity with case developments and the underlying factual disputes could aid the Court in deciding whether to exercise its jurisdiction under U.S. Const. art. III, § 2.

WHEREFORE, the States of Nebraska and Wyoming move that the Court refer the motions to amend pleadings filed herewith to the Special Master for his recommendations to the Court.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

/s/ RICHARD A. SIMMS

RICHARD A. SIMMS
Counsel of Record

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

/s/ DENNIS C. COOK

DENNIS C. COOK
Special Assistant Attorney General
Counsel of Record

COOK & HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

(47)

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED PETITION, AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF THE DECREE TO SPECIFY AN APPORTIONMENT OF THE NATURAL FLOWS OF THE LARAMIE RIVER BELOW WHEATLAND AND TO APPORTION THE UNAPPORTIONED NATURAL FLOWS OF THE NORTH PLATTE RIVER, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

February 18, 1994

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

BEST AVAILABLE COPY

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AMENDED PETITION

AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF THE DECREE TO SPECIFY AN APPORTIONMENT OF THE NATURAL FLOWS OF THE LARAMIE RIVER BELOW WHEATLAND AND TO APPORTION THE UNAPPORTIONED NATURAL FLOWS OF THE NORTH PLATTE RIVER

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

MOTION FOR LEAVE TO FILE AMENDED PETITION

The State of Nebraska hereby moves for leave to file its amended petition for an order to protect and enforce the equitable apportionment established by the Court through its Decree entered in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), for injunctive relief against the State of Wyoming and the United States of America, for modification of the Decree to specify an apportionment of the natural flows of the Laramie River below Wheatland during the irrigation season, and for modification of the Decree to apportion the unapportioned

natural flows of the North Platte River during the non-irrigation season.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-38802

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF THE DECREE TO SPECIFY AN APPORTIONMENT OF THE NATURAL FLOWS OF THE LARAMIE RIVER BELOW WHEATLAND AND TO APPORTION THE UNAPPORTIONED NATURAL FLOWS OF THE NORTH PLATTE RIVER

The State of Nebraska hereby petitions the Court for an order protecting and enforcing the equitable apportionment established by the Court through the provisions of its Decree of October 8, 1945, *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted on April 20, 1993, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), granting injunctive relief against the State of Wyoming and the United States of America, modifying the Decree to specify an apportionment of the natural flows of the Laramie River below Wheatland during the irrigation season, and apportioning the unapportioned natural flows

of the North Platte River during the non-irrigation season. In support hereof, Nebraska states:

COUNT I

1. In *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), the Court equitably apportioned the natural flows of the North Platte River during the irrigation season, and partially apportioned the natural flows during the non-irrigation season, among the states of Nebraska, Wyoming, and Colorado, except that it did not affirmatively preclude depletion of the contributions of the Laramie River to the critical Guernsey Dam to Tri-State Dam reach of the North Platte River, notwithstanding that such flows were expected to continue.

2. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season, by enjoining Colorado: (a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 145,000 acres of land in Jackson County, Colorado, during any one irrigation season; (b) from storing more than 17,000 acre feet of water from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year; and (c) from exporting more than 60,000 acre feet of water out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, in any period of 10 consecutive years.

3. In *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Court equitably apportioned the natural flows of the North Platte River during the irrigation season in the Guernsey Dam to Tri-State Dam reach of the river, 75% to Nebraska and 25% to Wyoming, and imposed restrictions on the use of the waters of the North Platte River and certain of its tributaries in Wyoming

to ensure, to the extent possible, that dependable and usable inflows would accrue to the reach from the upstream reaches and through accretions within the reach.

4. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), contained only those injunctions deemed necessary in 1945 to ensure that dependable and usable inflows would accrue to the Guernsey Dam to Tri-State Dam reach from the upstream reaches and through accretions within the reach to effectuate the apportionment of the total natural flows in the reach.

5. The Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), expressly declined to impose additional injunctions on the use or development of the natural flows rising above and within the Guernsey Dam to Tri-State Dam reach of the river in the absence of a contemporaneous threat of development, notwithstanding that the flows were expected to continue to provide dependable and usable inflows that would accrue to the reach from upstream reaches and through accretions within the reach.

6. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981, as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), did not specify the apportionment of the contributions of the Laramie River accruing within the Guernsey Dam to Tri-State Dam reach by injunction or other restrictions because there was no contemporaneous threat of further depletions to those flows.

7. While the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), did not apportion storage water, except as specified in ¶ XVII of the Decree, the equitable apportionment was premised on the recognition that Pathfinder, Seminoe, Alcova, Guernsey, and Glendo reservoirs store North Platte River water and would be operated to serve the same lands for which natural flows are apportioned, as well as for certain other lands in Nebraska and Wyoming.

8. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Decree enjoins

the storage of waters other than in accordance with the relative priorities, as among themselves, of Pathfinder, Guernsey, Seminoe, Alcova, and Glendo reservoirs, defined and fixed in that order, and provides that these reservoirs be operated junior to the priorities of the French Canal and the State Line Canals.

9. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), the Inland Lakes have a right to accrue 46,000 acre feet of natural flow in the lakes during the months of October, November, and April, with a priority date of December 6, 1904, and to temporarily store the water in Glendo and Guernsey reservoirs during the non-irrigation season.

10. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Decree requires Wyoming to prepare and maintain complete and accurate records of the total area of land irrigated and the storage of the water of the North Platte River and its tributaries.

11. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Court by depleting the natural flows of the North Platte River by:

a. The proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

b. Reducing the flow of tributaries entering the North Platte River below Alcova by means of groundwater development, the depletion of return flows, and the construction of reservoirs;

c. Reducing the flow of tributaries and the mainstem in Wyoming, as well as canal and lateral flows reaching Nebraska, by the present and future effects of existing groundwater development and by potential groundwater development for municipal, industrial, and irrigation pur-

poses which would result from favorable action on pending applications to appropriate; and

d. Failing to maintain complete and accurate records of water uses set forth in the Decree as is necessary to monitor compliance with the Decree.

12. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Court by depleting the natural flows of the North Platte River by such projects as the proposed Deer Creek Project, reregulating reservoirs and canal linings in the Goshen Irrigation District and the Horse Creek Conservancy District, and by permitting unlimited depletion of groundwater that is hydrologically connected to the North Platte River and its tributaries.

13. The current and imminent actions of the State of Wyoming contravene the Court's opinions in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and the Court's decision in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), and upset the equitable balance of the North Platte River established in the Decree.

14. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and continues to upset the equitable apportionment established by the Court through the provisions of its Decree.

15. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

16. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to protect and enforce the equitable apportionment and to restrain further violations of the Decree by the State of Wyoming.

17. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court enter its order requiring the State of Wyoming to comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953, and interpreted on April 20, 1993, and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

COUNT II

1. The allegations of Count I are adopted and incorporated herein.

2. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), apportioned the natural flows of the North Platte River among the states of Nebraska, Wyoming, and Colorado during the irrigation season, except for the inflows of the Laramie River to the Guernsey Dam to Tri-State Dam reach, and partially apportioned the natural flows during the non-irrigation season.

3. As amended in *Nebraska v. Wyoming*, 345 U.S. 981 (1953), the Decree states that the State of Wyoming, pursuant to contracts entered between irrigation water users and the U.S. Bureau of Reclamation, is entitled to 15,000 acre feet of Glendo Reservoir storage water to be used for the irrigation of lands in the North Platte River Basin in southeastern Wyoming below Guernsey Dam.

4. The United States is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir.

5. The current and imminent actions of the United States violate the Decree and upset the equitable balance of the North Platte River established by the Court.

6. Despite the State of Nebraska's efforts to resolve these matters, the United States has refused to alter its actions and continues to violate the Decree.

7. The United States' present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

8. The State of Nebraska has no effective remedy at law to enforce its rights against the United States. Injunctive

relief is necessary to enforce the Decree and to restrain further violations by the United States.

WHEREFORE, the State of Nebraska prays that the Court enter its order construing the Decree and requiring the United States to comply with the provisions of the Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and enjoining the United States from violating the State of Nebraska's apportionment under the Decree.

COUNT III

1. The allegations of Counts I and II are adopted and incorporated herein.

2. While the Court's decision in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), establishes that the inflows of the Laramie River to the Guernsey Dam to Tri-State Dam reach of the North Platte River during the irrigation season were not affirmatively specified as part of the apportionment of the inflows accruing to the reach from the upstream reaches and the other accretions within the reach, the decision recognizes that the Court in 1945 "expected that some Laramie water would contribute to the natural flows available for apportionment in the [Guernsey Dam to Tri-State Dam] reach." *Nebraska v. Wyoming*, 113 S.Ct. at 1698.

3. The Grayrocks Project is a post-Decree reservoir located in Wyoming on the Laramie River below Wheatland, operated by Basin Electric Power Cooperative. During construction of the project, the State of Nebraska challenged its legality. *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *appeal dismissed*, 594 F.2d 870 (8th Cir. 1979). The litigation was settled by an agreement entitled Agreement of Settlement and Compromise dated December 4, 1978 ("Grayrocks Settlement Agreement"). In exchange for Basin Electric guaranteeing to operate the project to ensure the delivery of specified quantities of water to the confluence of the Laramie and North Platte rivers, Nebraska and other plaintiffs agreed to

withdraw their objections to the project. The State of Wyoming, while encouraged to participate in the Agreement in order to resolve any outstanding controversies, refused to become a party to the litigation or the Grayrocks Settlement Agreement.

4. The State of Nebraska has historically relied on and continues to rely on the contributions of the Laramie River to the North Platte River as an important component of the natural flows apportioned in the critical Guernsey Dam to Tri-State Dam reach, in satisfaction of the guaranteed minimum stream flows set forth in the Grayrocks Settlement Agreement, and for other equities below Tri-State Dam in Nebraska that rely on the Laramie inflows to the North Platte River during the irrigation and non-irrigation seasons.

5. Wyoming has refused to honor, and has in fact sanctioned depletions, of the minimum flows guaranteed by the Grayrocks Settlement Agreement.

6. The State of Wyoming is presently causing injury to and threatens to further injure beneficial uses of and equitable reliance on the inflows of the Laramie River in existence before and after the entry of the Decree in 1945, including depletions of the minimum flows guaranteed by the Grayrocks Settlement Agreement by:

a. The proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

b. The construction and use of new pumping facilities on the Laramie River;

c. The construction of facilities to reregulate, store, and consume return flows;

d. Reducing the inflows of the Laramie River and its tributaries in Wyoming by the present and future effects of existing and threatened groundwater development; and

e. Additional activities which reduce the natural flows of the Laramie River to the North Platte River.

7. The State of Wyoming is presently causing injury to and threatens to further injure beneficial uses of and equitable reliance on the inflows of the Laramie River in existence before and after the entry of the Decree in 1945, including depletions of the minimum flows guaranteed by the Grayrocks Settlement Agreement, by such projects as the proposed Corn Creek Project, Goshen Irrigation District's river pumps, groundwater pumping, and surface water depletions.

8. The current and imminent actions of the State of Wyoming contravene the Court's opinions in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and the Court's recent decision, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), upset the equitable balance of the North Platte River established in the Decree, threaten the continuation of the guaranteed minimum flows set forth in the Grayrocks Settlement Agreement, and threaten to upset the equitable reliance on North Platte River waters in Nebraska.

9. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and continues to upset Nebraska's equitable apportionment and threaten Nebraska's equitable reliance on these waters.

10. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

11. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to protect equitable interests in Nebraska and to restrain further violations by the State of Wyoming.

12. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court specify that the inflows of the Laramie River below Wheatland are a component of the equitable apportionment of the natural flows in the Guernsey Dam to Tri-State Dam reach, 75% to Nebraska and 25% to Wyoming, and enjoin the State of Wyoming from depleting Nebraska's equitable share of the Laramie River's contribution to the North Platte River and from impeding or interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement.

COUNT IV

1. The allegations of Counts I, II, and III are adopted and incorporated herein.

2. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), equitably apportions the natural flows of the North Platte River during the irrigation season among the states of Nebraska, Wyoming, and Colorado, except that it does not specify an apportion-

ment of the contributions of the Laramie River to the critical Guernsey Dam to Tri-State Dam reach of the North Platte River, notwithstanding that such flows were expected to continue.

3. The Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), partially apportioned the natural flows of the North Platte River during the non-irrigation season by regulating the storage or accrual of natural flow by:

a. Enjoining Wyoming from storing more than 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Reservoir during each water year, *i.e.*, October 1 through September 30;

b. Enjoining Colorado from storing more than 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, during each water year;

c. Enjoining Wyoming from storing water out of priority with respect to specified reservoirs, except for out of priority storage or releases from Seminoe Reservoir for the generation of electricity if such storage or releases do not materially interfere with irrigation by the French Canal and the State Line Canals;

d. Enjoining Colorado from exporting more than 60,000 acre feet of water out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, in any period of 10 consecutive years; and

e. Apportioning the accrual of 46,000 acre feet during the months of October, November, and April to Nebraska for storage in the Inland Lakes.

4. The Decree specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season.

5. Except as specified in ¶ 3, *supra*, the non-irrigation season flows of the North Platte River were not equitably apportioned in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), notwithstanding that the Court sought to balance the equities among the states of Nebraska, Wyoming, and Colorado to provide certainty and resolve future disputes.

6. Since the equitable apportionment was effectuated in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), there have been changes in conditions making modification of the Decree or the granting of further relief necessary and appropriate.

7. Since the entry of the Decree, the unapportioned non-irrigation season flows of the North Platte River have been and continue to be relied upon by equitable interests in the State of Nebraska, including irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation, and fish and wildlife, including endangered and threatened species.

8. The demand for unapportioned non-irrigation season flows by equities in Nebraska presently beneficially using such water exceeds the supply.

9. Numerous existing and proposed developments in Wyoming threaten to utilize and deplete the unapportioned non-irrigation season flows of the North Platte River.

10. It is necessary to apportion the unapportioned non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows.

11. As part of the Grayrocks Settlement Agreement entered in 1978, Basin Electric guaranteed to operate the Grayrocks Project to deliver specified quantities of water to the confluence of the Laramie and North Platte rivers during the non-irrigation season.

12. The State of Nebraska has historically relied on and continues to rely on the non-irrigation season contributions of the Laramie River to the North Platte River guaranteed by the Grayrocks Settlement Agreement.

13. The State of Wyoming's existing and proposed actions have depleted and threaten to further deplete the minimum non-irrigation season flows guaranteed by the Grayrocks Settlement Agreement.

14. The allegations contained in this count do not constitute assertions by the State of Nebraska that the storage of water in Grayrocks Reservoir, the present depletions therefrom for the purposes of the Grayrocks Project, or the passage through or release of waters from the Grayrocks Reservoir in accordance with the Grayrocks Settlement Agreement, constitute injuries to Nebraska's claim to an equitable share of the non-irrigation season flows of the North Platte River.

15. The current and imminent actions of the State of Wyoming infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

16. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and has continued to assert its alleged right to infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

17. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

18. The State of Nebraska has no effective remedy at law to enforce its equitable rights against the State of Wyoming. A determination of each state's equitable share and injunctive relief are necessary to restrain further infringement by Wyoming on Nebraska's equitable share of the North Platte River.

19. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court equitably apportion the unapportioned non-irrigation season flows of the North Platte River between Nebraska and Wyoming and that the Court enjoin the State of Wyoming from depleting Nebraska's equitable share of the North Platte River during the non-irrigation season.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

February 18, 1994

Bowne of Phoenix, Inc., Law Printers (602) 468-1012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE	3
ARGUMENT	7
I. THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION OVER NEBRASKA'S AMENDED PETITION	7
II. THE STANDARDS FOR ACCEPTING A PETITION DO NOT INVOKE THE BURDEN ON PROOF ON THE MERITS	11
III. THE COURT SHOULD RESOLVE ALL ISSUES RELATING TO WYOMING'S AND THE UNITED STATES' VIOLATIONS OF THE DECREE	14
IV. THE COURT MUST EQUITABLY APPORTION THE FLOWS OF THE LARAMIE TO PROTECT NEBRASKA'S APPORTIONMENT	17
V. CONFLICTING CLAIMS BETWEEN NEBRASKA AND WYOMING TO AN OVER-APPROPRIATED RIVER CREATE A JUSTICIABLE ORIGINAL ACTION	23
CONCLUSION	30

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
Alabama v. Arizona, 291 U.S. 286 (1934)	12, 13
Arizona v. New Mexico, 425 U.S. 794 (1976)	9, 10
Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979)	9
Colorado v. Kansas, 320 U.S. 383 (1943)	12, 17
Colorado v. New Mexico, 459 U.S. 176 (1982)	12, 13, 19, 23
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	12
Cuffy v. Getty Refining & Marketing Co., 648 F. Supp. 802 (D. Del. 1986)	15
Evans Prods. Co. v. West Am. Ins. Co., 736 F.2d 920 (3d Cir. 1984)	15
Foman v. Davis, 371 U.S. 178 (1962)	14
Granus v. N. Am. Philips Lighting Corp., 821 F.2d 1253 (6th Cir. 1987)	14
Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938)	21
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	9, 10
Kansas v. Colorado, 185 U.S. 125 (1902)	13, 16
Kansas v. Colorado, 206 U.S. 46 (1907)	13, 17
Maryland v. Louisiana, 451 U.S. 725 (1981)	8, 9, 10
Middle Atl. Utils. Co. v. S.M.W. Dev. Corp., 392 F.2d 380 (2d Cir. 1968)	14
Missouri v. Illinois, 200 U.S. 496 (1906)	12

	Page
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953)	1, 13, 14, 15, 16, 17, 18, 19, 23
Nebraska v. Wyoming, 345 U.S. 981 (1953)	17, 19
Nebraska v. Wyoming, 479 U.S. 1051 (1987)	1
Nebraska v. Wyoming, 481 U.S. 1011 (1987)	1
Nebraska v. Wyoming, 492 U.S. 903 (1989)	4
Nebraska v. Wyoming, 112 S.Ct. 1930 (1992)	4
Nebraska v. Wyoming, 113 S.Ct. 1689 (1993)	2, 3, 5, 12, 16, 17, 18, 19
Nebraska v. Wyoming, 113 S.Ct. 1941 (1993)	2, 3, 6
New York v. Illinois, 274 U.S. 488 (1927)	7, 9
New York v. New Jersey, 256 U.S. 296 (1921)	12
North Dakota v. Minnesota, 263 U.S. 365 (1923)	12
Ohio v. Kentucky, 410 U.S. 641 (1973)	8, 11
Ohio v. Wyandotte Chems. Corp., 401 U.S. 493 (1971)	10
Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938)	7
Oklahoma v. Atchison, T. & S.F. Ry. Co., 220 U.S. 277 (1911)	7
Oklahoma v. Texas, 253 U.S. 465 (1920)	16, 17
Pennsylvania v. West Virginia, 262 U.S. 553 (1923)	8

	Page
R.E.B., Inc. v. Ralston Purina Co., 525 F.2d 749 (10th Cir. 1975)	14
In re Summers, 325 U.S. 561 (1945)	8
Texas v. Florida, 306 U.S. 398 (1939)	7, 9
Texas v. New Mexico, 462 U.S. 554 (1983)	10
United States v. Nevada, 412 U.S. 534 (1973)	9, 10
United States v. Nixon, 418 U.S. 683 (1974)	8
United States v. Texas, 143 U.S. 621 (1892)	8
United States v. Texas, 162 U.S. 1 (1896)	16
United States v. Texas, 339 U.S. 707 (1950)	16, 17
United States v. United States Smelting Ref. & Mining Co., 339 U.S. 186 (1950)	23
Washington v. Oregon, 297 U.S. 517 (1936)	12, 13, 19, 23
Wyoming v. Colorado, 259 U.S. 419 (1922)	13, 17, 18, 19, 24
Wyoming v. Colorado, 286 U.S. 494 (1932)	17
Wyoming v. Colorado, 298 U.S. 573 (1936)	17
Wyoming v. Colorado, 309 U.S. 572 (1940)	17

DOCKETED CASES

Kansas v. Colorado, No. 105, Original	17
Nebraska v. Wyoming, No. 108, Original	17

Page

STATUTES AND COURT RULES

Colorado River Compact, 42 Stat. 171 (enacted 1921, signed 1922) 18

Republican River Compact, 57 Stat. 86 (enacted 1943, signed 1942) .. 18

U.S. Const. art. III, § 2 ..... 7, 8, 23

Supreme Court Rule 17.2 14

Fed. R. Civ. P. 15(a) 14

Wyo. Stat. § 41-2-112 (1977) 27

MISCELLANEOUS

Note, *Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665 (1959) 10

1 W.A. Hutchins, *Water Rights Laws in the Nineteen Western States* 445-48 (1971) 20

J.W. Moore & R.D. Freer, *Moore's Federal Practice* ¶15.08 [2] (2d ed. 1990) 14

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED PETITION

INTRODUCTION

The State of Nebraska moved for leave to file its petition to reopen *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), to address violations of the Decree by Wyoming.[1] The Court granted Nebraska's motion. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987). Wyoming filed its answer and a motion for leave to file a counterclaim.[2] The Court granted Wyoming's motion. *Nebraska v. Wyoming*, 481 U.S. 1011 (1987). On April 20, 1993, the

---

[1]Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) ("Nebraska's Petition").

[2]Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim (Mar. 18, 1987) ("Wyoming's Counterclaim").

Court issued its opinion on cross-motions for summary judgment. *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). As a result of the Court's decision, certain issues raised in Nebraska's Petition and in Wyoming's Counterclaim were resolved, certain issues remained unchanged and will proceed to trial, and other issues were substantially transformed.

On October 9, 1991, Nebraska filed a motion for leave to file an amended petition.[3] On April 26, 1993, the Court denied without prejudice Count I of the 1991 Amended Petition which sought an apportionment of the unapportioned non-irrigation season flows of the North Platte River. *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). Counts II and III of the motion for leave to file amended petition, which allege violations of the Decree by Wyoming and the United States, were referred to Special Master Olpin. *Id.*

As a result of the Court's decision on the cross-motions for summary judgment, the Court's order relating to Nebraska's motion to amend petition, continuing discovery, and certain intervening events, Nebraska is filing this motion for leave to amend its Petition. To conform its pleadings to the Court's decisions and in the interest of clarity and conciseness, this Amended Petition would replace and supersede Nebraska's Petition and Nebraska's 1991 Amended Petition.

Count I of this Amended Petition repeats allegations from Nebraska's Petition — matters on which the Court has already granted leave to file — and modifies allegations from Count II of Nebraska's 1991 Amended Petition. Count II of this Amended Petition alleges a violation of the

---

[3]Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims, Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims, and Brief in Support of Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Oct. 9, 1991)("Nebraska's 1991 Amended Petition").

Decree by the United States. Count III of this Amended Petition replaces the allegations in Nebraska's Petition regarding the Laramie River, modified to account for the Court's decision on the cross-motions for summary judgment. *See* 113 S.Ct. 1689. Count IV of this Amended Petition is a renewal of Count I of Nebraska's 1991 Amended Petition — the motion to apportion the unapportioned non-irrigation season flows. Special Master Olpin recommended that the Court deny without prejudice Nebraska's initial motion in this regard on ripeness grounds.[4] The Court did so. 113 S.Ct. 1941. As a result of the resolution of certain issues and the substantive transformation of other issues in this case to date, an equitable distribution of non-irrigation flows is now ripe for resolution. Finally, Count III of Nebraska's 1991 Amended Petition — allegations of Decree violations by the United States — would be partially withdrawn if this motion is granted.

STATEMENT OF THE CASE

Nebraska's original Petition sought to address various violations of the Decree by Wyoming. Nebraska alleged that Wyoming was violating the Decree and threatening to upset Nebraska's equitable apportionment established by the Court by depleting the flows of the Laramie River, by constructing the proposed Deer Creek Project, and by actions of Wyoming officials to prevent the continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska. Wyoming's Counterclaim alleged that Nebraska was violating the Decree by diverting natural flow in excess of present beneficial use requirements, by demanding and diverting natural flow and storage water from above Tri-State Dam

---

[4]Letter from Owen Olpin, Special Master, *Nebraska v. Wyoming*, No. 108, Original, to The Honorable Justice Byron R. White, The Supreme Court of the United States at 6 (Apr. 9, 1992) ("Master Olpin's letter to the Court Regarding Nebraska's Motion for Leave to File").

for uses below the dam that are not authorized, and by using Glendo storage water in a manner not authorized by the Decree.

Based on the issues as framed in Nebraska's Petition and Wyoming's Counterclaim, Wyoming filed a motion for summary judgment on September 11, 1987, seeking a summary resolution of the entire case, except its counterclaim. The Special Master denied each element of Wyoming's motion and reported his decision to the Court in the First Interim Report of Special Master, dated June 14, 1989. The Court did not invite exceptions to the First Interim Report, but rather accepted it for filing without modification. *Nebraska v. Wyoming*, 492 U.S. 903 (1989).

After a period of extensive discovery, cross-motions for summary judgment were filed by Nebraska, Wyoming, Colorado, and the United States in February and March of 1991, relating to all aspects of the case. On April 9, 1992, Special Master Olpin made several recommendations to the Court in the Special Master's Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention. Master Olpin recommended that all of Wyoming's and Colorado's motions for summary judgment be denied. He further recommended that the Court grant Nebraska's and the United States' motions for summary judgment with respect to the Inland Lakes issues and that it grant Nebraska's motion for summary judgment with respect to the lack of limitations on individual canal diversions. The Master recommended that other aspects of Nebraska's motion for summary judgment be denied.

The Court invited the parties to file exceptions to the Special Master's First and Second Interim Reports. *Nebraska v. Wyoming*, 112 S.Ct. 1930 (1992). Exceptions were filed by Wyoming, Colorado, and Nebraska in July of 1992. Oral argument on the exceptions was held before the Court on January 13, 1993. The Court issued its opinion on the cross-motions for summary judgment on April 20, 1993. *See* 113

S.Ct. 1689. The Court accepted Special Master Olpin's recommendations in nearly all respects.[5]

Subsequent to the filing of the cross-motions for summary judgment, Nebraska filed a motion for leave to file an amended petition with the Court on October 9, 1991. Count I of the amended petition sought an apportionment of the unapportioned non-irrigation season flows of the

---

[5]The Court denied Wyoming's motion for summary judgment relating to the proposed Deer Creek Project, finding that genuine issues of material fact require trial. 113 S.Ct. at 1699-1700. Additionally, while the Court did not resolve the meaning of ¶ X, which Wyoming contended was a blanket exemption for its project, it was "troubled by Paragraph X." *Id.* at 1699.

Nebraska's and the United States' motions relating to the Inland Lakes were granted by the Court. *Id.* at 1696-97. The Court found that the Inland Lakes have a right to accrue 46,000 acre feet of natural flow in the lakes during the months of October, November, and April, with a priority date of December 6, 1904. *Id.* at 1697. The Inland Lakes were also allowed to temporarily store the water in Glendo and Guernsey reservoirs during the non-irrigation season. *Id.*

With respect to the Laramie River, the Court denied Wyoming's and Nebraska's motions for summary judgment. *Id.* at 1697-99. The Court found that the Laramie River was unapportioned by the Court in 1945, notwithstanding that its contributions were used as part of the calculus to determine the apportionment in the critical Guernsey Dam to Tri-State Dam reach and that such flows were expected to continue. *Id.* at 1698. The Court stated that the relief which Nebraska sought — restrictions on Wyoming's use of the Laramie River — would constitute a modification of the Decree. *Id.* at 1698-99.

The Court denied the cross-motions for summary judgment with respect to most of the Tri-State matters. *Id.* at 1700. There was one important exception. The Court granted Nebraska's motion for summary judgment which sought an interpretation of ¶ V of the Decree. *Id.* at 1700-01. The Court agreed with Nebraska and found that the Decree did not contain limitations on individual canal diversions, but rather allowed Nebraska to use its 75% apportionment in the Guernsey Dam to Tri-State Dam reach according to its discretion. *Id.*

North Platte River. Counts II and III of the 1991 Amended Petition alleged further violations of the Decree by Wyoming, and, for the first time, violations of the Decree by the United States. After the parties and *amici* briefed this matter, Special Master Olpin *sua sponte* wrote a letter to the Court containing a recommendation on Count I of Nebraska's 1991 Amended Petition:

> While Nebraska is convincing on the importance of the North Platte's unapportioned non-irrigation season flows and while the threshold adopted by the Court's majority in 1945 arguably has been met, I nonetheless recommend that Nebraska's motion be denied without prejudice on ripeness grounds. . . . The time will likely come when a year around apportionment will be needed, but for now I recommend going forward with the discrete claims that are already before the Court, some of which do involve non-irrigation season natural flows. The resolution of those discrete claims will inform any subsequent proceeding dealing more comprehensively with the apportionment of non-irrigation season flows.

Master Olpin's letter to the Court Regarding Nebraska's Motion for Leave to File at 6. On April 26, 1993, the Court denied without prejudice Nebraska's Motion for Leave to File with respect to Count I and referred Counts II and III to the Special Master for his recommendation. 113 S.Ct. 1941.

Following the Court's decision on April 20, 1993, and its order of April 26, 1993, Master Olpin convened a status conference in June of 1993, to discuss various pretrial matters. The conference included a discussion of the procedure for preparing the Master's recommendation to the Court on Counts II and II of Nebraska's 1991 Amended Petition. During the conference, it became apparent that at least two of the parties contemplated possible pleading amendments as a result of the Court's April decisions and prior discovery. A subsequent order entered by Master

Olpin set February 4, 1994, as the deadline for filing proposed pleading amendments. The deadline was later changed to February 18, 1994.

To encourage judicial economy and a speedy resolution of their pleading amendments, the states of Nebraska and Wyoming cooperated in the drafting of a joint motion to refer which is being filed simultaneously with this motion, the Amended Petition and brief, and Wyoming's proposed amendments to its counterclaim. If the Court grants the joint motion to refer, the Special Master will set a schedule for further briefing and make his recommendations to the Court in due course. If the Court denies the motion, the parties will proceed pursuant to the Court's order.

ARGUMENT

POINT I

THE COURT SHOULD EXERCISE ITS ORIGINAL JURISDICTION OVER NEBRASKA'S AMENDED PETITION

Nebraska has properly invoked the Court's original jurisdiction over its amended petition. Under U.S. Const. art. III, § 2, Nebraska must establish that it is not a nominal party and that the Amended Petition presents a justiciable "case or controversy."[6] *See Texas v. Florida*, 306 U.S. 398 (1939); *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-96 (1938); *New York v. Illinois*, 274 U.S. 488, 489-90 (1927).

The Court has jurisdiction to hear actions between states if the matter in dispute presents a justiciable "case or

---

[6]It should be clear that Nebraska is not a "nominal" party actually representing private interests. *See Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 392-96 (1938); *Oklahoma v. Atchison, T. & S.F. Ry. Co.*, 220 U.S. 277, 288-89 (1911). Nebraska's interests *parens patriae* embrace agricultural, municipal, industrial, recreational, environmental, and fish and wildlife interests along the North Platte and Platte Rivers.

controversy" under art. III, § 2 of the United States Constitution. In *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Court wrote:

> The Constitution provides for this Court's original jurisdiction over cases in which a "State shall be a Party." Art. III, § 2, cl. 2. Congress has in turn provided that the Supreme Court shall have "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251 (a) (1976 ed., Supp. III). In order to constitute a proper "controversy" under our original jurisdiction, "it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence."

451 U.S. at 735-36 (citations omitted). *See also Pennsylvania v. West Virginia*, 262 U.S. 553, 591-92 (1923); *United States v. Texas*, 143 U.S. 621, 644-46 (1892). The Court's original jurisdiction is broadly construed to embrace all issues within a "case or controversy" under U.S. Const. art. III, § 2, to "reach and argue the merits of the controversy presented . . . dispos[ing] of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigant must bear." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

A "controversy" is not a mere disagreement, but rather the kind of controversy courts are called upon to resolve.[7] *See United States v. Nixon*, 418 U.S. 683, 696 (1974). Specifically, a controversy must be appropriate for judicial determination, definite and concrete, involving the legal

---

[7]"Case" has been defined as "any question respecting the Constitution, treaties or laws of the United States [which] has assumed 'such a form that the judicial power is capable of acting on it.' " *See In re Summers*, 325 U.S. 561, 566-67 (1945).

relations of parties having adverse legal interests, and admitting of specific relief through a decree of conclusive character. In *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979), the Court noted that one " 'does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.' " 442 U.S. at 298 (citations omitted).

Similarly, in original actions, the controversy must arise from "an actual or presently threatened interference with the rights of another." *New York v. Illinois*, 274 U.S. at 489-90. As the Court put it in *Texas v. Florida:*

> . . . [O]ur constitutional authority to hear the case and grant relief turns on the question whether the issue framed by the pleadings constitutes a justiciable "case" or "controversy" within the meaning of the Constitutional provision, and whether the facts alleged and found afford an adequate basis for relief according to accepted doctrines of the common law or equity systems of jurisprudence, which are guides to decision of cases within the original jurisdiction of this Court.

306 U.S. at 405 (citations omitted).

The Court has also held that original jurisdiction is exercised "sparingly." *United States v. Nevada*, 412 U.S. 534, 538 (1973). Resort to original jurisdiction is justified only in "appropriate cases." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). *See also Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976). In *Maryland v. Louisiana*, the Court observed that "what is 'appropriate' involves not only 'the seriousness and dignity of the claim,' but also 'the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had.' " 451 U.S. at

739-40 (quoting *Illinois v. City of Milwaukee*, 406 U.S. at 93).[8]

Nebraska's proposed amendments satisfy the jurisdictional requirement for an actual controversy and fall within the ambit of the Court's discretion for accepting jurisdiction because matters alleged in Nebraska's Amended Petition are necessary to protect the State of Nebraska's equitable apportionment and its equities in unapportioned water from wrongful actions by the State of Wyoming. The proposed Amended Petition seeks to secure Nebraska's apportionment by fully enforcing the Decree, by adding injunctions to further implement the Decree, where they had previously been thought unnecessary, and by apportioning unapportioned natural flows. Without new injunctive and restrictions and the enforcement of existing injunctions, Wyoming, through reservoir construction, groundwater development, actions to reduce return flows, and failure to maintain complete and accurate water use records, would deplete the natural flows of the North Platte River in violation of the Decree and to the detriment of post-Decree equitable interests in Nebraska which have historically relied on the existing regimen of the river.

The Court should grant Nebraska's motion for leave to file this Amended Petition and exercise jurisdiction over this controversy for these reasons: 1) The Decree is being violated by Wyoming; 2) additional restrictions must be

---

[8]The circumstances in which the Court declines to exercise its original jurisdiction fall into two categories, *i.e.*, political questions and the existence of an alternative forum. *See* Note, *Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665, 694-700 (1959). The existence of an "adequate" alternative forum is not in issue here. *See Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976); *United States v. Nevada*, 412 U.S. 534, 538 (1973); *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 495-99 (1971). The sole forum in which to allocate or enforce an interstate apportionment is the Supreme Court of the United States. There is no alternative forum. *See Texas v. New Mexico*, 462 U.S. 554, 567 (1983). Furthermore, this is not a political question.

placed on Wyoming to protect and effectuate the equitable apportionment established by the Court in 1945; 3) the North Platte River is over-appropriated during the non-irrigation season; 4) there is downstream reliance on non-irrigation flows jeopardized by actual and threatened development in Wyoming; and 5) the pending original action requires jurisdiction over non-irrigation flows to fully resolve these issues. In sum, the amendments are necessary to resolve the existing controversy.

POINT II

THE STANDARDS FOR ACCEPTING A PETITION DO NOT INVOKE THE BURDEN OF PROOF ON THE MERITS

In assessing this motion for leave to file, the standards for the exercise of original jurisdiction and the standards for relief on the merits must be kept distinct. Motions for leave were defined by the Court in *Ohio v. Kentucky*: "Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Ohio v. Kentucky*, 410 U.S. at 644. This procedure tests the legal sufficiency of a petition by disposing of threshold legal issues.

The facts are not weighed by the Court on a motion for leave to file. Rather, the Court assesses whether the facts alleged, if true, present a claim of sufficiently serious magnitude for the exercise of original jurisdiction. The Court does not require "fact pleading," which specifies and supports every allegation in detail.[9]

By contrast, the traditional standard for relief on the merits in an original action is that there must be clear and convincing evidence establishing that the actions of a state are of a serious magnitude and fully and clearly proven before the Court will intervene and enjoin the actions of

---

[9]*See, e.g.*, pleading pursuant to California's rules of procedure.

another state. *See generally Colorado v. New Mexico*, 459 U.S. 176, 187-88 n.13 (1982); *Colorado v. Kansas*, 320 U.S. 383, 393-94 (1943).[10] This determination, however, is made by the Court after it has granted the motion for leave to file and after it has heard the evidence at trial.

When seeking to enforce a decree or compact, the plaintiff need not establish injury, but rather only that a violation of the decree or compact has occurred. *Nebraska v. Wyoming*, 113 S.Ct. at 1695. Accordingly, in a motion for leave to file in which decree or compact violations are alleged, a well pleaded allegation of compact or decree violations is sufficient to invoke the Court's jurisdiction.[11]

A well pleaded action for equitable apportionment meets the Court's test for justiciability because it necessarily includes the concepts of an "imminent threat" of "serious injury."[12] The Court has repeatedly held that a fully appro-

---

[10]*Accord Washington v. Oregon*, 297 U.S. 517, 522 (1936); *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931); *North Dakota v. Minnesota*, 263 U.S. 365, 374 (1923); *New York v. New Jersey*, 256 U.S. 296, 309 (1921); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906).

[11] The Court's decision in *Nebraska v. Wyoming*, 113 S.Ct. 1689 indicates that the burden on a state seeking to enforce a decree is different from that involved in modifying a decree. To the extent that a modification involving "a request for recognition of new rights" is presented, "a higher standard of proof applies." *Id.* at 1695. In an enforcement action, however, "the plaintiff need not show injury . . .." The only question "is whether that conduct violates a right established by the decree." *Id.* The distinction is based on whether interference to sovereign interests occurs "in the first instance." *Id.* at 1696.

[12]There is no additional requirement that the state seeking an equitable apportionment must demonstrate that the threatened injury is "imminent" or attempt a factual showing of "necessity." Language to that effect in *Alabama v. Arizona*, 291 U.S. 286 (1934), arose in a completely different context. In that case, Alabama sought to enjoin five other states from enforcing their

cont'd

priated river in which downstream equities are threatened by actual or proposed upstream development necessarily invokes sovereign rights and creates the "clash of interests . . . which makes the controversy a justiciable one under [the Court's] original jurisdiction." *Nebraska v. Wyoming*, 325 U.S. at 610.[15] Moreover, as the Court said in *Kansas v. Colorado*: "[T]he disagreement, coupled with its effect upon a stream passing through the two States, makes a matter appropriate for investigation and determination by this court." *Kansas v. Colorado*, 206 U.S. 46, 95-96 (1907).

Consequently, the Court has rejected the argument that factual issues must be fully developed in the preliminary stages of an original action. The weighing of untested evidence to determine success on the merits is not a factor in determining whether to grant a motion for leave to file. The Court does "not pause to consider the scope of the relief which it might be possible to accord on such a bill." *Kansas v. Colorado*, 185 U.S. 125, 145 (1902). The allegations in Nebraska's Amended Petition are of ample magnitude to require the exercise of the Court's original jurisdiction.

---

statutes against the sale of products made from prison labor on the ground that those states were depriving Alabama of its interstate market in prison manufactured products. The Court properly found the factual allegations of injury to be highly speculative and insufficiently pled. *Id.* at 291. The ruling has no precedential effect on the clearly discernable impacts arising from the competition for interstate water.

[15] *See also Colorado v. New Mexico*, 459 U.S. 176 (1982); *Washington v. Oregon*, 297 U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Kansas v. Colorado*, 206 U.S. 46 (1907).

POINT III

THE COURT SHOULD RESOLVE ALL ISSUES RELATING TO WYOMING'S AND THE UNITED STATES' VIOLATIONS OF THE DECREE

Counts I and II of this Amended Petition repeat allegations from Nebraska's Petition and contain allegations of additional violations of the Decree by the State of Wyoming and the United States of America.[14] In Counts I and II, Nebraska seeks to protect and enforce its equitable apportionment established by the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953).

Supreme Court Rule 17.2 states that the Federal Rules of Civil Procedure, "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." Under Fed. R. Civ. P. 15(a), leave to amend pleadings is freely given. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Insofar as amendments to a complaint or petition are concerned, the objective is to give the plaintiff "a chance to test his claim on the merits." *Middle Atl. Utils. Co. v. S.M.W. Dev. Corp.*, 392 F.2d 380, 384 (2d Cir. 1968). Accordingly, where the amended complaint or petition states a valid cause of action it should be granted. *See Granus v. N. Am. Philips Lighting Corp.*, 821 F.2d 1253, 1256 (6th Cir. 1987); *R.E.B., Inc. v. Ralston Purina Co.*, 525 F.2d 749 (10th Cir. 1975). This policy also extends to the introduction of an entirely new cause of action. *See* 3 J.W. Moore & R.D. Freer, *Moore's Federal Practice* ¶ 15.08 [2] (2d ed. 1990).

There must be a specific showing of substantial prejudice to deny an amended pleading. Under Fed. R. Civ. P. 15(a),

---

[14]The allegations of additional Decree violations are similar to allegations made in Count II of Nebraska's 1991 Amended Petition. They have been revised, however, to take into account Nebraska's better understanding of Wyoming practices as a result of discovery and changed circumstances.

"prejudice" affects a party's ability to present its case. As the court stated in *Cuffy v. Getty Refining & Marketing Co.*, 648 F. Supp. 802 (D. Del. 1986):

> . . . [I]t is obvious that an amendment, designed to strengthen the movant's legal position, will in some way harm the opponent. In the context of a 15(a) amendment, prejudice means that the non-moving party "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Heyl & Patterson Intern.*, 663 F.2d at 426.

648 F. Supp. at 806. *See also Evans Prods. Co. v. West Am. Ins. Co.*, 736 F.2d 920, 924 (3d Cir. 1984).

No prejudice would result from accepting Nebraska's Amended Petition. Beginning with the Court's decision of April 20, 1998, on the cross-motions for summary judgment, the issues have evolved. Both Nebraska and Wyoming are filing motions for leave to amend their pleadings to account for the changed circumstances. Neither party will be prejudiced in preparing a defense for any of the proposed pleading amendments. Because of the necessary pretrial schedule on the pending legal issues, all parties and *amici* will have more than a sufficient opportunity to investigate the factual claims and to gather evidence in support of or in defense against any new allegations. The introduction of additional matters in Nebraska's proposed Amended Petition will not deny any party a fair opportunity to defend against the allegations in the Amended Petition.

The allegations in Counts I and II are intended to protect and enforce Nebraska's equitable apportionment established by the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953).[15] The Court has

---

[15]Some allegations remain unchanged from the original Petition. Additional present and threatened development and depletions in Wyoming which upset the equitable apportionment have

cont'd

held that enforcement of the equitable apportionment effectuated by the Decree is entirely within the purview of the Court's original jurisdiction pursuant to ¶ XIII. *See* 113 S.Ct. at 1695. Accordingly, Count I of this Amended Petition incorporates existing claims from Nebraska's Petition and adds related allegations requiring enforcement. The new allegations are as fundamental to the enforcement of Nebraska's apportionment as those accepted in 1987. They include significant present and future groundwater depletions, which in turn are depleting and will deplete the surface flows relied on by the downstream state, *i.e.*, Nebraska. Count II adds allegations against the United States with respect to uses of Glendo storage water patently in conflict with the Decree. If the Amended Petition is filed, it will govern future proceedings.

The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), contained only those injunctions required to ensure that dependable and usable inflows would accrue to the Guernsey Dam to Tri-State Dam reach from upstream reaches to effectuate the apportionment of sufficient natural flows in the reach to meet the demand. The Court declined to impose additional injunctions in the absence of a contemporaneous threat of development. Because of present threatened development in Wyoming, it is now time to place additional restrictions on Wyoming's use of the North Platte River and its tributaries to protect the equitable apportionment established by the Court in 1945.

In original actions there is a compelling policy in favor of full development of the facts. *See United States v. Texas*, 339 U.S. 707, 715 (1950).[16] The exercise of original jurisdiction should therefore be regarded as comprehensive, em-

---

[16]*See also Oklahoma v. Texas*, 253 U.S. 465, 471 (1920); *Kansas v. Colorado*, 185 U.S. at 144-45, 147 (1902); *United States v. Texas*, 162 U.S. 1 (1896).

bracing all issues in a cause of action.[17] Wyoming and the United States will not be unfairly disadvantaged or deprived of an opportunity to present facts or evidence in response to these allegations. To the contrary, the Amended Petition will clarify the parties' rights and responsibilities and eliminate uncertainty related to the respective entitlements of the states to the waters of the North Platte River.

POINT IV

THE COURT MUST EQUITABLY APPORTION THE FLOWS OF THE LARAMIE TO PROTECT NEBRASKA'S APPORTIONMENT

Count III of the Amended Petition seeks an equitable apportionment of the irrigation season inflows of the Laramie River. Count III evolves from allegations in Nebraska's Petition and the Court's decision on the cross-motions for summary judgment.

In its opinion on April 20, 1993, the Court noted that "Wyoming and Nebraska both moved for summary judgment [with respect to the Laramie River inflows to the North Platte], taking diametrically opposed positions with respect to their rights to Laramie waters." 113 S.Ct. at 1697. In asserting their claims, each state articulated its

---

[17]The Court has been forced to revisit several controversies, including three equitable apportionment cases, to settle unresolved issues. *See, e.g., Oklahoma v. Texas*, 253 U.S. 465 (1920) and *United States v. Texas*, 339 U.S. 707 (1950); *Kansas v. Colorado*, 206 U.S. 46 (1907), *Colorado v. Kansas*, 320 U.S. 383 (1943), and *Kansas v. Colorado*, No. 105, Original; *Wyoming v. Colorado*, 259 U.S. 419 (1922), *Wyoming v. Colorado*, 286 U.S. 494 (1932), *Wyoming v. Colorado*, 298 U.S. 573 (1936), and *Wyoming v. Colorado*, 309 U.S. 572 (1940); and *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *Nebraska v. Wyoming*, 345 U.S. 981 (1953), and the present case, No. 108, Original. The post-Decree resolution of omitted issues should be avoided here. Justice and equity, as well as judicial economy, require that the Amended Petition be allowed.

entitlement to the waters of the Laramie in terms of *res judicata*. Wyoming maintained that the Court apportioned all of the flows of the Laramie below Wheatland to Wyoming in *Wyoming v. Colorado*, 259 U.S. 419 (1922). Nebraska maintained that the Court apportioned all of the flows of the Laramie below Wheatland to Nebraska in *Nebraska v. Wyoming*, 325 U.S. 589, 667 (1945), *modified*, 345 U.S. 981 (1953); *see also* Doherty Report at 67 (Table III).

The Court concluded, however, that in establishing the equitable apportionment of the North Platte River, including its tributaries, "the Court [in 1945] apparently expected that some Laramie water would contribute to the natural flows available for apportionment in the pivotal reach" and that the "Laramie flows that actually have reached the North Platte [since 1945] have been included in the equitable apportionment . . .."[18] 113 S.Ct. at 1698. The Court believed that "the evidence, most fairly read, did

---

[18]In adding the inflows from the upper reach at Whalen to the "[u]sable net accretions" between Whalen and Tri-State, Special Master Doherty stated that he was calculating "the total sectional natural flow fund" . . . to determine "what volume of water there [was] for apportionment . . .." Doherty Report at 70, 61.

The presumption that interstate apportionments necessarily involve a specified amount of delivery to the downstream state reveals a common misperception of the apportionment schemes in interstate compacts and decrees. *See* 113 S.Ct. at 1698. Of the 33 compacts and decrees defining interstate apportionments, only two compacts require a "specified amount of delivery." Colorado River Compact, 42 Stat. 171 (enacted 1921, signed 1922); Republican River Compact, 57 Stat. 86 (enacted 1943, signed 1942). Of the 12 interstate decrees, none apportions a specified amount of water. Most legal relationships in interstate water are premised on the recognition that the specification of a certain delivery is impracticable or impossible. Accordingly, no provision of the Decree in 1945 provides "a requirement of a specified amount of delivery to the downstream state."

not decide the fate of the excess Laramie waters in 1945."[19] *Id.*

The Court indicated that to obtain relief on the Laramie, Nebraska must seek modification of the Decree. *Id.* at 1698-99. Wyoming's actual and threatened depletions of the unapportioned irrigation season flows of the Laramie River below Wheatland, combined with the historical reliance on the same flows by downstream equities in Nebraska, frame a case for equitable apportionment of the flows, which Nebraska seeks in proposed Count III, consistent with the Court's posturing of the case on April 20, 1993. *Id.* *See Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. New Mexico*, 459 U.S. 176 (1982); *Washington v. Oregon*, 297 U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922).

Nebraska possesses numerous equities which have relied historically — and continue to rely — on the unapportioned irrigation season flows of the Laramie.[20] The primary Nebraska users of Laramie contributions to the North Platte River are the irrigators who divert in the over-appropriated Whalen/Tri-State reach. Return flows result

---

[19]The Court noted that "[t]he decree did not restrict Wyoming's use of the Laramie or require Wyoming regularly to deliver a specified amount of Laramie water to the North Platte confluence." 113 S.Ct. at 1698.

[20]The Laramie River is the largest tributary in the Whalen/Tri-State reach. On the average, it is responsible for 29% of the natural flow accretions to the reach during the irrigation season. Between 1946 and 1992, the Laramie contributed an irrigation season average of 57,464 acre feet of natural flow to the over-appropriated Whalen/Tri-State reach. Of that amount, 75% has been made available to Nebraska appropriators pursuant to ¶ V of the Decree, *i.e.*, 43,098 acre feet. *See* 345 U.S. at 985 (¶ V). Assuming a 10% incremental conveyance loss, Nebraska irrigators in the Whalen/Tri-State reach have historically diverted an annual average of 38,788 acre feet of Laramie flows during the irrigation season. In a system where the most senior appropriators have not had their natural flow needs met in 42 out of the last 46 years, the Laramie contributions are significant.

from these primary diversions, generating second and subsequent uses of the same water. *See* 1 W.A. Hutchins, *Water Rights Laws in the Nineteen Western States* 445-48 (1971). Secondary users composing the equitable reliance below Tri-State Dam in Nebraska include irrigators who utilize return flows, hydropower generation and power plant cooling users, municipal users, industrial users, recreation users, and fish and wildlife, including endangered and threatened species.

The annual associated economic benefits to the State of Nebraska from the Laramie contributions to the North Platte from primary uses in the Whalen/Tri-State reach are $2.5 million in net returns to irrigators and $13.6 million in economic activity resulting from the sale of agricultural products.

Equities in Nebraska that have historically relied and continue to rely on Laramie flows would suffer serious injury if the proposed Corn Creek Project were constructed. The Corn Creek Irrigation District encompasses 70,000 acres which are presently in dry land crops and rangelands. Water for the project is proposed from three sources — Grayrocks Reservoir, Glendo Reservoir, and a direct flow diversion from the Laramie River. The principal water supply for the project would consist of 22,500 acre feet per annum from Grayrocks Reservoir. Basin Electric Power Cooperative is obligated by contract to provide the proposed Corn Creek Project with 15,000 acre feet of water between April 1 and September 30, and 7,500 acre feet of water between October 1 and March 31, with no reduction for drought periods. An average annual water demand of 32,600 acre feet is projected for the proposed Corn Creek Project. Because of the local hydrogeologic conditions, none of the irrigation water would return to the North Platte River system.

Goshen Irrigation District ("Goshen") recently completed construction of a new permanent pumping station which replaces a low capacity pump that had been used intermittently near the mouth of the Laramie River. The

original river pump diverted an average of 271 acre feet per year or three cfs averaged over the irrigation season. Beginning this summer, Goshen's diversions from the Laramie River could reach 10,125 acre feet and eventually depletions of the Laramie River could skyrocket to 20,250 acre feet annually, significantly depleting the contributions of the Laramie to the critical Whalen/Tri-State reach of the North Platte River. Nebraska equities have historically relied — and continue to rely — on Laramie flows contributing to the Whalen/Tri-State reach. Goshen's new depletions would undermine the historical reliance by existing equities in Nebraska. Additionally, Goshen's pumping station would deplete the instream flow releases guaranteed by the Grayrocks Settlement Agreement.

Significant development of groundwater resources has occurred within the lower Laramie River basin since 1945.[21] There are approximately 16,780 additional acres in the lower Laramie River Basin which have post-1945 permitted but unadjudicated groundwater rights. Some of these rights have been permitted as recently as May 1992. The exercise of these rights will cause depletions to the surface flows of the Laramie River and its tributaries. After enough time has elapsed and the aquifer system has reached a new steady-state, virtually 100% of the consumptive groundwater withdrawals in the area between Cottonwood Creek and the Laramie River will be reflected in stream flow depletions.

Subsequent to the entry of the Decree, Wyoming has allowed substantial depletions of the Laramie River below Wheatland in the form of new surface water appropriations. New agricultural uses could divert up to 11,790 acre feet of Laramie water for the irrigation of 3,930 acres of cropland. Industrial uses could divert up to 32,625 acre feet per year.

---

[21]The conjunctive management of surface and groundwater lies within the federal common law of equitable apportionment. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

Wyoming has also adjudicated post-1945 storage rights below Wheatland on the Laramie and its tributaries totaling 9,540 acre feet, exclusive of the 104,109 acre feet storage right of Grayrocks Reservoir.

The depletions caused by Wyoming's post-1945 adjudicated surface water rights could reach as high as 44,400 acre feet. There are over 4,000 additional acres for Whalen surface water rights from the lower Laramie River system which have been permitted but not adjudicated since 1945. Under Wyoming's statutes, an additional 12,000 acre feet of surface water could be diverted to serve these lands. The most recent of these rights was permitted in 1993. Nebraska equities have historically relied on the flows of the Laramie River, and Wyoming should not be allowed to deplete these flows causing injury to Nebraska's existing equities.

The Wyoming Water Development Commission has funded several projects on the Laramie River at and upstream of the Wheatland Project which have the potential to diminish the flows of the Laramie River below the Wheatland Irrigation District. They include projects associated with Lake Hattie, the rehabilitation of Wheatland Reservoir No. 1, the proposed construction of new storage in the upper Laramie River basin, the Pioneer Canal-Lake Hattie Irrigation District, and the lining of canals in the Wheatland Irrigation District.

In summary, Nebraska's proposed Count III properly seeks a modification of the Decree to apportion the irrigation season flows of the Laramie River below Wheatland, based on Wyoming's actual and threatened depletions of such flows, and historical reliance on the same flows by downstream equities in Nebraska.

POINT V

CONFLICTING CLAIMS BETWEEN NEBRASKA AND WYOMING TO AN OVER-APPROPRIATED RIVER CREATE A JUSTICIABLE ORIGINAL ACTION

In Count IV, Nebraska seeks an equitable apportionment of the non-irrigation season flows of the North Platte River. In *Nebraska v. Wyoming*, the Court held that conflicting claims between states to a fully appropriated river in and of itself created a justiciable controversy under U.S. Const. art. III, §2:

> . . . *Wyoming v. Colorado, supra*, indicates that where the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination. If there were a surplus of unappropriated water, different considerations would be applicable. Cf. *Arizona v. California*, 298 U.S. 558. But where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land. The present claimants being States, we think the clash of interests to be of that character and dignity which makes the controversy a justiciable one under our original jurisdiction.

325 U.S. at 610. The holding could be construed as law of the case, applicable to future proceedings under the Court's retained jurisdiction. *Id.* at 671-72; *compare United States v. United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198-99 (1950).

Wyoming's actual and threatened depletions of the unapportioned flows of the North Platte River present the classic equitable apportionment conflict, *i.e.*, the threat to downstream equities posed by upstream development. *See Colorado v. New Mexico*, 459 U.S. 176 (1982); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Washington v. Oregon*, 297

U.S. 517 (1936); *Wyoming v. Colorado*, 259 U.S. 419 (1922). The Court summed up the situation in *Wyoming v. Colorado*:

> The contention of Colorado that she as a State rightfully may divert and use, as she may choose, the waters flowing within her boundaries in this interstate stream, regardless of any prejudice that this may work to others having rights in the stream below her boundary, can not be maintained. The river throughout its course in both States is but a single stream wherein each State has an interest which should be respected by the other. A like contention was set up by Colorado in her answer in *Kansas v. Colorado* and was adjudged untenable. Further consideration satisfies us that the ruling was right.

259 U.S. at 466.

During the non-irrigation season, all of the currently unapportioned water in the river below Guernsey Dam flows into Lake McConaughy.[22] The reservoir has a capacity of nearly 2,000,000 acre feet, and is located in western Nebraska above the confluence of the North Platte and South Platte rivers. Kingsley Dam, which forms Lake McConaughy, was completed in 1941. The dam and reservoir were expressly planned and designed to capture the non-irrigation season flows, the return flows of the North Platte Project, and any other unused flows that were transported to that reach of the river. The average annual inflow into Lake McConaughy between 1946 and 1987 was 1,105,000 acre feet. Kingsley Dam is a structure through which all subsequent downstream flows are controlled. When Lake McConaughy does not have a sufficient water supply, downstream equities are adversely affected.

---

[22]Guernsey, along with Glendo, Alcova, Pathfinder, and Seminoe reservoirs, normally close their gates during the non-irrigation season in order to store natural flow for use during the irrigation season. Therefore, most of the accruals to the river above Guernsey Reservoir are captured by upstream reservoirs.

The primary sources of water entering Lake McConaughy are the inchannel natural flows from Wyoming that pass Tri-State Dam, the diversion dam just downstream of the Wyoming-Nebraska state line, and the return flows between Tri-State Dam and Bridgeport that result from the diversion of irrigation water above Tri-State Dam. The inchannel natural flows passing Tri-State are primarily accretions to the river below Guernsey Reservoir. The return flows which enter the river between Tri-State Dam and Bridgeport are derived primarily from diversions to canals at or above Tri-State Dam. When water is applied to farmland upstream during the irrigation season, part of the unused water percolates into the ground as part of the hydrologic cycle. The unconsumed water reappears in the river system downstream at a later point in time and is called return flow. During the non-irrigation season the inchannel flows averaged 197,400 acre feet for the years 1946-1987. Return flows in the Tri-State Dam to Bridgeport section of the river during the non-irrigation season were 342,400 acre feet on an annual average basis, 1946-1987. Thus the non-irrigation season inflow to Nebraska from Wyoming averaged 539,800 acre feet annually, 1946-1987.

Both Nebraska and Wyoming claim the right to use without limit the non-irrigation season water supply. There is insufficient water to satisfy all existing demands, aside from any proposed new depletions. The stresses on the system can no longer tolerate the failure to apportion the non-irrigation season flows.

Nebraska possesses a broad spectrum of equities dependent on non-irrigation season flows. These equities are jeopardized by actual and threatened developments in Wyoming. Traditional economic uses and fish and wildlife uses have developed in Nebraska based upon the unapportioned, non-irrigation season flows and the regimen of the North Platte River established by the Decree. From an economic standpoint, the most important is irrigation. Non-irrigation season water that is stored in Lake McConaughy is used

during the irrigation season to supplement or fully irrigate 230,000 acres of land each year. The associated annual economic benefits to the State of Nebraska are a $16.1 million increase in net returns to the irrigators and a $53.7 million increase in economic activity resulting from the sale of additional agricultural production.

Power production occurs during the irrigation season and during the non-irrigation season. There is a series of generating units which together generate an annual average of 550,000 megawatt hours of power worth $8.2 million annually to electric consumers in Nebraska.

Municipal water use of the North Platte and Platte rivers is also critical in Nebraska. Various municipalities, including Grand Island and Kearney, have well fields in the alluvium of the rivers that draw water on an annual basis. Because of increasing groundwater contamination in areas where municipal well fields used to be located, more and more towns and cities are turning to the river for a fresh and uncontaminated water supply. At least periodic flows in the river are needed to assure dependable water supplies for municipalities. The unapportioned, non-irrigation season flows are an important component of the water supply for municipal and domestic uses.

Recreational uses also rely on the currently unprotected flows of the North Platte River and the regimen of the river as it presently exists during the irrigation season. Recreation related to the North Platte and Platte rivers and associated reservoirs is estimated to have generated 7.8 million visitor days per year. Platte River Valley recreation has been valued at $34 million annually and produces new spending within Nebraska of $16.2 million a year.[23]s

---

[23]Monies received from visitors who come to Nebraska to witness the annual waterfowl and bird migrations are substantial. The Platte River is a major stopover point in the central flyway for scores of migratory birds during the spring and fall migrations. It is estimated that 80,000 people came to the Central Platte region to view the crane and waterfowl spring migration in 1991.

cont'd

Finally, fish and wildlife are beneficiaries of unapportioned, non-irrigation season flows and the irrigation season regimen of the North Platte River. All water which currently flows into Nebraska is important to support minimum stream flows for the Platte River. The riparian habitat within a three-mile corridor within the reach between Lexington and Denman, Nebraska, has been declared as critical habitat for the endangered whooping crane. In addition, a larger 150 mile stretch of habitat along the Platte River provides an important habitat for seven other endangered or threatened species, as well as the staging area and migratory habitat for 80% of the world's sandhill crane population.[24] Decreased flow would cause habitat degradation and could cause the extinction of some species.

The average annual value of the equities in Nebraska that rely on the unapportioned, non-irrigation season flows and the irrigation season regimen of the North Platte River include $16.1 million in increased net returns to irrigators, $34 million in recreation benefits, $8.2 million in hydropower benefits, and an increase in state economic activity of nearly $70 million per year from the spending associated with irrigation and recreation.

Nebraska's equities are threatened by Wyoming's proposals for upstream development which would utilize and consume non-irrigation season flows. Wyoming has a state funded Water Development Program administered by the Wyoming Water Development Commission. An express purpose of the program is to "develop and preserve Wyoming's water . . .." Wyo. Stat. § 41-2-112 (1977).[25] The

---

Estimated direct economic benefit from these visitors was about $15 million, and the economic activity generated by this spending is estimated to be $40.5 million.

[24]Endangered and threatened species include the Whooping Crane, Bald Eagle, Least Tern, Piping Plover, American Burying Beetle, Eskimo Curlew, Western Prairie Fringed Orchid, and the Pallid Sturgeon.

[25]To assure the success of the program, the State of Wyoming has assured that the program was well-funded. The program is

cont'd

program presently has $67,000,000.00 available for appropriation and the Development Commission has recommended expenditures of $24,000,000.00. With these abundant resources, the Commission has aggressively promoted water development projects in Wyoming in the North Platte River Basin, including the Laramie River.

Through formal discovery, Nebraska has become aware of numerous water development projects in Wyoming in the North Platte River Basin.[26] Wyoming describes the status of these projects as "under construction," "construction pending," "planning," "feasibility," "idea," "on hold," or "inactive." Some of these projects are the subject of the pending action and others are being monitored by Nebraska. However, given the number of proposed projects in the North Platte River Basin in Wyoming, the reason for Nebraska's apprehension is well-founded. Aside from Nebraska's apprehension, however, the present conflict between the downstream equities currently relying on non-irrigation season water and the proposed and threatened

---

funded through general appropriations and an excise tax on coal, oil, and gas. Total revenues since 1977 exceed $433,000,000, and total expenditures exceed $255,000,000.

[26]Projects identified by Wyoming include the Bates Creek Project, Deer Creek Project, Box Elder Creek Project, Wagonmound Creek Project, LaBonte Creek Project, Horseshoe Creek Project, Corn Creek Project, McIntosh Project, Rawlins Project, Seminoe Enlargement, Robertson-McConnell Project, Edgerton Midwest Project, Sandy Lakes Project, Casper-Alcova Project, Horse Creek Project, Natrona County Regional Project, Tisthammer Project, and the Wy Coal Gas Project. Further, Wyoming has identified seven general water planning/development reports, seven reports related to the proposed Deer Creek Project, three reports related to the Seminoe Enlargement, five reports related to the Edgerton Midwest Project, three reports related to the Corn Creek Project, one report related to Sandy Lakes, three reports related to the Casper Alcova Project, one report related to the Horse Creek Project, one report related to the Natrona County Project, two reports related to the Tisthammer Reservoir, and one report related to the Wy Coal Gas Project.

upstream water developments in Wyoming make the need to equitably apportion the unapportioned, non-irrigation season flows imminent.

The rejection of Count I in Nebraska's 1991 Amended Petition was predicated on the Special Master's letter of April 9, 1992, to Justice White accompanying the Master's Second Interim Report. In that letter, the Special Master described Nebraska's position as "correct that the non-irrigation season flows have proven critical to the delicate balance of the river." *See* Master Olpin's letter to the Court Regarding Nebraska's Motion for Leave to File at 3. The Special Master nevertheless concluded that the motion was not ripe, although "[t]he time will likely come when a year around apportionment will be needed . . .." *Id.* The facts now make it clear that the issue is now ripe for adjudication.

CONCLUSION

Nebraska does not lightly invoke the Court's original jurisdiction over its Amended Petition. The amended counts present allegations which are necessary to resolve the controversy, to provide certainty to the states and to the United States in their administration of the waters of this interstate stream, and to enable the Court to expeditiously dispose of an interstate conflict in the forum that exists for that purpose. The Amended Petition should be adopted to enable the entire controversy to be concluded.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-38802

(48)

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

No. 108, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

WYOMING MOTION FOR LEAVE TO FILE AMENDED COUNTERCLAIMS AND CROSS-CLAIMS, AMENDED COUNTERCLAIMS AND CROSS-CLAIMS, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED COUNTERCLAIMS AND CROSS-CLAIMS

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant
Attorney General
Counsel of Record
DONALD M. GERSTEIN
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

DENNIS C. COOK
Special Assistant
Attorney General
COOK & HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant
Attorneys General
MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

February 18, 1994

BEST AVAILABLE COPY

61

TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE AMENDED AMENDED COUNTERCLAIMS AND CROSS-CLAIMS

AMENDED COUNTERCLAIMS AND CROSS-CLAIMS

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED COUNTERCLAIMS AND CROSS-CLAIMS

No. 108, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

WYOMING MOTION FOR LEAVE TO FILE AMENDED COUNTERCLAIMS AND CROSS-CLAIMS

Defendant, State of Wyoming, hereby requests leave of the Court to amend its counterclaims against Nebraska, to file additional counterclaims against Nebraska and to file cross-claims against the United States and Colorado. In support of this motion, Wyoming asserts the following grounds:

The Court's opinion of April 20, 1993 clarified that, to the extent it asks for new restrictions on Wyoming's use of Deer Creek or the Laramie River, Nebraska's 1986 Petition in this case may be interpreted to seek modification of the Decree. *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). However, the Court twice has denied Nebraska leave to amend its petition to go beyond the confines of the existing apportionment by seeking a new apportionment for instream uses or a new apportionment of flows outside the irrigation season. *Nebraska v. Wyoming*, 485 U.S. 931 (1988); *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). In view of the Court's previous orders and opinions in this case, Wyoming now seeks leave to amend its existing claims against Nebraska not to claim a new apportionment, but to request modification of the Decree to provide additional relief

where necessary to fully carry out the equitable apportionment previously determined by the Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953).[1] Changed conditions such as increased water supply, changes in the United States Bureau of Reclamation's operation of the federal reservoirs, increased diversions and wasteful practices by Nebraska canals and other conditions give rise to these claims pursuant to Paragraph XIII of the Decree.

The first and second counterclaims tendered herewith are not new. They are simply a restatement and clarification of the Wyoming counterclaim which the Court previously accepted for filing. *Nebraska v. Wyoming*, 481 U.S. 1011 (1987); *see* March 18, 1987 Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 8-9 (Docket No. 5).[2] The first counterclaim seeks enforcement or modification of the Decree as necessary to give effect to the limits of Nebraska's equitable apportionment and to the Court's corresponding ruling that uses below Tri-State Dam have no equitable claim to direct flow water from Wyoming. The second counterclaim would amend Wyoming's present counterclaim concerning Nebraska's use of Glendo Reservoir storage water by withdrawing the allegation that Nebraska has used that water outside the basin of the North Platte River and by identifying the specific water service contract which Wyoming alleges violates the Decree.

Discovery and pre-trial preparation in this case have also given rise to new claims against Nebraska to modify the Decree with respect to the use of water stored in Glendo Reservoir under Paragraph XVII of the Decree and with respect to the determination and administration of transportation or "carriage" losses on

---

[1] As used herein "Decree" refers to the 1945 decree, 325 U.S. 665, modified in 1953, 345 U.S. 981.

[2] "Docket No." refers to the docket maintained by Special Master Olpin as part of the record in this case.

delivery of water pursuant to Paragraph V of the Decree. These new claims likewise are for the purpose of carrying into effect the equitable apportionment previously determined by the Court and are directly related to Wyoming's existing counterclaims. Wyoming does not seek a new apportionment, but only the provision of additional relief in the Decree to give full effect to the previously determined apportionment.

Wyoming also seeks leave to assert against the United States as a party the same claims that are asserted against Nebraska. The inclusion of claims for relief against the United States as a party is necessary for a complete adjudication of the present disputes between Wyoming and Nebraska. Although the Court determined that the United States is an appropriator under Wyoming law and that Wyoming will stand in judgment for the United States, the Court also recognized that the United States' operation of its reservoirs and projects on the North Platte River is restricted by administration of the Decree. *Nebraska v. Wyoming*, 295 U.S. 40 (1935); *Nebraska v. Wyoming*, 325 U.S. 589, 613-616, 630-631 (1945). The United States operates the federal reservoirs which control the majority of the flow of the North Platte River. The United States must be subject to the injunctions in any decree in this case in order to have a complete adjudication of the matters in dispute.

Pursuant to Sup. Ct. R. 17.2, the Federal Rules of Civil Procedure may be taken as a guide in original actions. The counterclaims against Nebraska tendered in the Wyoming amended pleading are in the nature of compulsory counterclaims under Fed.R.Civ.P. 13(a). Further, Fed.R.Civ.P. 13(g) provides that a pleading may state as a cross-claim "any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." Each of the claims asserted

against the United States or Colorado arises out of a transaction or occurrence addressed either in Wyoming's counterclaims against Nebraska or in Nebraska's 1986 petition.

The United States intervened as a party in the original litigation and fully participated in all aspects of this equitable apportionment. Moreover, the United States has participated to assert and protect its interests as a party in this proceeding. By intervening and participating fully in this case, the United States has consented to exercise of the Court's jurisdiction over the United States with respect to matters of enforcement or modification of the Decree as necessary to give effect to the equitable apportionment determined in the earlier litigation.

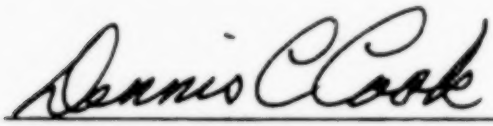
Colorado is joined as a defendant with respect to two claims for modification of the Decree. Such joinder is necessary because Colorado was a party to the original litigation and to the 1953 stipulation for modification of the Decree. Wyoming does not assert that Colorado has violated the apportionment or taken any action that has caused the need to modify the Decree. Wyoming does not seek new injunctions against Colorado and does not seek to modify any of the existing injunctions against Colorado.

Amendment of the pleadings should be freely allowed when, as here, the claims for relief sought to be asserted would not significantly expand or unduly complicate the litigation, have an independent basis in the Court's original jurisdiction, and are within the subject matter over which the Court has already accepted jurisdiction in this case under Paragraph XIII of the Decree.

Therefore, Wyoming respectfully requests the Court to grant leave to file the counterclaims and cross-claims tendered herewith.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
Counsel of Record
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK
Special Assistant Attorney General
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

ATTORNEYS FOR THE STATE OF
WYOMING

No. 108, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

WYOMING AMENDED COUNTERCLAIMS AND CROSS-CLAIMS

DEFINITIONS

The terms "Nebraska", "the United States" and "federal reservoirs", as used in this document, are defined as follows:

"Nebraska" means the State of Nebraska, its officials and representatives as well as individual and collective users of water within its borders.

"United States" means the United States of America and each of its agencies, representatives or officials having responsibility for administration or operation of any of the federal reservoirs.

"Federal reservoirs" refers to those reservoirs and related facilities on the North Platte River owned and operated by the United States Bureau of Reclamation as part of the North Platte Project, the Kendrick Project or the Kortes or Glendo units of the Pick-Sloan Missouri Basin Program.

GENERAL ALLEGATIONS

The General Allegations in paragraphs 1 through 8 and in paragraphs 34 and 35 are incorporated in each of the counterclaims and cross-claims herein.

1. The Court has jurisdiction of the counterclaims asserted against Nebraska and the cross-claims asserted against Colorado under U.S. Const. art. III, § 2, cl. 2, under 28 U.S.C. §1251(a), and under Paragraph XIII of the decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945) ("the Decree").

2. The Court has jurisdiction of the cross-claims asserted against the United States herein under U.S. Const. art. III, § 2, cl. 2, under 28 U.S.C. §1251(b)(2), and under Paragraph XIII of the Decree.

3. In accepting this case, the Court has exercised its retained jurisdiction pursuant to Paragraph XIII of the Decree to consider the need for modification of the Decree in response to a change of conditions that might render the Decree inequitable. Included within the relief available in this case is the addition of injunctive relief or the release of restrictions as necessary to give effect to the apportionment.

4. In 1945, the Court determined that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. 589, 628 (1945). The Court also held,

> If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting

> below Tri-State, application for appropriate relief may be made at the foot of the decree.

Id. at 628-629.

5. The equitable apportionment implemented by the Decree was intended to protect the supply of irrigation water to meet the reasonable beneficial use requirements of the Nebraska lands under canals that divert from the North Platte River at and upstream of Tri-State Dam.

6. The Decree is being administered by Nebraska and the United States in such a way as to result in natural flow and federal storage water from Wyoming being delivered to uses in Nebraska diverting below Tri-State Dam that were not included as part of Nebraska's equitable apportionment of the North Platte River.

7. The United States was granted leave to intervene as a party to this case and, as a result, is bound by the Court's Decree and has consented to the full and complete adjudication of all matters and issues determined in the earlier litigation or reasonably incidental thereto.

8. The cross-claims against the United States are for the purpose of carrying into effect the apportionment determined by the Court in 1945, as modified in 1953. As such, they are assertable against the United States as a party.

FIRST COUNTERCLAIM

9. Nebraska has circumvented and violated the equitable apportionment effected by the Decree, and continues to do so, by the actions set forth in this first counterclaim. Such actions have

either violated the Decree or prevented the Decree from carrying into effect the apportionment determined by the Court in its 1945 opinion. As a consequence, the Decree must be enforced, interpreted and modified to add appropriate relief that gives full effect to the apportionment determined by the Court's 1945 opinion.

10. The Court in its April 20, 1993 opinion, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), concluded that Paragraph IV of the Decree does not impose individual ceilings on the amount of water that may be diverted by an individual canal in Nebraska. The Court acknowledged the continuing dispute over the extent to which Paragraph IV limits the call of the Nebraska State Line Canals against the federal reservoirs. Under Paragraph IV, Wyoming is enjoined to administer the federal reservoirs in priority as to the Nebraska State Line Canals only up to the diversion limits fixed in Paragraph IV. When those diversion limits are exceeded, Wyoming is under no obligation to regulate the storage of water in the federal reservoirs to make water available for diversion by the State Line Canals.

11. Nebraska has circumvented and violated the equitable apportionment by demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree and by demanding that the federal reservoirs in Wyoming, which are described in Paragraph IV of the Decree, bypass water to the Nebraska State Line Canals in excess of the diversion limitations and seasonal volumetric limitations fixed in Paragraph IV of the Decree.

12. In recent years the United States has placed a call against water rights in Wyoming that are junior to the water storage rights of the federal reservoirs and Wyoming officials have administered that call by regulating or curtailing such

junior diversions in Wyoming. No such call had ever been placed before 1988.

13. As a result of Nebraska demanding and the United States delivering more water through the federal reservoirs than the Nebraska canals are entitled to under the equitable apportionment, storage in the federal reservoirs has been depleted or foregone, thereby increasing the call by the federal reservoirs to the injury of junior water rights in Wyoming. Nebraska and the United States have failed and refused to recognize or enforce reasonable limits on the diversions by the Nebraska canals.

14. Nebraska has circumvented and violated the equitable apportionment, and continues to do so, by demanding natural flow and storage water from sources above Tri-State Dam and bypassing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree. Specific examples of such action include,

a. Diverting more water than needed for beneficial, irrigation use and returning such water unused through wasteways to the North Platte River below Tri-State Dam;

b. Knowingly using substantially inflated estimates of the amount of irrigated acreage on which the allowable diversion rates are determined and thereby allowing diversions substantially in excess of the reasonable water requirements of the lands actually irrigated;

c. Failing to adequately monitor and measure the use of water on Nebraska lands under canals diverting in the Guernsey to Tri-State Dam section of the North Platte River;

d. Assuming and applying unreasonably large and unsubstantiated transportation losses in the administration of

storage water deliveries below Tri-State Dam, resulting in substantial quantities of storage water being passed below Tri-State Dam where such storage water is not used in accordance with the contracts governing its use but is converted from storage water to water available for appropriation by other uses below Tri-State Dam;

e. Allowing excessive diversions into the Interstate Canal which result in the storage of natural flow in the Inland Lakes during the irrigation season (1) in excess of the right to store up to 46,000 acre-feet of water during October, November and April each year for the Inland Lakes as established by the Court's April 20, 1993 opinion and (2) without regard to whether such water is needed to meet the beneficial use requirements of the lands using water from the Inland Lakes.

WHEREFORE, Wyoming requests the Court to enjoin Nebraska's continuing circumvention and violation of the apportionment, to modify the Decree as necessary to confirm that equitable apportionment does not allow Nebraska to demand direct flow water from Wyoming for use below Tri-State Dam and to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree.

SECOND COUNTERCLAIM

15. Nebraska has violated Paragraph XVII of the Decree by permitting the delivery of storage water from Glendo Reservoir in the amount of 8,000 acre-feet per year to the Central Nebraska Public Power and Irrigation District for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements.

WHEREFORE, Wyoming requests the Court to enjoin further violations of Paragraph XVII of the Decree by Nebraska.

THIRD COUNTERCLAIM

16. In the alternative to the second counterclaim, Wyoming asserts that the restrictions on the place and manner of use of water stored in Glendo Reservoir set forth in Paragraph XVII of the Decree are no longer equitable. Conditions have changed so that such limitations on the place and manner of use of Glendo Reservoir storage water prevent the equitable apportionment of the water storable in Glendo Reservoir as originally intended by the parties and the Court when the Decree was amended in 1953.

17. The intent and purpose of the stipulation modifying the Decree in 1953 was to apportion the use of water stored in Glendo Reservoir in the amount of 25,000 acre-feet per year to Nebraska and 15,000 acre-feet per year to Wyoming.

18. Wyoming and Nebraska have been unable to fully use their respective shares of the Glendo storage water under Paragraph XVII of the Decree within the limitations on place and manner of use imposed by Paragraph XVII. The Decree has failed to carry out the apportionment intended by the 1953 stipulation. The Decree therefore should be modified to remove the restrictions in Paragraph XVII on the place and manner of use of water stored in Glendo Reservoir.

WHEREFORE, Wyoming requests the Court to modify Paragraph XVII of the Decree to allow the 15,000 acre-feet of storage water in Glendo Reservoir allocated to Wyoming and the 25,000 acre-feet of storage water in Glendo Reservoir allocated to Nebraska to be used directly or by exchange for all beneficial uses under the laws of the respective states.

FOURTH COUNTERCLAIM

19. The procedure for determining transportation or "carriage" losses set forth in Paragraph V of the Decree is no longer factually accurate or equitable.

20. The States of Nebraska and Wyoming and the United States have jointly funded technical studies of the transportation losses addressed in Paragraph V. Such studies demonstrate that sufficient data and technology is now available to make a more accurate estimate of transportation losses than the estimate produced by use of the procedure required by Paragraph V of the Decree.

21. The parties have been unable to agree on a procedure for determining transportation losses that would replace those required by Paragraph V of the Decree.

22. The administration of the apportionment of natural flow under the Decree requires the daily segregation of natural flow and storage water in the river. A reasonably accurate determination of carriage losses is essential to that administration. In order to carry into effect the apportionment determined by the Court in 1945, as modified in 1953, more accurate procedures and data should be used in determining and assessing transportation losses.

23. Failure to properly assess transportation losses invalidates the segregation of natural flow and storage necessary to administer the decreed apportionment, upsets the equitable balance of the apportionment and injures Wyoming users.

24. The provision in Paragraph V of the Decree dictating the formula for determination of carriage losses is not necessary and unduly complicates the Decree. The State of Wyoming,

through the office of the Wyoming State Engineer, has the authority and duty to determine and assess carriage losses for storage water deliveries on every stream in Wyoming.

WHEREFORE, Wyoming requests the Court to amend Paragraph V of the Decree to remove the provisions for determination of carriage losses and to leave such determination to state officials under state law.

FIRST CROSS-CLAIM

25. The allegations in paragraphs 9 through 14 of the first counterclaim are hereby incorporated in this first cross-claim.

26. The United States has circumvented and violated the equitable apportionment, and continues to do so, by operating the federal reservoirs to deliver natural flow water for diversion by Nebraska irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the lands entitled to water from those canals under the Decree, by failing to store water in the federal reservoirs when available under Paragraph IV of the Decree and by bypassing or releasing water to the Nebraska State Line Canals in excess of the diversion limitations and seasonal volumetric limitations fixed in Paragraph IV of the Decree.

27. The United States has circumvented and violated the equitable apportionment, and continues to do so, by operating the federal reservoirs to bypass river flows and release storage water from sources above Tri-State Dam with knowledge of and acquiescence in the bypass or diversion of such water for uses below Tri-State Dam that are not recognized or authorized by the Decree. Specific examples of actions by the United States that undermine the decreed apportionment include,

a. Operating the federal reservoirs to deliver to Nebraska users more water than is reasonably required when such deliveries result in the return of water unused through wasteways to the North Platte River below Tri-State Dam;

b. Delivering water substantially in excess of the beneficial use requirements of the lands actually irrigated in Nebraska by honoring demands for water delivery to Nebraska water users based on irrigated acreage estimates that Nebraska and United States officials know are substantially inflated but which Nebraska officials nevertheless use to set the allowable diversion rates;

c. Failing to require adequate monitoring and measuring of uses of water on Nebraska lands under canals diverting in the Guernsey to Tri-State Dam section of the North Platte River;

d. Delivering excessive amounts of Glendo Reservoir storage water and North Platte Project storage water under the Warren Act to Nebraska irrigators and acquiescing in the application by Nebraska officials of unreasonably large and unsubstantiated transportation losses in the administration of storage water deliveries below Tri-State Dam, all of which results in substantial quantities of storage water being passed below Tri-State Dam where such storage water is not used in accordance with the contracts governing its use but is converted from storage water to water available for appropriation by other uses below Tri-State Dam;

e. Operating the federal reservoirs and canals so as to deliver excessive amounts of natural flow for diversion by the Interstate Canal, resulting in the storage of water in the Inland Lakes during the irrigation season in excess of the storage rights of the Inland Lakes determined by the Court and without regard

to whether such water is needed to meet the beneficial use requirements of the lands using water from the Inland Lakes;

f. Operating the federal reservoirs for the generation of electric power in a manner which interferes with the primary use of the reservoirs for irrigation.

WHEREFORE, Wyoming requests the Court (1) to enjoin the United States' continuing violations of the apportionment, (2) to modify the Decree as necessary to confirm that the equitable apportionment does not allow Nebraska to demand water from Wyoming for use below Tri-State Dam, (3) to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass natural flow to the Nebraska State Line Canals in excess of the diversion limits or annual volumetric limitations fixed in Paragraph IV of the Decree and (4) to enjoin the United States and its officials to operate and administer the federal reservoirs so that water is not released to Nebraska canals in a manner that circumvents the equitable apportionment.

SECOND CROSS-CLAIM

28. The United States has violated Paragraph XVII of the Decree and the federal law governing use of Glendo Reservoir by delivering storage water from Glendo Reservoir in the amount of 8,000 acre-feet per year to the Central Nebraska Public Power and Irrigation District for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements.

WHEREFORE, Wyoming requests the Court to enjoin further violations of Paragraph XVII of the Decree and federal law by the United States.

THIRD CROSS-CLAIM

29. In the alternative to the second cross-claim, Wyoming incorporates by reference the third counterclaim, including paragraphs 16 through 18, *supra*, and asserts the claim for modification of Paragraph XVII of the Decree set forth therein as a cross-claim against the United States and the State of Colorado.

FOURTH CROSS-CLAIM

30. The equitable apportionment which the Decree was intended to carry into effect was premised in part on the assumption that the United States would operate the federal reservoirs and deliver storage water in accordance with applicable federal and state law and in accordance with the contracts governing use of water from the federal reservoirs.

31. The United States has failed to operate the federal reservoirs in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs. Specifically, the United States has allocated storage water in a manner which (a) upsets the equitable balance on which the apportionment of natural flow was based, (b) results in the allocation of natural flow contrary to the provisions of the Decree and contrary to the equitable apportionment, (c) promotes inefficiency and waste of water contrary to federal and state law, (d) violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. §523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under any project" after "preserving a first right to lands and entrymen under the project" and (e) exceeds the limitations in the contracts under the Warren Act.

32. Such action by the United States has caused water shortages to occur more frequently and to be more severe, thereby causing injury to Wyoming and its water users.

WHEREFORE, Wyoming requests the Court (1) to declare that the United States' allocation procedure is contrary to the equitable apportionment, to applicable federal and state law and to the contracts governing use of water from the North Platte Project, (2) to enjoin the United States' continuing violations of federal and state law and (3) to direct the United States to comply with the terms of its contracts.

FIFTH CROSS-CLAIM

33. The fourth counterclaim, including paragraphs 19-24, *supra*, is hereby incorporated and the claim for modification of Paragraph V of the Decree to provide for more accurate determination of transportation losses is asserted as a cross-claim against the United States and the State of Colorado.

FURTHER GENERAL ALLEGATIONS

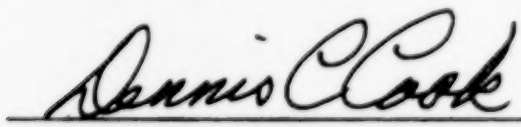
34. The past and continuing violations of the Decree or the equitable apportionment intended to be effected by the Decree by Nebraska and the United States have caused and continue to cause irreparable injury to Wyoming and its citizens. The waste of water delivered to Nebraska canals has caused water shortages to occur more frequently and to be more severe, has resulted in calls by the United States for regulation or curtailment of Wyoming water rights that are junior to the federal reservoirs, and has interfered with potential water development in Wyoming that would have otherwise taken place under the equitable apportionment.

35. Wyoming has no adequate remedy at law to enforce its rights against Nebraska and the United States. Injunctive relief is necessary to enforce the Decree, to modify the Decree where necessary to carry out the previously determined equitable apportionment and to restrain further circumvention and violation of that apportionment by Nebraska and the United States.

WHEREFORE, Wyoming prays that the Court enter an order granting judgment for Wyoming on the counterclaims and cross-claims asserted herein, enjoining Nebraska and the United States from further violations of the Decree, providing for additional relief as necessary to carry into effect the previously determined equitable apportionment of the North Platte River and granting such further relief as the Court may deem just and proper.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
Counsel of Record
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK
Special Assistant Attorney General
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782
ATTORNEYS FOR THE STATE OF
WYOMING

No. 108, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

WYOMING BRIEF IN SUPPORT OF MOTION TO FILE AMENDED COUNTERCLAIMS AND CROSS-CLAIMS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

I. JURISDICTION 1

II. INTRODUCTION AND STATEMENT OF THE CASE 1

A. PRIOR PROCEEDINGS 1

B. SCOPE OF THE PRESENT CASE 3

C. SCOPE OF WYOMING'S AMENDED PLEADINGS 4

III. SUMMARY OF ARGUMENT 6

IV. ARGUMENT 7

A. LEAVE TO AMEND THE WYOMING PLEADINGS SHOULD BE GRANTED BECAUSE THE TENDERED CLAIMS MEET THE STANDARDS OF THE COURT FOR EXERCISE OF ITS ORIGINAL JURISDICTION AND WOULD NOT UNDULY EXPAND OR COMPLICATE THE LITIGATION. 7

1. Amended Pleadings Must Satisfy the Standards for Exercise of the Court's Original Jurisdiction. 7

2. Wyoming's Amended Counterclaims and Cross-Claims are Asserted for the Purpose of

Carrying into Full Effect the Apportionment Determined in the 1945 Litigation. 8

B. THE AMENDED COUNTERCLAIMS AGAINST NEBRASKA RAISE ISSUES THAT SHOULD BE ADDRESSED IN THE CASE AS PRESENTLY POSTURED. 12

1. Wyoming's First Counterclaim Would Clarify a Counterclaim that has Already been Accepted by the Court. 12

2. Wyoming's Second Counterclaim Merely Would Narrow a Counterclaim that has Already Been Accepted by the Court. 14

3. Wyoming's Third Counterclaim Would Introduce an Alternative Claim for Modification of Paragraph XVII of the Decree. 15

4. The Carriage Loss Values in Paragraph V are no Longer Valid, Serve no Purpose and, Therefore, Should be Removed from the Decree. 18

C. THE CROSS-CLAIMS AGAINST THE UNITED STATES ARE NECESSARY FOR A COMPLETE ADJUDICATION OF EXISTING COUNTER-CLAIMS. 20

1. The United States is subject to the court's jurisdiction. 23

2. The First Cross-Claim Merely Seeks to Join the United States as a Defendant in Claims that

have Already been Accepted by the Court as Counterclaims Against Nebraska. 25

3. The Second and Third Cross-Claims would Join the United States as a Defendant in an Existing Claim Alleging that Nebraska's Use of Glendo Reservoir Violates Paragraph XVII of the Decree and in an Alternative Claim to Modify Paragraph XVII. 25

4. Wyoming's Fourth Cross-Claim would Challenge the Manner in which the United States has Allocated Water Released from the Federal Reservoirs. 26

5. The Fifth Cross-Claim would Join the United States in the Claim to Modify the Paragraph V Carriage Loss Formula ..... 28.

D. THE CROSS-CLAIMS AGAINST COLORADO ARE INTENDED SOLELY TO GIVE COLORADO NOTICE AND AN OPPORTUNITY TO BE HEARD ON CLAIMS FOR MODIFICATION OF THE DECREE THAT WOULD AFFECT COLORADO. 28

V. CONCLUSION 29

TABLE OF AUTHORITIES

Cases **Page**

Arizona v. California,
298 U.S. 558 (1936) 23

Arizona v. California,
373 U.S. 546 (1963) 8, 24

Arizona v. California,
376 U.S. 340 (1964) 24

California v. Nevada,
447 U.S. 125 (1980) 7

Connecticut v. Massachusetts,
282 U.S. 660 (1931) 7

Goshen Irrigation District v. United States,
Case No. C89-0161J, (D. Wyo. complaint filed
June 23, 1989) 27

Guaranty Trust Co. v. United States,
304 U.S. 126 (1938) 24

Idaho v. Oregon,
462 U.S. 1017 (1983) 8

Kansas v. United States,
204 U.S. 331 (1907) 23

Minnesota v. United States,
305 U.S. 382 (1939) 23

Nebraska v. Wyoming,
295 U.S. 40 (1935) 23

Nebraska v. Wyoming,
304 U.S. 545 (1938) 1, 24

Nebraska v. Wyoming,
325 U.S. 589 (1945), *modified* 345 U.S. 981 (1953) ..... *passim*

Nebraska v. Wyoming,
345 U.S. 981 (1953) 15, 26

Nebraska v. Wyoming,
479 U.S. 1051 (1987) 1

Nebraska v. Wyoming,
481 U.S. 1011 (1987) 1, 13

Nebraska v. Wyoming,
483 U.S. 1002 (1987) 1

Nebraska v. Wyoming,
485 U.S. 931 (1988) 2, 3, 11

Nebraska v. Wyoming,
492 U.S. 903 (1989) 2

Nebraska v. Wyoming,
113 S.Ct. 1689 (1993) ..... *passim*

Nebraska v. Wyoming,
113 S.Ct. 1941 (1993) 2, 4, 11

Ohio v. Kentucky,
410 U.S. 641 (1973) 7

Rufo v. Inmates of the Suffolk County Jail,
112 S.Ct. 748 (1992) 10

Sanitary Dist. of Chicago v. United States,
266 U.S. 405 (1925) 23

Texas v. New Mexico,
462 U.S. 544 (1983) 7

United States v. Swift and Co.,
286 U.S. 106 (1932) 10, 16

United States v. The Thekla,
266 U.S. 328 (1924) 24

United States v. United Shoe Corp.,
391 U.S. 244 (1968) 8, 10, 17

Wyoming v. Colorado,
286 U.S. 494 (1932) 8

Constitutions

U.S. Const., art. III, §2, cl. 2 1
Wyo. Const., art. 8, §5 19

Statutes and Court Rules

Wyo. Stat. §41-3-303 (1977) 22
Neb. Rev. Stat. §46-202(2) (1988 Reissue) 22
28 U.S.C. §§501, 516-519 (1988) 24
28 U.S.C. §1251(a) (1988) 1
28 U.S.C. §1251(b)(2) (1988) 1
Reclamation Act of 1902, 43 U.S.C. §372 (1988) 22
Warren Act, 43 U.S.C. §523 (1988) 27

Fed.R.Civ.P. 13(a) 12
Fed.R.Civ.P. 15(a) 7
Sup.Ct.R. 17.2 7

I. JURISDICTION

Wyoming seeks leave of the Court in this original action to amend its pleadings to assert counterclaims against the State of Nebraska and cross-claims against the United States and the State of Colorado. The Court has jurisdiction of the counterclaims asserted against Nebraska and the cross-claims asserted against Colorado under U.S. Const., art. III, §2, cl. 2, under 28 U.S.C. §1251(a) (1988) and under Paragraph XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified* 345 U.S. 981 (1953) ("the Decree"). The Court has jurisdiction of the cross-claims asserted by Wyoming against the United States under U.S. Const. art. III, §2, cl. 2, under 28 U.S.C. §1251(b)(2) (1988), and under Paragraph XIII of the Decree. The United States has consented to exercise of the Court's jurisdiction over it by intervening as a party in this litigation. *Nebraska v. Wyoming*, 304 U.S. 545 (1938).

II. INTRODUCTION AND STATEMENT OF THE CASE

A. PRIOR PROCEEDINGS

Nebraska's petition to enforce the apportionment of the North Platte River was filed on October 7, 1986 (Docket No. 1),[1] and was accepted by the Court on January 20, 1987. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987). Wyoming's answer and counterclaims were filed March 18, 1987 (Docket No. 5) and accepted by the Court on April 20, 1987. *Nebraska v. Wyoming*, 481 U.S. 1011 (1987). The matter was referred to Special Master Owen Olpin on June 22, 1987. *Nebraska v. Wyoming*, 483 U.S. 1002 (1987). On September 11, 1987, Wyoming filed its first motion for summary judgment with the Special Master addressing Nebraska's claims of Decree viola-

---

[1] "Docket No." refers to the docket that has been maintained by Special Master Olpin as part of the record in this case.

tion (Docket No. 23). While Wyoming's summary judgment motion was pending before the Special Master, Nebraska filed a motion for leave to file an amended petition which the Court denied. *Nebraska v. Wyoming*, 485 U.S. 931 (1988). Nebraska's first amended petition would have sought modification of the Decree to provide a new apportionment for instream uses in Central Nebraska (Docket No. 47). Subsequently, the Special Master denied Wyoming's motion for summary judgment but left open the possibility of later summary disposition of any of the claims. First Interim Report of Special Master, accepted for filing by the Court June 26, 1989, *Nebraska v. Wyoming*, 492 U.S. 903 (1992).

Following a period of discovery, all four parties filed cross-motions for summary judgment. While those cross-motions for summary judgment were pending, Nebraska again sought leave to file an amended petition (Docket No. 407). The Court decided the cross-motions for summary judgment in its April 20, 1993 opinion. *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). One week later, the Court denied Nebraska leave to file Count I of its amended petition which would have sought a new apportionment of the non-irrigation season flows of the North Platte River based primarily on allegations of injury to uses below Tri-State Dam.[2] *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). The Court referred Nebraska's motion for leave to file Counts II and III of its tendered amended petition to the Special Master for recommendation. Count II would bring additional claims against Wyoming for alleged violation of Nebraska's apportionment and Count III would bring claims against the United States for alleged violation of Nebraska's apportionment. (Docket No. 407).[3]

---

[2] Tri-State Dam constitutes the downstream terminus of the equitable apportionment under the 1945 Decree. *Nebraska v. Wyoming*, 325 U.S. 589, 628-629 (1945).

[3] Nebraska announced at a recent status conference with the Special Master that it likely would withdraw Counts II and III of its pending amended petition and incorporate an amended version of those counts in another motion for leave to file amended petition. Transcript of January 21, 1994 status conference at 13.

B. SCOPE OF THE PRESENT CASE

Much of the argument in this case has focused on the question of whether Nebraska's 1986 petition was one for enforcement or for modification of the Decree. Three differing interpretations of the scope of the case presented by that petition have been asserted:

(1) Wyoming argued originally that the Court exercised jurisdiction over Nebraska's 1986 petition solely for the purpose of enforcing rights that were determined in the Decree. That position was rejected by the Court in its recent opinion. *Nebraska v. Wyoming*, 113 S.Ct. at 1695.

(2) The Court in its April 20, 1993 opinion also rejected Nebraska's arguments that the proposed construction of Deer Creek Reservoir and developments on the Laramie River violate the Decree, but read Nebraska's petition broadly enough to encompass a request for imposition of new injunctions. *Id.* at 1695-1696. In doing so the Court held that Nebraska could litigate matters that were not determined or not fully determined in the original litigation. However, the Court has not accepted any claims to relitigate matters that were previously determined. That fact is evidenced by the denial of the two requests by Nebraska to amend its pleadings to seek a new apportionment for non-irrigation season uses and for uses below Tri-State Dam. *Nebraska v. Wyoming*, 485 U.S. 931 (1988); *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993).

(3) A third view of the case expressed by some of the *amici* is that, under the present pleadings, the Court will undertake a complete reweighing of the equities, including the issue of whether Nebraska is entitled to an apportionment for uses below Tri-State Dam, such as instream uses in the Central Platte for wildlife habitat. Response of Platte River Whooping Crane Critical Habitat Maintenance Trust to Memorandum of Nebraska of Laramie River Claims (filed with the Special Master December 14, 1993) (Docket No. 603). Such an expansive view of the case ignores the fact that the

Court has twice denied Nebraska leave to bring those very claims for a new apportionment.

The Court did say that "[a]t least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment." *Nebraska v. Wyoming*, 113 S.Ct. at 1695. However, considering the equity of imposing new injunctions or releasing existing injunctions within the existing apportionment is not the same as considering a claim for a new or different apportionment. The only interpretation that gives effect to both the April 20, 1993 opinion and the Court's orders denying Nebraska leave to amend is one that distinguishes between modification of the Decree and modification of the underlying equitable apportionment. While the Court has indicated a willingness to consider the need for modification of the Decree to give effect to the original apportionment, it has not opened the case to an unlimited reconsideration of the apportionment or to a complete reweighing of the equities on which the apportionment was based.

C. SCOPE OF WYOMING'S AMENDED PLEADING

The pleading amendments now tendered by Wyoming are premised on the view that the Court has not exercised its jurisdiction to entertain claims of a completely new apportionment or claims for relitigation of matters that were litigated and determined in the earlier proceedings. Where Wyoming's amended claims would seek modification of the Decree, the purpose is to request additional relief as necessary to give effect to the previous apportionment.

The first and second counterclaims in the amended pleading tendered herewith would amend the existing counterclaims against Nebraska as follows:

(1) To clarify that the relief sought by Wyoming might involve modification of the Decree in order to provide relief in the

form of injunctions against Nebraska to carry into effect the apportionment determined by the Court in the 1945 opinion;

(2) To add specificity to the claims that Nebraska has circumvented the Decree by bypassing or diverting water around Tri-State Dam for use below Tri-State Dam; and

(3) To withdraw the specific allegation that Nebraska has used Glendo Reservoir storage water outside the basin of the North Platte River in violation of Paragraph XVII of the Decree.

The amended pleading tendered herewith also includes two new counterclaims against Nebraska for modification of the Decree. The third counterclaim, as an alternative to the second counterclaim alleging a violation of Paragraph XVII of the Decree by use of Glendo Reservoir water, would request the modification of Paragraph XVII to remove restrictions on the place and manner of use of Glendo Reservoir storage water. The fourth counterclaim would ask the Court to remove the predetermined carriage loss values now contained in Paragraph V of the Decree.

Wyoming's amended pleading also would bring a number of cross-claims against the United States (1) to join the United States in each of the counterclaims asserted against Nebraska and (2) to challenge the United States' operation of the federal reservoirs as contrary to the equitable apportionment. Also, Wyoming's amended pleading would join Colorado as a defendant with respect to the third and fourth counterclaims against Nebraska. Such joinder would be for the sole purpose of insuring that Colorado has notice of and an opportunity to be heard concerning the requested modification of the Decree. Wyoming does not allege that Colorado has violated the apportionment or taken any action that has caused a need to modify the Decree. Wyoming does not seek new injunctions against Colorado and does not seek to modify any of the existing injunctions against Colorado.[4]

---

[4] Wyoming did not file cross-claims initially against the United States or Colorado but left open the possibility of such claims as the case developed and the need for such claims became apparent. Wyoming Motion for Leave to File Counterclaim at 8 (Docket No.5).

III. SUMMARY OF ARGUMENT

Wyoming's original counterclaim was brought for the purpose of obtaining a clearer definition of Nebraska's apportionment. The amended counterclaims that Wyoming now tenders have that same purpose.

Wyoming's evidence in support or in defense of claims already accepted by the Court will establish wasteful and inefficient practices by Nebraska and the United States. Such practices have depleted the federal reservoirs resulting in more frequent and more severe curtailment of water deliveries in Wyoming and excess flows below Tri-State Dam. Wyoming must defend against Nebraska's claims that the Deer Creek and Laramie River projects violate the apportionment, while Nebraska and the United States permit excess diversions, inefficiency and waste on Nebraska's lands protected by the apportionment. Nebraska's claims, more than anything else, demonstrate the injury Wyoming suffers so long as Nebraska's apportionment remains essentially undefined. Without a clearer definition of Nebraska's apportionment, Wyoming would continue to face uncertainty and a threat of costly litigation whenever its users propose some change of use or new development in the North Platte basin.

The original apportionment in this case expressly apportioned only natural flows below Guernsey Dam. But that apportionment was predicated upon a certain operation of the federal reservoirs to deliver storage water to uses below Guernsey Dam as much as it was predicated on the specific restrictions imposed on irrigation in Wyoming and Colorado and the specific priorities assigned to the federal reservoirs. Decree Paragraphs I through V. Wyoming's cross-claims would require the United States to operate the federal reservoirs in accordance with the storage contracts and the manner of operation on which the court based the apportionment.

Wyoming's amended pleading would not seek a new or different apportionment, but would seek new injunctions in the Decree or the release of existing injunctions to carry out the original

apportionment. It would allow a complete review of the operation of the river, including the administration of storage water under the existing Decree before adding or modifying any injunctions.

IV. ARGUMENT

A. LEAVE TO AMEND THE WYOMING PLEADINGS SHOULD BE GRANTED BECAUSE THE TENDERED CLAIMS MEET THE STANDARDS OF THE COURT FOR EXERCISE OF ITS ORIGINAL JURISDICTION AND WOULD NOT UNDULY EXPAND OR COMPLICATE THE LITIGATION.

1. Amended Pleadings Must Satisfy the Standards for Exercise of the Court's Original Jurisdiction.

The Federal Rules of Civil Procedure, which may be used as a guide in original actions, provide that leave to amend a pleading should be "freely given when justice so requires." Fed.R.Civ.P. 15(a); Sup.Ct.R. 17.2. However, an amended pleading to assert additional claims or to substantially change existing claims must meet the standards laid down by the Court for exercise of the Court's original jurisdiction. *Ohio v. Kentucky*, 410 U.S. 641 (1973); *California v. Nevada*, 447 U.S. 125 (1980). Whether claims are raised by an original or by an amended pleading, the Court will exercise the same "substantial discretion to make case by case judgments" about the appropriateness of exercising its original jurisdiction. *Ohio v. Kentucky, supra; California v. Nevada, supra; Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

Generally the Court will exercise its original jurisdiction to enjoin the activities of one sovereign state at the instance of another only where injury of a serious magnitude is shown by clear and convincing evidence. *Connecticut v. Massachusetts*, 282 U.S. 660

(1931); *Idaho v. Oregon*, 462 U.S. 1017 (1983). However, in this case the Court has held that Paragraph XIII of the Decree may ease a party's threshold burden to establish that a claim falling within the purview of Paragraph XIII should be accepted by the Court. *Nebraska v. Wyoming*, 113 S.Ct. at 1696.

2. Wyoming's Amended Counterclaims and Cross-Claims are Asserted for the Purpose of Carrying into Full Effect the Apportionment Determined in the 1945 Litigation.

Wyoming's amended pleading would seek the imposition of additional injunctions and the release of existing injunctions for the purpose of carrying into effect the underlying apportionment. The Decree itself is a series of limited injunctions deemed necessary by the Court to carry into effect the interstate equitable apportionment that was determined in the Court's 1945 opinion. *See Nebraska v. Wyoming*, 325 U.S. at 657 and *Arizona v. California*, 373 U.S. 546, 602 (1963) (the Court, in both cases, after deciding the controversy among the states over the interstate apportionment of a river, directed the parties to devise a form of decree to carry the opinion into effect). *See also generally United States v. United Shoe Corp.*, 391 U.S. 244 (1968).

Not all matters that were determined conclusively in the earlier litigation were necessarily included as injunctions in the Decree. For example, the Court recently found that Nebraska's apportionment determined in the earlier litigation included the right to store 46,000 acre-feet in the Inland Lakes during October, November and April, despite the Decree's silence with respect to the Inland Lakes. *Nebraska v. Wyoming*, 113 S.Ct. at 1697. In that instance, the Court recognized that "when the decree is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue." *Id.* at 1695, citing *Wyoming v. Colorado*, 286 U.S. 494, 506-508 (1932).

In the earlier litigation, the Court unequivocally determined that, as a matter of equitable apportionment, Nebraska's uses diverting below Tri-State Dam were adequately supplied by local sources, including return flows, and that Nebraska was not entitled to demand water from Wyoming for such uses. *Nebraska v. Wyoming*, 325 U.S. at 628. Special Master Doherty stated the matter plainly:

> The conclusion is that Nebraska's claim for equitable apportionment of water originating above the Wyoming State line is in all events limited to the North Platte Project and State Line Canals and the lands supplied by them.

Report of Michael J. Doherty, Special Master, at 96. The United States, fearing that Nebraska might find a way to do indirectly that which the Court held it could not do directly, asked the Court to include injunctions in the Decree to assure that Nebraska could not require natural flow water to be delivered from Wyoming for use below Tri-State Dam. The Court declined to include such injunctions specifically limiting Nebraska's diversions, but anticipated the possibility that relief at the foot of the Decree would be required and expressly retained jurisdiction for that purpose. *Nebraska v. Wyoming*, 325 U.S. at 629. Wyoming's existing counterclaim invoked that retained jurisdiction, not to relitigate decisions rendered in the Court's 1945 opinion, but to demonstrate that the Decree may now need to be adjusted to carry out the Court's decision.

In recent years Nebraska's administration of the natural flow and storage rights for Nebraska lands has been calculated to force as much water as possible below Tri-State Dam so that Nebraska could then claim equitable reliance on such flows. Nebraska's diversions in the Guernsey to Tri-State section have far exceeded the beneficial use requirements found by Special Master Doherty. Affidavit of Bern S. Hinckley at 5-7, ¶¶ 8-10, Wyoming Second Motion for Summary Judgment (Docket No. 294). Supplies to canals below Tri-State Dam to Bridgeport, Nebraska have also been greater than

the beneficial use requirements determined by Special Master Doherty. Second Affidavit of Bern S. Hinckley, Figure 1, Wyoming Brief in Opposition to Nebraska's Motion to Recommend an Apportionment of Non-Irrigation Season Flows (Docket No. 316). While enjoying such increased supplies, Nebraska has opposed even the smallest of new developments in Wyoming. The purpose of Wyoming's counterclaim was to obtain a clearer definition of Nebraska's apportionment so that Wyoming would not face expensive and time consuming litigation every time some new development takes place in the North Platte basin.

Where Wyoming asks for modification of the existing Decree, it does so because the Decree is not accomplishing its intended purpose. In similar circumstances where the Court has been asked to approve a modification of an equitable decree, it has consistently focused on the purpose of the decree — to carry out the underlying decision. For example, *United States v. Swift and Co.*, 286 U.S. 106, 115 (1932), confirmed the power of a court in equity to modify a decree in an anti-trust suit, even when the decree was entered originally upon consent of the parties, if a provision of the decree has "been turned through changing circumstances into an instrument of wrong." The *Swift* opinion held that one seeking to be relieved of injunctions in a decree must make a "clear showing of grievous wrong." *Id.* at 119. Recently the Court tempered the rule of *Swift*, suggesting the need for flexibility in considering a request for release from injunctions in a decree based on changed conditions. *Rufo v. Inmates of the Suffolk County Jail*, 112 S.Ct. 748, 758 (1992) ("the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality").

In *United States v. United Shoe Corp.*, 391 U.S. 244, 251-252 (1968), the Court allowed modification of a decree to impose additional restraints or injunctions:

> If the decree has not, after 10 years, achieved its "principal objects," namely, "to extirpate practices that have caused or may hereafter cause monopolization, and to restore workable competition in the

> market" — the time has come to prescribe other, and if necessary more definitive means to achieve the result.

Whether the proposed modification of a decree is to relieve a defendant of injunctions[5] or to impose new restrictions, the overriding concern of the Court is to accomplish the underlying purpose of the decree. In this case, that purpose is to carry out the apportionment determined in the Court's 1945 opinion.

The claims for modification of the Decree that Wyoming's amended pleading would bring are in sharp contrast to the amended claims Nebraska sought to bring in its first motion to amend (Docket No. 47) and in Count I of its second motion to amend (Docket No. 407). In each of those pleadings, Nebraska sought to relitigate the Court's 1945 decision to obtain a new or changed apportionment of water from Wyoming for uses in Nebraska below Tri-State Dam. The Court denied each of those amendments without opinion. *Nebraska v. Wyoming*, 485 U.S. 931 (1988); *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). The thrust of Wyoming's opposition to Nebraska's previous motions to amend was that they would have transformed this case into a much larger and more complicated action for the reapportionment of the river. By contrast, the amended pleading that Wyoming tenders should be accepted for filing because it seeks not to undo the apportionment that the Court

---

[5] Special Master Doherty recognized that the apportionment was based upon water supply conditions that existed during a severe drought in the 1930's. He therefore recommended that the Court retain jurisdiction

> to amend the decree upon a showing of such change of conditions as might render the operation of the decree inequitable. This recommendation contemplates particularly the possibility of the passing of the present drought cycle and the future availability of far greater water supplies comparable with those of former years which might justify a release of some or all of the restrictions now proposed.

Report of Michael J. Doherty, Special Master, at 10-11; *Nebraska v. Wyoming*, 325 U.S. at 620.

formulated in the 1945 decree, but to give that apportionment full force and effect in light of conditions that have changed since entry of the Decree.

B. THE AMENDED COUNTERCLAIMS AGAINST NEBRASKA RAISE ISSUES THAT SHOULD BE ADDRESSED IN THE CASE AS PRESENTLY POSTURED.

Each of the counterclaims asserted in Wyoming's amended pleading is directly related to matters already part of this case under Nebraska's 1986 petition, as interpreted by the Court's April 20, 1993 opinion. *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993). Fed.R.Civ.P. 13(a) defines a "compulsory counterclaim" as one which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." With that rule as a guide, Wyoming's amended counterclaims are in the nature of compulsory counterclaims and should be accepted by the Court in order to provide for a complete adjudication of the Decree-related issues already before the Court.

1. Wyoming's First Counterclaim Would Clarify a Counterclaim that has Already been Accepted by the Court.

The Wyoming counterclaim that the Court accepted for filing in 1987 was brought under Paragraph XIII of the Decree and asserted in part,

> 2. Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:
>
> (a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State

> Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;
>
> (b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree;. . .

Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 8-9, accepted for filing 481 U.S. 1011 (1987) (Docket No. 5).

Wyoming alleged that Nebraska not only violated the Decree, but also "circumvented" the Decree by excessive diversions and other actions that resulted in water going past or around Tri-State Dam. Wyoming asserted that such action was contrary to the Court's 1945 ruling that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628. The allegation that Nebraska "circumvented" the Decree was an obvious reference to the problem anticipated by the Court in 1945:

> We cannot assume that Nebraska will undertake to circumvent the decree. . . If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

Id. at 628-629.

No party has questioned that the imposition of new injunctions to carry out the apportionment is within the scope of relief that the Master might recommend or the Court might adopt if Wyoming

proved its existing counterclaim. The first purpose of Wyoming's amended first counterclaim therefore is simply to clarify that modification of the Decree is part of the relief that Wyoming seeks.

The second purpose for amending the first counterclaim against Nebraska is to include specific allegations concerning the actions in Nebraska that Wyoming alleges to violate the apportionment. Wyoming has undertaken substantial discovery and technical studies since filing its original counterclaim in 1987. This part of the amendment, while probably not necessary under the principle of notice pleading, is made in the interest of providing Nebraska and the Court with a more detailed description of the Nebraska actions that are the subject of Wyoming's counterclaim.

Because there is no substantive change in the counterclaim that would enlarge the Court's jurisdiction or the scope of relief sought, the Court should grant leave to file Wyoming's first counterclaim.

2. Wyoming's Second Counterclaim Merely Would Narrow a Counterclaim that has Already Been Accepted by the Court.

Wyoming's existing counterclaim in part alleges that Nebraska has violated and circumvented the Decree by, "using Glendo Reservoir water outside of the basin of the North Platte River in western Nebraska, for uses other than irrigation and as a substitute for storage water previously available under permanent arrangements." Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 9 (Docket No. 5).

The second counterclaim in Wyoming's amended pleading would (1) identify the specific contract for Glendo Reservoir water which Wyoming claims violates the Decree, and (2) delete the allegation that water under that contract has been used on lands outside the basin of the North Platte River. The Court should grant leave to file Wyoming's second counterclaim because it would narrow the issues for trial without prejudice to any other party.

3. Wyoming's Third Counterclaim Would Introduce an Alternative Claim for Modification of Paragraph XVII of the Decree.

Both Nebraska and Wyoming have alleged that uses of Glendo Reservoir storage water in the other state violate Paragraph XVII of the Decree.[6] *See* Count II of Nebraska's pending amended petition (Docket No. 407); Wyoming second counterclaim, *supra*. Paragraph XVII now provides that storage water from Glendo Reservoir "may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre-feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre-feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements."

Paragraph XVII was added to the Decree upon the joint motion of the parties. *Nebraska v. Wyoming*, 345 U.S. 981 (1953). That stipulation and the amendment of the Decree cleared the way for construction of Glendo Reservoir. Each of the parties was to realize a substantial benefit from the stipulation. The injunction limiting irrigation in the North Platte basin in Colorado was modified to allow Colorado to irrigate an additional 10,000 acres. Decree, Paragraph I(a). The United States was able to build Glendo Reservoir and to use nearly one-half million acre-feet of storage space in that reservoir to re-store water released from Pathfinder Reservoir for power generation. Decree, Paragraph XVII(b). That change greatly increased the power generation capacity of the federal reservoir system as well as the revenues associated with

---

[6] At a telephonic status conference with the Special Master on January 21, 1994, Nebraska indicated that it would withdraw the part of Count II that challenges the United States' water allocation procedures, but apparently Nebraska continues to assert that certain actions of the United States violate Paragraph XVII. Transcript of January 21, 1994 status conference at 13.

power generation while not interfering with the United States' obligation or ability to deliver irrigation water. Nebraska and Wyoming were to have the use of additional storage water in the amounts of 25,000 acre-feet and 15,000 acre-feet per year, respectively with the ability to carry over storage up to a total storage amount of 100,000 acre-feet. Decree, Paragraph XVII(b).

Nebraska, Colorado and the United States have realized the benefits of Glendo Reservoir apportioned to them in the 1953 modification of the Decree. However, Wyoming users have contracted for only 4650 acre-feet of the 15,000 acre-feet of Glendo storage water apportioned to Wyoming. Wyoming has not been able to use the majority of its apportioned share of Glendo water under the present language of Paragraph XVII, which limits such use to irrigation use downstream of Guernsey Dam. In short, changed circumstances have resulted in Wyoming being denied the benefits of the apportionment that the 1953 modification of the Decree was intended to carry into effect.

Of course, the Court does not lightly undertake to remove restrictions in a decree. It has been said that the party asking for such a modification of a decree must demonstrate that it is suffering "grievous wrong" from operation of the injunction that it would have lifted or changed. *United States v. Swift and Co.*, 286 U.S. at 119. In this case, the inability to use Wyoming's apportioned share of Glendo Reservoir certainly rises to the level of such hardship as to warrant modification of the Decree. Moreover, both Special Master Doherty and the Court, when fashioning the Decree, anticipated that the Decree would need to be adjusted to meet changing circumstances such as increased water supply. Report of Michael J. Doherty, Special Master, at 10-11; *Nebraska v. Wyoming*, 325 U.S. at 620. The need for a change in Paragraph XVII is partly and directly the result of a greater water supply than anticipated being available to both Wyoming and Nebraska.

The fact that Paragraph XVII of the Decree was added by consent and stipulation of the parties does not affect the Court's power to modify the Decree. *See United States v. Swift and Co.*, 286

U.S. at 114-115 (1932). Whether the Decree was entered after litigation or after consent, the Court may change it "in adaptation to changed conditions" when its purpose is no longer being served. *Id.*; *United States v. United Shoe Corp.*, 391 U.S. 244 (1968).

When the 1953 stipulation was being negotiated, the parties contemplated that the supplemental irrigation water to be made available by Glendo Reservoir would be used by canals in the area between Guernsey Dam and Scottsbluff, Nebraska. Definite Plan Report, Glendo Unit, December 31, 1952, at 4-6, Third Affidavit of David G. Wilde, United States Motion for Summary Judgment on the Inland Lakes (Docket No. 297). However, in the 35 years since Glendo water was first made available, that anticipated demand for the water has not materialized. The last 8,000 acre-feet of Nebraska's share of Glendo water is under contract to the Central Nebraska Public Power and Irrigation District ("CNPPID") for delivery each fall to Lake McConaughy. The water is delivered for re-storage in Lake McConaughy, although CNPPID claims that such water is used to replace water delivered for the irrigation of lands lying in the lower reaches of the North Platte Basin.[7] In the second counterclaim, Wyoming asserts that the CNPPID contract violates Paragraph XVII.

The relaxation of the restrictions in Paragraph XVII that Wyoming seeks would apply equally to both Wyoming and Nebraska's apportioned shares of Glendo Reservoir water. Consequently, if such modification were granted, both Wyoming's second counterclaim and part of Nebraska's pending Count III would become moot. For that reason, Wyoming has brought this claim as

---

[7] The payment for water delivered under this contract is made by Basin Electric Power Cooperative as part of an agreement between CNPPID and Basin Electric in which CNPPID agreed to credit Basin Electric's obligation to mitigate the potential further reduction of Laramie River flows under paragraph 5 of the Grayrocks Settlement Agreement with water delivered under this contract. However, the State of Nebraska, who is the actual party to the settlement agreement, has never acknowledged that delivery of Glendo water under this 8,000 acre-foot contract would satisfy any obligation of Basin Electic under the settlement agreement.

an alternative to its second counterclaim. The release of restrictions requested by Wyoming would not preclude use of Glendo water below Guernsey; it would merely allow more flexibility for use upstream of Guernsey or upstream of Glendo by exchange.

In recent responses to interrogatories, Nebraska acknowledged that Wyoming's share of Glendo Reservoir water could be used for purposes other than irrigation without injury to Nebraska's equitable apportionment, so long as the "net impact on Nebraska. . . (were) the same as if the water were used in accordance with ¶17(b) of the Decree as it presently exists." Nebraska's Answers to Wyoming's Fifth Set of Interrogatories at 13-15, Interrogatory No. 10 (Docket No. 610).

Wyoming's third counterclaim frames the issue of whether the restrictions on use of Glendo Reservoir water could be removed without violating the equitable apportionment of the North Platte River. That issue is certainly proper for adjudication in this case where issues involving the apportionment of Glendo storage under Paragraph XVII have already been accepted by the Court.

4. The Carriage Loss Values in Paragraph V are no Longer Valid, Serve No Purpose and, Therefore, Should be Removed from the Decree.

The fourth counterclaim in Wyoming's amended pleading brings to the Court a long-standing dispute that the parties have been unable to resolve by agreement despite repeated efforts.

When water is diverted through a section of the river, a portion of that water is lost to evaporation, temporary storage in the banks of the river, ground water infiltration, consumptive use by plants along the river, and other factors. Such losses are referred to as "carriage" losses in Paragraph V of the Decree. In order to accurately account for water deliveries and to accurately segregate natural flow from storage water in the river, a proper accounting of carriage losses must be maintained. Paragraph V of the Decree prescribes a procedure for accounting for carriage losses in the

North Platte River in Wyoming based on an exhibit presented by the United States in the original litigation. Paragraph V requires that the prescribed carriage loss values be used "unless and until Nebraska, Wyoming and the United States agree upon a modification thereof."

Nebraska, Wyoming and the United States agree that the carriage loss values in Paragraph V are no longer factually accurate or technically correct. For that reason, the parties jointly funded a technical study, the purpose of which was to develop new and more accurate procedures for determining carriage loss in the river. Nevertheless, after review of the new technical data, the parties have been unable to reach agreement on the appropriate formula for determining carriage losses.

The use of incorrect carriage loss values results in an incorrect accounting and segregation of natural flow and storage water in Wyoming. Under the present procedure, some water that is actually natural flow will be accounted as storage water and vice versa. Such accounting errors adversely impact the intrastate administration of water downstream of the federal reservoirs in Wyoming.

The Wyoming State Engineer determines and assesses carriage losses on the delivery of storage water throughout the state as part of his constitutional duty to administer the state's waters. Wyo. Const., art. 8, §5. Such administration of water deliveries is typically the province of state water administrators, even where the deliveries are made across state lines. Even in the North Platte River basin upstream of the federal reservoirs the Wyoming State Engineer assesses transportation loss in administering storage deliveries for a major municipal water exchange project. However, without any reason stated in the Court's opinion or in Special Master Doherty's report, the Wyoming State Engineer has been denied the ability to carry out such duties on the North Platte downstream of the federal reservoirs.

In short, there appears to be no good reason that the carriage loss provision of Paragraph V should be included in the Decree. The formula prescribed in Paragraph V has become somewhat of an historical curiosity since the parties agree that it is wrong. The Court

need not involve itself in such a matter of continuing administration. Such matters of administration are better left to state water officials who deal with them on a daily basis.

C. THE CROSS-CLAIMS AGAINST THE UNITED STATES ARE NECESSARY FOR A COMPLETE ADJUDICATION OF EXISTING COUNTER-CLAIMS.

The cross-claims in Wyoming's amended pleading would add the United States as a defendant with respect to each of the counterclaims brought against Nebraska. In addition, the fourth cross-claim would assert that the United States has undermined the equitable apportionment by the manner in which it has operated the federal reservoirs.

The Court did not apportion storage water in the 1945 Decree but left it to be distributed according to the storage contracts and the federal and state laws governing those contracts. *Nebraska v. Wyoming*, 325 U.S. at 630-631. However, the presence of large amounts of storage water in the system and the existence of contracts governing that water's use were factors that weighed heavily in the Court's equitable apportionment decision. *Id.* at 639, 645.[8] On the average about one-half of the water that is available to meet the irrigation requirements of the lands served by diversions in the Guernsey to Tri-State section of the river is storage water.[9] Report

---

[8] Paragraph XII(b) of the Decree, while recognizing the United States' rights in storage water and in operation of the federal reservoirs, does not grant the United States free reign to operate the reservoirs in a manner that undermines the apportionment.

[9] "Storage water", as applied to the federal reservoirs, is defined as "and water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree." Decree Paragraph XI(b). This "departure from the ordinary meaning of storage" was deemed necessary by the Court because the Decree would expressly limit the amount of natural flow that the federal reservoirs would be required to pass to the Nebraska canals. See *Nebraska v. Wyoming*, 325 U.S. at 630-631.

of Michael J. Doherty, Special Master, at 71, Table IV; *Nebraska v. Wyoming*, 325 U.S. at 605. The United States through its Bureau of Reclamation ("the Bureau") controls that storage water.

With the exception of a few small canals in Wyoming, all of the canals diverting in the Guernsey to Tri-State Dam section of the river have contracts for the delivery of storage water to meet their needs when there is insufficient natural flow. *Id.* at 628-632. In theory, when a canal does not have a right to sufficient natural flow to meet its requirements, it calls for the delivery of storage water. *Id.* at 628. In practice, the federal reservoirs are operated by the Bureau simply to meet the full requests of the canals in the Guernsey to Tri-State section, without regard to how much water is diverted or whether the water is beneficially used. United States Response to Wyoming's Sixth Set of Interrogatories at 22-24, Interrogatory Nos. 30(c) through 30(f) (Docket No. 613). Wyoming has long asserted that such an operation promotes waste and inefficiency and upsets the balance of the equitable apportionment.

By way of example, when senior canals divert more natural flow than they need, junior canals must call for more storage water to meet their requirements. The resulting depletion of storage supplies directly and adversely impacts the Wyoming users in the Kendrick Project, which is the most junior of the federal storage reservoirs and the last to refill. Such depletion of storage also results in larger and more prolonged calls by the federal reservoirs against other, junior users in Wyoming. The Bureau shares the responsibility for such waste when it passes water through the federal reservoirs to be wasted below Tri-State Dam. To redress the injury that Wyoming users suffer by the waste of water in the Guernsey to Tri-State Dam section, Wyoming must have recourse against the United States as the operator of the federal reservoirs.

The problem that Wyoming faces is brought into focus by the Court's recent opinion. The Court declared that Paragraph IV of the Decree is not a self-executing limit on the amount of water that the Nebraska canals may divert. *Nebraska v. Wyoming*, 113 S.Ct. at 1700-1701. However, the Court also expressly acknowledged that

"Paragraph IV 'limits the extent to which the Nebraska canals may stop federal reservoirs from storing water. . .'" *Id.* at 1701 (quoting brief of the United States). Wyoming had asked the Court by way of summary judgment to address the nature and extent of the Paragraph IV limitation on the ability of the Nebraska canals to call water through the federal reservoirs. The Court did not reject Wyoming's argument on the merits, but said that it must await further factual development:

> Wyoming asks us to clarify that the federal reservoirs have no obligation to bypass natural flow to a senior Nebraska canal when the canal is making excessive calls for federal storage water. Because there is as yet inadequate factual development on the question whether Nebraska canals have in fact made excessive calls, we decline to do so.

Id.

Wyoming's evidence will demonstrate that the Nebraska canals have requested, and the federal reservoirs have bypassed flows or released storage water greatly in excess of the limits of Paragraph IV as well as any reasonable standard of beneficial use. Such an operation of the river is contrary to the apportionment envisioned by the Court and contrary to federal reclamation law and the laws of Wyoming and Nebraska which limit storage water rights to beneficial use. *See* Section 8 of the Reclamation Act of 1902, 43 U.S.C. §372 (1988); Wyo. Stat. §41-3-303(1977); Neb. Rev. Stat. §46-202(2) (1988 Reissue). The United States also denies the authority of the Wyoming State Engineer to administer releases from the federal reservoirs to assure that they are beneficially used. United States Response to Wyoming's Sixth Set of Interrogatories at 45-48, Interrogatory No. 58 (Docket No. 613).

If Paragraph IV of the Decree does not limit diversions by the Nebraska canals directly, and since the United States as operator of the federal reservoirs will not limit its releases from the federal

reservoirs in accordance with Paragraph IV, then Wyoming has no recourse when Nebraska attempts to increase her apportionment by demanding and receiving excess flows to the canals in the Guernsey to Tri-State Dam section. The only remedy Wyoming has in this regard is to seek clarification from the Court and modification of the Decree as necessary. The United States now appears to be on the opposite side of the issue from the position it occupied in 1945 when the Court anticipated the need for relief at the foot of the Decree. *See Nebraska v. Wyoming*, 325 U.S. at 628-629. Consequently, Wyoming must assert the claims against the United States as a party.

1. The United States is subject to the Court's Jurisdiction.

The United States may not be sued without its consent. *Kansas v. United States*, 204 U.S. 331, 341 (1907); *Arizona v. California*, 298 U.S. 558, 568 (1936). Generally, a waiver of sovereign immunity and consent to be joined in an action as a defendant can only be granted by act of Congress. *Minnesota v. United States*, 305 U.S. 382, 387 (1939). However, in *Nebraska v. Wyoming*, the United States was not sued as a defendant.[10] Rather, the United States, by the Attorney General, intervened in the litigation in order to assert a claim on behalf of the United States to a separate apportionment of the waters of the North Platte River and to protect the interests of the United States in the federal reservoirs.

The Court has long held that the United States, by its Attorney General, may bring suit to assert its property interests. *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925). The authority of the Attorney General to bring suit to protect the interest of the

---

[10] Wyoming initially moved for dismissal of Nebraska's complaint on the ground that the United States was an indispensable party which was immune from joinder in the suit. The Court ruled that the United States was a Wyoming appropriator and not an indispensable party. *Nebraska v. Wyoming*, 295 U.S. 40 (1935). That issue was decided before the United States intervened as a party and subjected itself to the Court's jurisdiction.

United States is currently codified at 28 U.S.C. §§501, 516-519 (1988).

When the United States voluntarily brings or joins an action to assert a claim, "it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *United States v. The Thekla*, 266 U.S. 328, 339-340 (1924). *See also Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938) (the sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act). Here the subject matter is the equitable apportionment of the North Platte River and each of the claims Wyoming would bring against the United States are not only an incident to, but go to the very heart of, that apportionment.

In the present case, the United States intervened *as a party* to claim for itself an apportionment of the North Platte River as well as to defend its interest as owner and operator of the federal reservoirs. *Nebraska v. Wyoming*, 304 U.S. 545 (1938). The United States has fully participated in every aspect of this litigation. As a party, the United States is bound by the Decree. *See Arizona v. California*, 373 U.S. 546 (1963). Having thus intervened as a party and subjected itself to the jurisdiction of the Court, the United States cannot now claim that it is immune from suit in any action brought to enforce, interpret or modify the Decree.

In *Arizona v. California, supra*, the United States intervened as a party for the purpose of adjudicating its rights in the waters of the Colorado River. The decree entered for the purpose of carrying out the Court's opinion contained specific injunctions against the "United States, its officers, attorneys, agents and employees." *Arizona v. California*, 376 U.S. 340, 341 (1964). Likewise, in this case Wyoming requests injunctive relief against the United States to carry out the apportionment determined in the Court's earlier opinion.

Each cross-claim tendered by Wyoming bears directly on the interests the United States sought to protect by intervening in the litigation — the United States' operation of the federal reservoirs.

The United States cannot claim that is immune from suit with respect to the matters raised in the cross-claims.

2. The First Cross-Claim Merely Seeks to Join the United States as a Defendant in Claims that have Already been Accepted by the Court as Counterclaims Against Nebraska.

The first cross-claim in Wyoming's amended pleading would not raise any new issues beyond those raised by the amended counterclaims against Nebraska. As demonstrated above, by intervening in the original litigation, the United States consented to be bound by the Decree and to be subject to the jurisdiction of the Court in any litigation incidental to the Decree. The purpose of the cross-claim simply is to assert that actions of the United States or its officials are responsible for circumventing the apportionment and for the resulting injury to Wyoming and its water users.

3. The Second and Third Cross-Claims would Join the United States as a Defendant in an Existing Claim Alleging that Nebraska's Use of Glendo Reservoir Violates Paragraph XVII of the Decree and in an Alternative Claim to Modify Paragraph XVII.

The purpose of the second cross-claim is to assert that the United States is partially responsible for violation of Paragraph XVII of the Decree in entering into a water service contract for Glendo Reservoir storage water with the CNPPID. Because the Bureau is the contracting entity for water in Glendo Reservoir, no complete adjudication of the claim that the contract violates Paragraph XVII can be had without joining the United States.

Likewise, the third cross-claim would join the United States in the alternative claim to modify the Decree to remove the restrictions on the place and manner of use of Glendo Reservoir water. Wyo-

ming deems it necessary to assert this claim against the United States because the United States owns and operates Glendo Reservoir and because the United States was a party to the 1953 stipulation which gave rise to Paragraph XVII of the Decree. *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

4. Wyoming's Fourth Cross-Claim would Challenge the Manner in which the United States has Allocated Water Released from the Federal Reservoirs.

The fourth cross-claim is an extension of the first counterclaim and the first cross-claim. It alleges that the Bureau's operation of the federal reservoirs has upset the apportionment and circumvented the Decree. As a predicate of the apportionment, the Court assumed that the United States would operate the federal reservoirs in a predictable manner in accordance with the storage contracts and applicable federal and state laws. The United States has not done so and as a result has undermined the equitable apportionment. Wyoming's only relief in this regard is to seek interpretation of the Decree and modification if necessary to assure the operation of the reservoirs in the manner on which the Court based the equitable apportionment.

Wyoming particularly challenges the procedure by which the United States allocates water from the federal reservoirs. When officials of the Bureau determine that the supply of storage water in the federal reservoirs is insufficient, they declare an "allocation year". In an allocation year, the Bureau allocates available storage supplies in the North Platte Project reservoirs among the contractors. The amount of water allocated to each contractor is based on the actual diversions by that contractor of both natural flow and storage water averaged over the previous 10 years. United States Response to Wyoming's Sixth Set of Interrogatories at 24-25, Interrogatory No. 30(h) (Docket No. 613). Given the fact that the Bureau does not limit its deliveries in non-allocation years, but opens the reservoir gates to meet all requests regardless of need, the

contractors are encouraged to, and do, divert excessive amounts of water in order to better their position in the allocation of storage supplies that will occur in the allocation year. Such practice promotes waste and causes irreparable injury to junior users in Wyoming whose diversions are curtailed when the senior federal reservoirs refill their depleted storage supplies. In addition, this poor practice increases the frequency of storage water shortages for storage water users in Wyoming.

Moreover, the Bureau does not recognize the North Platte project canals as having any priority over Warren Act contractors for available storage supplies. That interpretation and administration of the storage contracts is flatly contrary to the Warren Act which requires that the United States recognize "a first right" to federal storage water in the lands under the North Platte Project canals. 43 U.S.C. §523 (1988). The practice of the United States in allocating the storage water is also contrary to the plain language of the Warren Act contracts which are only to dispose of storage water that is *surplus* to the needs of the project lands. Report of Michael J. Doherty, Special Master, at 189-195. But of more importance in this case, when the United States departs from the storage contracts and applicable laws in administering the federal reservoirs, it changes the very balance of equities on which the Court based the apportionment.[11] As established above, the Court relied heavily on the presence of storage water and assumed its distribution in accordance with the contracts in determining the equitable apportionment.

---

[11] The United States may argue that this issue may be decided in a case pending in the federal district court in Wyoming. *Goshen Irrigation District v. United States*, Case No. C89-0161J, (D. Wyo. complaint filed June 23, 1989). Neither Nebraska nor Wyoming is a party to that case. While this issue was tried in 1989, the Judge has neither ruled nor ordered further proceedings. Wyoming believes the Judge has informally stayed that procedure pending the outcome of this Supreme Court litigation. In addition, the United States has moved to dismiss that suit on grounds of sovereign immunity. Only the Supreme Court in its original jurisdiction can acquire jurisdiction over both states and the United States and bind all of those parties in a final resolution of the issue. That is precisely what the Court did earlier in this case when it assumed jurisdiction over the pending federal district court case involving the Inland Lakes water right.

Nebraska v. Wyoming, 325 U.S. at 630-631, 639, 645. Unless the United States is directed to comply with the storage contracts and applicable laws, the apportionment prescribed in the Decree will no longer be equitable and may need to be adjusted.

5. The Fifth Cross-Claim would Join the United States in the Claim to Modify the Paragraph V Carriage Loss Formula.

Wyoming would join the United States in the claim for removal of the carriage loss provision from Paragraph V of the Decree. The United States is one of the parties who must agree to any change in the carriage loss formula under the present provisions of Paragraph V. The United States has not agreed and appears to benefit from the error generated by the present carriage loss provision in Paragraph V. Because the parties have been unable to agree, the Court's intervention is needed to break the deadlock which interferes with Wyoming's intrastate water rights administration.

D. THE CROSS-CLAIMS AGAINST COLORADO ARE INTENDED SOLELY TO GIVE COLORADO NOTICE AND AN OPPORTUNITY TO BE HEARD ON CLAIMS FOR MODIFICATION OF THE DECREE THAT WOULD AFFECT COLORADO.

Colorado was a party to the 1953 stipulation which resulted in the addition of Paragraph XVII of the Decree. For that reason Wyoming would join Colorado in the third cross-claim so that Colorado may be heard if it has any objection to Wyoming's request to remove the restrictions on the place and manner of use of Glendo Reservoir water. Similarly, Wyoming would join Colorado in the fifth cross-claim which seeks modification of the Paragraph V carriage loss formula. Wyoming believes that Colorado has no particular interest in the carriage loss formula, but would join

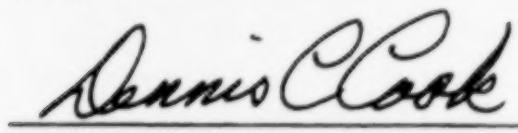
Colorado as a defendant solely for the purpose of giving Colorado an opportunity to be heard.

V. CONCLUSION

The Court should grant Wyoming leave to file the amended counterclaims and cross-claims and order replies and answers to be filed by the respective parties on a schedule to be determined by the Court.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
Counsel of Record
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK
Special Assistant Attorney General
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON AND
WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

ATTORNEYS FOR THE STATE OF WYOMING

(49)

Supreme Court, U.S.
FILED
MAR 16 1994
OFFICE OF THE CLERK

No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF NEBRASKA, PLAINTIFF

v.

STATES OF WYOMING AND COLORADO

ON JOINT MOTION BY NEBRASKA AND WYOMING TO REFER TO SPECIAL MASTER THEIR MOTIONS FOR LEAVE TO FILE AMENDED PLEADINGS

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

12 pp

TABLE OF AUTHORITIES

Case:	Page
Nebraska v. *Wyoming*:	
325 U.S. 589 (1945)	1
479 U.S. 1051 (1987)	2
481 U.S. 1011 (1987)	2
483 U.S. 1002 (1983)	2
485 U.S. 931 (1988)	3
492 U.S. 903 (1989)	2
112 S. Ct. 1930 (1992)	2
113 S. Ct. 1689 (1993)	2, 5, 6
113 S. Ct. 1941 (1993)	4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATES OF WYOMING AND COLORADO

ON JOINT MOTION BY NEBRASKA AND WYOMING TO REFER TO SPECIAL MASTER THEIR MOTIONS FOR LEAVE TO FILE AMENDED PLEADINGS

BRIEF FOR THE UNITED STATES

Nebraska has moved for leave to file an Amended Petition for an Order Enforcing Decree, and Wyoming has moved for leave to file Amended Counterclaims and Cross-Claims. The two States also have filed a joint motion requesting that their separate motions for leave to file amended pleadings be referred to the Special Master for his recommendation as to whether those motions should be granted. The United States does not oppose the joint motion by Nebraska and Wyoming to refer those motions to the Special Master.

A. On October 7, 1986, the State of Nebraska sought leave from this Court to file a petition for an order enforcing the Court's Decree in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), which established an interstate apportionment of the flow of the North Platte River. The

United States (which is a party to the Decree) responded that Nebraska appeared to identify a substantial interstate dispute and suggested that the Court grant the petition and appoint a Special Master to consider Nebraska's claims. U.S. Mem. 3-4 (filed Dec. 19, 1986). On January 20, 1987, this Court granted Nebraska leave to file its petition to enforce the Decree and instructed the parties to file answers. 479 U.S. 1051. On April 20, 1987, the Court granted Wyoming's motion for leave to file a counterclaim. 481 U.S. 1011. On June 22, 1987, the Court referred the case to Special Master Owen Olpin, 483 U.S. 1002, who filed First and Second Interim Reports. See 492 U.S. 903 (1989), and 112 S. Ct. 1930 (1992). The Second Interim Report recommended that the Court grant summary judgment in favor of the United States and Nebraska on the so-called Inland Lakes dispute (Second Interim Rep. 16, 19-35), grant partial summary judgment in favor of Nebraska on an issue concerning limitations on the use of Nebraska's apportionment (*id.* at 18-19, 89-100), and deny summary judgment on all other claims (*id.* at 17-19). The Court considered exceptions filed by the States, overruled them, and remanded the case to the Special Master for further proceedings. 113 S. Ct. 1689 (1993).

Over the course of these proceedings it instituted in 1986, Nebraska has moved to amend its pleadings three times, first in 1988, then in 1991, and now again in 1994. In its 1988 motion to amend the 1986 Petition, Nebraska sought a modification of the existing Decree to impose a requirement that Nebraska, Wyoming, and Colorado share the burden of maintaining the stream flows necessary for critical wildlife habitat along the Platte River. In its response to Nebraska's motion, the United States observed that the motion, if granted, "would greatly expand the scope, character, and complexity" of the case.

U.S. Mem. 3 (filed Feb. 12, 1988). The Court denied Nebraska's motion to amend its 1986 Petition. 485 U.S. 931 (1988).*

On October 9, 1991, Nebraska again sought leave to amend its 1986 Petition. The 1991 proposed Amended Petition presented three claims:

> Count I sought an amendment of the Decree "to apportion the unapportioned, non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows." 1991 proposed Amended Petition, para. 20.
>
> Count II sought to enlarge the claim for relief set forth in the 1986 Petition, alleging violations of the existing Decree by Wyoming through excessive use of natural flow and ground water for irrigation, depletion of storage water, depletion of return flows reaching the North Platte River, and excessive consumption of water on tributaries entering the North Platte River below Alcova Reservoir. Compare 1986 Petition, pages 3-4, *with* 1991 proposed Amended Petition, para. 2 and page 13.
>
> Count III, which requested relief against the United States for the first time, alleged that the United States was violating the Decree by "[c]ontracting for the use of Glendo Reservoir water for other than authorized purposes" and "[a]llocating

---

* The United States had suggested that Nebraska's motion to amend its 1986 Petition be referred to the Special Master for a recommendation as to whether the Court should grant the motion. U.S. Mem. 4-5 (filed Feb. 12, 1988).

> natural flows among its contractors in designated water-short years," in violation of paragraphs V, VI, and XII of the existing Decree. 1991 proposed Amended Petition, Count III, para. 2.

This Court denied Nebraska leave to file Count I of the 1991 proposed Amended Petition, and it referred Counts II and III to the Special Master for his recommendation as to whether Nebraska's motion for leave to file those counts should be granted. 113 S. Ct. 1941 (1993). That referral is pending before the Special Master.

B. Both Nebraska and Wyoming now seek leave to amend their pleadings.

1. Nebraska's 1994 proposed Amended Petition, which is intended to "supersede" its 1986 Petition and its 1991 proposed Amended Petition (see Neb. Br. 2), presents four claims:

> Count I reasserts the 1986 Petition's challenge to Wyoming's proposed construction of storage capacity on tributaries. Compare 1986 Petition, para. 3c, *with* 1994 proposed Amended Petition, Count I, paras. 11a, 12. It also reasserts the claims presented in Count II of Nebraska's 1991 filing, which is now pending before the Special Master for his recommendation. Compare 1991 proposed Amended Petition, Count II, para. 2, *with* 1994 proposed Amended Petition, Count I, paras. 11, 12.
>
> Count II reasserts one, but not both, of the claims presented in Count III of Nebraska's 1991 filing, which is also currently pending before the Special Master for his recommendation. Compare 1991 proposed Amended Petition, Count III, para. 2(a), *with* 1994 proposed Amended Petition, Count II, paras. 3-4. Count II alleges that "[t]he United States is

presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by contracting for the use of Glendo Reservoir water for other than authorized purposes." 1994 proposed Amended Petition, Count II, para. 4.

Count III reasserts, albeit with greater specificity, the Laramie River claims presented in Nebraska's 1986 Petition. Compare 1994 proposed Amended Petition, Count III, para. 6, *with* 1986 Petition, paras. 3a, 3b. It seeks, in addition, an apportionment of Laramie River inflows to the North Platte River, and to have the Court "enjoin the State of Wyoming from depleting Nebraska's equitable share of the Laramie River's contribution to the North Platte River and from impeding or interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement." 1994 proposed Amended Petition, page 11. The relief requested appears to be consistent with this Court's 1993 conclusion (113 S. Ct. at 1698) that Laramie River inflows to the North Platte River were expected to contribute to the natural flows that would be available for the 1945 apportionment of the River but were not specifically apportioned by that Decree.

Count IV of the 1994 proposed Amended Petition (like Count I of Nebraska's 1991 filing) seeks equitable apportionment of the non-irrigation season flows of the North Platte River. Compare 1991 proposed Amended Petition, Count I, page 11, *with* 1994 proposed Amended Petition, Count IV, page 16. Count IV alleges that "irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation, and fish and wildlife, includ-

ing endangered and threatened species," in Nebraska rely on non-irrigation season flows (para. 7), which "existing and proposed developments in Wyoming threaten to utilize and deplete" (para. 9).

In sum, Nebraska's 1994 proposed Amended Petition appears to encompass all of the claims in its pending 1986 Petition and most of the claims in its 1991 proposed Amended Petition—including a requested modification of the existing Decree to apportion non-irrigation season flow. The Court denied leave to file the latter claim, without prejudice, last year, following the Special Master's recommendation that it was not ripe for resolution. 113 S. Ct. 1941 (1993).

2. Wyoming, for the first time, also seeks to amend its pleadings. Specifically, Wyoming proposes to amend its pending counterclaim and to add two new counterclaims against Nebraska and five new cross-claims against the United States. Wyoming's pending counterclaim, which the Court granted it leave to file in 1987, alleges that Nebraska is violating the decree by "demanding natural flow * * * in excess of the present beneficial use requirements of the Nebraska lands entitled to water * * * under the Decree," by "demanding natural flow and storage water * * * for uses below Tri-State Dam that are not recognized or authorized by the Decree," and by "using Glendo Reservoir water outside of the basin of the North Platte River." 1987 Counterclaim para. 2(a)-(c). A central premise underlying the first two of those claims—that paragraph V of the existing Decree imposes upper limits on Nebraska's diversions—was rejected by the Court in the 1993 decision. 113 S. Ct. 1700-1701.

Wyoming's 1994 filing responds to that ruling and seeks additional relief against both Nebraska and the United States:

> Wyoming's First Counterclaim and First Cross-Claim both seek an amendment of the Decree in response to the Court's conclusion that paragraph V of the existing Decree imposes no specific upper limits on Nebraska's right to divert water. The First Counterclaim seeks modification of the Decree "to confirm that equitable apportionment does not allow Nebraska to demand direct flow water from Wyoming for use below Tri-State Dam" and "to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree." 1994 proposed Amended Counterclaims and Cross-Claims, page 6. The First Cross-Claim seeks analogous relief against the United States. *Id.*, page 11.

> Wyoming's Second and Third Counterclaims and Second and Third Cross-Claims (like Count II of Nebraska's 1994 proposed Amended Petition) deal with contracting practices for water stored in Glendo Reservoir, which are addressed in paragraph XVII of the existing Decree. The Second Counterclaim and Cross-Claim allege that Nebraska and the United States have violated the Decree by delivering, or permitting the delivery of, "storage water from Glendo Reservoir * * * for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements," and they seek to enjoin Nebraska and the

United States from committing those alleged violations. 1994 proposed Amended Counterclaims and Cross-Claims, paras. 15, 28 and pages 7, 11. The Third Counterclaim and Cross-Claim, which are styled as alternatives to their second counterparts, seek an amendment of the Decree to permit Glendo storage water to "be used directly or by exchange for all beneficial uses under the laws of the respective states." *Id.*, pages 7, 12.

Wyoming's Fourth Counterclaim and Fifth Cross-Claim seek modification of the method set out in paragraph V of the Decree for determining river "'carriage' losses." The Fourth Counterclaim alleges that "data and technology" are available to make a more "accurate estimate of transportation losses than the estimate produced by use of the procedure required by Paragraph V of the Decree," and it seeks modification of paragraph V of the Decree to "leave such determination to state officials under state law." 1994 proposed Amended Counterclaims and Cross-Claims, para. 20 and page 9. The proposed Fifth Cross-Claim seeks the same relief against the United States and Colorado. *Id.*, page 13.

Wyoming's Fourth Cross-Claim alleges that the United States "has failed to operate the federal reservoirs in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs," and it seeks declaratory and injunctive relief against the United States with respect to the operation of the federal projects and associated water storage contracts. 1994 proposed Amended Counterclaims and Cross-Claims, para. 31 and page 13.

C. Nebraska's 1994 proposed Amended Petition encompasses both the 1991 Count I seeking a non-irrigation season apportionment, which was rejected for filing without prejudice by the Court in 1993, and the two Counts of the 1991 proposed Amended Petition that are now pending before the Special Master. The proposed non-irrigation season apportionment, in particular, would substantially expand this litigation. Wyoming's proposed Amended Counterclaims and Cross-Claims would also expand the litigation beyond the scope contemplated by the counterclaim that the Court granted Wyoming leave to file in 1987.

Although we have serious reservations about the proposed amended pleadings to the extent they would lead to unnecessary or open-ended expansion of this litigation, we do not oppose the joint motion by Nebraska and Wyoming for referral of the proposed amendments of their pleadings to the Special Master for his consideration and recommendation in the first instance. That course of action will enable the parties to brief the issues in detail. It will also enable the Special Master, who is intimately familiar with this complex case and the interrelationship of the new issues now raised by the parties to the claims that the Court has already granted leave to file, to prepare a detailed recommendation that sorts out those issues he concludes are appropriate for resolution in this litigation at this time from those he concludes are not.

Accordingly, we suggest that the Court vacate its April 26, 1993, order referring Counts II and III of Nebraska's 1991 proposed Amended Petition to the Special Master and grant the joint motion by Nebraska and Wyoming to refer Nebraska's motion for leave to file an Amended Petition for an Order Enforcing Decree and Wyoming's motion for leave to file Amended Counter-

claims and Cross-Claims to the Special Master for his recommendation to the Court as to whether (or in what respects) those motions should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MARCH 1994

(60)

No. 108, Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING, *et al.*,
Defendants.

OWEN OLPIN, SPECIAL MASTER THIRD INTERIM REPORT ON MOTIONS TO AMEND THE PLEADINGS

September 9, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
GLOSSARY OF SELECTED TERMS	v
I. OVERVIEW OF THE CASE	1
II. HISTORY OF THE CASE	8
A. The Original Proceedings	8
B. Changed Conditions	11
C. The Current Proceedings	20
1. Present Status of the 1987 Issues	20
a. Intervention Issues	20
b. The Inland Lakes Issue	21
c. Tributary Issues	21
(1) Laramie River Issues	21
(2) The Deer Creek Issue	23
d. Counterclaim Issues	23
2. The Motions to Amend the Pleadings	26
a. Nebraska's 1988 Proposed Amendment	26
b. Nebraska's 1991 Proposed Amendments	27
c. Nebraska's 1994 Proposed Amendments	28
d. Wyoming's 1994 Proposed Amendments	31
III. BASIS FOR AND SUMMARY OF RECOMMENDATIONS	33
A. Amendments That I Recommend Be Granted	34
B. Amendments That I Recommend Be Denied	35
IV. RECOMMENDED DISPOSITION OF NEBRASKA'S PROPOSED AMENDMENTS TO THE PLEADINGS	36

TABLE OF CONTENTS—Continued

	Page
A. Count I	36
1. Groundwater Pumping Issues	38
2. Horse Creek Issue	41
B. Count II	43
C. Count III	44
D. Count IV	47
V. RECOMMENDED DISPOSITION OF WYOMING'S PROPOSED AMENDMENTS TO THE PLEADINGS	55
A. First Counterclaim and First Cross-Claim	55
1. Restructuring of the Decree	56
2. Relationship of Proposed Amended Counterclaim and Cross-Claim to Wyoming's 1987 Counterclaim	57
3. The Court's 1993 Opinion	60
4. Practical and Policy Considerations	62
5. Remaining Elements of the Proposed Amended First Counterclaim and First Cross-Claim	63
B. Wyoming Second and Third Counterclaims and Wyoming Second and Third Cross-Claims	64
C. Wyoming Fourth Counterclaim and Wyoming Fifth Cross-Claim	65
D. Wyoming Fourth Cross-Claim	67
1. Storage Water Not Apportioned	69
2. Availability of Alternative Forum	70
APPENDIX A:	
Map—North Platte River Basin	A-1

TABLE OF CONTENTS—Continued

	Page
APPENDIX B:	
Map—North Platte River Area Irrigation	B-1
APPENDIX C:	
Modified Decree	C-1
APPENDIX D:	
Nebraska's 1994 Proposed Amendments to the Pleadings	D-1
APPENDIX E:	
Wyoming's 1994 Proposed Amendments to the Pleadings	E-1

TABLE OF AUTHORITIES

CASES Page

California v. Texas, 437 U.S. 601 (1978) 50
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) ..... *passim*
Nebraska v. Wyoming, 479 U.S. 1051 (1987) 3
Nebraska v. Wyoming, 481 U.S. 1011 (1987) 3
Nebraska v. Wyoming, 485 U.S. 931 (1988) 26, 48
Nebraska v. Wyoming, 492 U.S. 903 (1989) 4
Nebraska v. Wyoming, 113 S. Ct. 1689 (1993) ..... *passim*
Nebraska v. Wyoming, 113 S. Ct. 1941 (1993) 28, 48
Nebraska v. Wyoming, 114 S. Ct. 1290 (1994) 6
Nebraska v. Wyoming & Colorado, 483 U.S. 1002 (1987) 20
New Jersey v. New York, 283 U.S. 336 (1931) 19
New York v. New Jersey, 256 U.S. 296 (1921) 50
Texas v. New Mexico, 462 U.S. 554 (1983) 54
Wyoming v. Colorado, 259 U.S. 419, *amended*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957) 21
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992) 49

STATUTES

Clean Water Act, 33 U.S.C. §§ 1251, *et seq.* 18
Endangered Species Act of 1973, 16 U.S.C. 1531, *et seq.* 17
National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, *et seq.* 17
Reclamation Act, 43 U.S.C. §§ 372, *et seq.* 12

MISCELLANEOUS

Paul J. Currier, *et al.*, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* (1985) 16
Paul A. Johnsgard, *The Platte: Channels In Time* (1984) 9
Joseph L. Sax, *et al.*, *Legal Controls of Water Resources* (2d ed. 1991) 39
Richard A. Simms, *et al.*, *Interstate Compacts and Equitable Apportionment*, 34 Rocky Mtn. Min. L. Inst. § 23 (1988) 16

GLOSSARY OF SELECTED TERMS

An "*acre foot*" is that quantity of water that will cover an acre of land to the depth of one foot. It is the equivalent of 43,560 cubic feet. It is common to refer to a right to a specified number of acre feet in a water year or during an irrigation season.

One "*second foot*" of water equals 1.98 acre feet of water per day and 722.7 acre feet per year.

A "*call*" is a demand made by or on behalf of senior water appropriators requiring the holders of more junior appropriation rights to refrain from diverting and using water until the senior's prior rights have been met.

There will be many references to the priorities, requirements, and supplies of "canals." In such instances the word "*canal*" is used as representative of the lands under or served by the canal.

"*Consumptive use*" refers to the water lost by evaporation and transpiration in the course of diversion and use. It is represented by the difference between the water diverted and that which returns to the stream.

"*Instream use*" refers to nondiversionary use by leaving water in the stream to support wildlife, recreational and other values served by the natural stream environment.

"*Irrigation requirement*" is the quantity of water (including unavoidable waste), exclusive of precipitation, that is required for crop production.

"*Irrigation season*" is used in this Report, as defined in the decree, to include the months of May through September during which irrigation deliveries are made to lands in the North Platte Basin.

"*Natural flow*" or "direct flow" refers to all water in a stream except that which comes from storage water releases.

The western law of "*prior appropriation*" is the body of water law adopted widely by arid western states, including Colorado, Wyoming and Nebraska, under which water rights are administered on a priority of appropriation basis with senior water rights holders being entitled to receive their entire requirements before more junior rights come into priority.

"*Return flow*" is the residual which returns to a stream of water which has been diverted and used. It may be "visible" or "invisible" depending upon whether it takes the form of surface flows or underground percolation.

"*Second foot*" is an abbreviated expression for "one cubic foot per second of time." It is a unit of measurement of the flow of water.

The term "*storage water*", as applied to releases from reservoirs owned and operated by the United States, is defined as any water which is released from rservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree.

"*Water year*" as used herein means the twelve months between and including October 1 of each year and September 30 of the following year. This is the water year of Nebraska, Wyoming and Colorado, and is the standard water year employed by the United States Geological Survey.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 108, Original

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, *et al.*,

Defendants.

OWEN OLPIN, SPECIAL MASTER THIRD INTERIM REPORT ON MOTIONS TO AMEND THE PLEADINGS

September 9, 1994

I. OVERVIEW OF THE CASE

This interstate water controversy first came before the Supreme Court in October, 1934, when the State of Nebraska filed a bill against the State of Wyoming alleging violations of the western water law rules of priority of appropriation on the North Platte River. The State of Colorado was impleaded as a defendant, and in 1938 the United States was granted leave to intervene.[1] Sixty years later, these four parties are again before the Court in a renewed effort to sort out their competing claims to North Platte waters.

[1] That earlier case is referred to in this Third Interim Report as "the original proceedings."

The original proceedings concluded in 1945 when the Court, after nearly a decade of litigation before Special Master Michael J. Doherty, issued an opinion and a decree equitably apportioning the waters of the stream.[2] The polestar of the decree is its proportionate allocation of natural flows during the irrigation season in the "pivotal" reach of the North Platte between the Guernsey Reservoir and Dam in Wyoming, approximately forty miles upstream of the Wyoming-Nebraska state line, and the Tri-State Diversion Dam in Nebraska, approximately one mile downstream of the state line. Paragraph V of the decree apportions seventy-five percent of the natural flow in that reach to Nebraska and twenty-five percent to Wyoming. The Court expressly retained jurisdiction at the foot of the decree in order to respond to changed circumstances.[3]

On October 7, 1986, Nebraska petitioned the Court under the reopener clause to enforce the decree and for injunctive relief.[4] Seeking redress for alleged "current and threatened harm to [her] apportionment pursuant to the terms of the Decree," [5] Nebraska invoked, among other

---

[2] *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) (the "original opinion" and the "decree").

[3] Paragraph XIII of the decree (the "reopener clause") states in part:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Nebraska v. Wyoming, 325 U.S. at 671.

[4] Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) ("Neb. 1986 Pet.") (Docket Item No. 1). References to the docket items of this original record are included in footnotes.

[5] Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief (Oct. 6, 1986) ("Neb. 1986 Br. in Support") at 4 (Docket Item No. 1).

provisions, Subparagraph XIII(c) of the reopener clause which contemplated possible future relief on "[t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." The Court on January 20, 1987, granted Nebraska leave to file her 1986 petition challenging proposed water development projects on Wyoming tributaries, including the Laramie River and Deer Creek, both of which have historically contributed significant flows to the pivotal reach.[6] Nebraska also pleaded an issue concerning the storage priority of four reservoirs in Nebraska known as the Inland Lakes that has since been resolved by the Court in her favor and in favor of the United States.[7]

Wyoming filed her answer and counterclaim on March 18, 1987,[8] which the Court accepted for filing on April 20, 1987.[9] Wyoming's counterclaim alleged that Nebraska

---

[6] *Nebraska v. Wyoming*, 479 U.S. 1051 (1987).

[7] On April 20, 1993, the Court held that the decree authorizes the federal Bureau of Reclamation to continue its longstanding diversion and storage practices in the Inland Lakes, four off-channel reservoirs in Nebraska, served by the Interstate Canal which diverts from the mainstem at the Whalen Diversion Dam in Wyoming. The Court determined that the Inland Lakes share the December 6, 1904 priority date of the original components of the Bureau's North Platte Project. Pursuant to that priority, the Bureau may divert and store 46,000 acre feet of water in the Inland Lakes during the non-irrigation season. Inland Lakes storage water may be temporarily stored in the Guernsey and Glendo Reservoirs for later delivery to the Inland Lakes. *Nebraska v. Wyoming*, 113 S. Ct. 1689, 1697 (1993). The Inland Lakes issue itself is now out of the case, although Wyoming's administration, under state law, of the Inland Lakes priority relative to the priority of the proposed Deer Creek Project remains as a possible issue to be resolved in this case.

[8] Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim (Mar. 18, 1987) (respectively, "Wyo. 1987 Answer," "Wyo. 1987 Counterclaim") (Docket Item No. 5).

[9] *Nebraska v. Wyoming*, 481 U.S. 1011 (1987).

is circumventing the decree by demanding and diverting water from irrigation canals at and above the Tri-State Dam in excess of the "present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree" [10] and by demanding natural flow and storage water from sources above Tri-State Dam and diverting it for unrecognized and unauthorized uses below Tri-State Dam. The latter claim is based upon the Court's determination in 1945 that Nebraska's canals diverting downstream of Tri-State Dam were adequately served by return flows and other local supplies and, therefore, were not entitled to call on upstream flows from Colorado and Wyoming for irrigation uses. Wyoming also alleged that Nebraska was using Glendo Reservoir storage water for non-irrigation uses and uses outside the North Platte Basin in western Nebraska.[11]

Following years of extensive discovery and motions on various matters, including two rounds of summary judgment motions,[12] the Court in 1993 issued its opinion

---

[10] Wyo. 1987 Counterclaim at 8 (Docket Item No. 5).

[11] *Id.* at 8-9.

[12] The procedural history of the case is set forth in more detail below. *See infra* pp. 20-33. I have filed two previous interim reports.

On June 16, 1989, I filed my First Interim Report recommending that five pending motions for intervention be denied and that Wyoming's September 11, 1987 motion for summary judgment on the issues in the case be denied without prejudice. First Interim Report of Special Master (June 14, 1989) ("First Interim Report") (Docket Item No. 140). The Court received and filed the report without inviting exceptions at that time. *Nebraska v. Wyoming*, 492 U.S. 903 (1989).

I filed my Second Interim Report on April 9, 1992, recommending that the Court: (i) deny all of the renewed motions for intervention; (ii) grant summary judgment for the United States and Nebraska that the Inland Lakes have the same December 6, 1904, priority date as the other original components of the Bureau of Reclamation's North Platte Project to divert 46,000 acre feet of storage water to the Inland Lakes during the non-irrigation season, with temporary storage in Guernsey and Glendo Reservoirs; (iii)

eliminating two issues from the case,[13] explicating the remaining issues, setting forth the standards for the exercise of its original jurisdiction in this case and the standards for securing relief, enforcing or modifying rights under the decree, and describing the scope of these proceedings.

Further discovery and an exercise undertaken at my request, during which Nebraska prepared a memorandum concerning Wyoming's present and proposed developments on the Laramie River [14] and Wyoming prepared a memo-

---

grant judgment for Nebraska that, under Paragraph V of the decree, Nebraska is free to allocate her share of the North Platte waters as she sees fit, and that while Paragraph IV limits the extent to which Nebraska canals diverting from the mainstem may prevent federal reservoirs from storing water in Wyoming, that paragraph does not restrict the actual quantities of water those canals can ultimately divert; and (iv) deny all other motions for summary judgment. The Court overruled the parties' exceptions to the First and Second Interim Reports. *Nebraska v. Wyoming*, 113 S. Ct. at 1689, 1701.

[13] The Inland Lakes issue was resolved by the 1993 opinion. *See supra* note 7. The Court also ruled that paragraph V of the decree does not impose absolute ceilings on diversions by Nebraska canals taking from the pivotal reach. The Court held that, under Paragraph V, "Nebraska is free to allocate its share among its canals as it sees fit." *Nebraska v. Wyoming*, 113 S. Ct. at 1701. The Court also held that Paragraph IV does not restrict the actual quantities of water the Nebraska canals may divert under the decree; it simply limits the extent to which Nebraska canals diverting in the mainstem may prevent federal reservoirs from storing water in Wyoming under the junior Wyoming priorities of those reservoirs. *Id.* at 1700.

[14] Nebraska's Memorandum on the Status of the Laramie River Claims (Nov. 12, 1993) ("Neb. Laramie Memo.") (Docket Item No. 591). Nebraska described and developed her injury claims respecting proposed Wyoming developments on the Laramie, including the proposed Corn Creek Irrigation Project (a surface water diversion system, a pump station, a low water diversion weir, a 15,000 acre foot reservoir and a water distribution pipeline) (*id.* at 22-26); the Goshen Irrigation District's new diversion from the Laramie (new permanent higher capacity pumps to re-

randum describing her present and intended administration of water rights in the North Platte Basin,[15] led to the current petitions filed by Nebraska and Wyoming on February 18, 1994 proposing amendments to the pleadings.

On March 21, 1994, the Court referred the petitions of both states to me for my recommendations.[16] If Nebraska's petition is granted, her amended pleadings would supersede and replace her original 1986 pleadings and also the amendments proposed by Nebraska in 1991, which the Court earlier referred to me.[17] Similarly, Wyoming's proposed amended pleadings, if granted, would replace her 1987 counterclaim. The amendments proposed by the two states address additional concerns that have arisen as a result of the Court's 1993 opinion and

---

place a low capacity pump) (*id.* at 26-35); groundwater development on the Laramie (a table provided by Nebraska suggests that from 1945 to 1992, acreage irrigated by groundwater increased from 12 acres to 6,749 acres) (*id.* at 36); and several water projects on the Laramie (*id.* at 40-44).

[15] Wyoming Memorandum Describing the Administration of Water Rights in the North Platte Basin (Sept. 17, 1993) (Wyo. Water Admin. Memo.") (Docket Item No. 565).

[16] *Nebraska v. Wyoming*, 114 S. Ct. 1290 (1994). By that order the Court granted Nebraska's and Wyoming's joint motion requesting that their proposed pleading amendments be filed with me for my recommendations. *See* Nebraska's and Wyoming's Joint Motion to Refer Motions for Leave to File Amended Pleadings to the Special Master for His Recommendation (Feb. 18, 1994) (Docket Item No. 625). The United States filed a brief stating that it did not oppose the Nebraska and Wyoming joint motion to refer even though it did have "serious reservations about the proposed amended pleadings to the extent they would lead to unnecessary or open-ended expansion of this litigation." Brief for the United States on Joint Motion by Nebraska and Wyoming to Refer to Special Master Their Motions for Leave to File Amended Pleadings (Mar. 16, 1994) ("Brief for the United States") at 9 (Docket Item No. 628).

[17] *Nebraska v. Wyoming*, 113 S. Ct. 1689 (1993).

as a result of discovery and learning in the case to date. The Court's ruling on the proposed amendments will shape the issues for final trial preparation.

As with the 1986 Nebraska and 1987 Wyoming petitions for leave to file, the 1994 petitions have been fully briefed, this time initially before me in accordance with the Court's referral. The briefs, transcripts of proceedings, and other materials in the record that are now before the Court enable the Court to dispose of the petitions whether or not the Court agrees with my recommendations.[18] Following a complete round of briefing and supplemental briefing on the important groundwater pumping issue, I held a two-day hearing in Denver, Colorado on July 26 and 27, 1994.[19] Prior to that hearing I advised the parties and *amici* of my tentative recommendations,[20] and they were afforded full opportunity during the hearing to contest or support those tentative recommendations. In view of the full opportunity that has been afforded to respond to my recommendations and the full written record that is available to the Court, I respectfully suggest, in the interest of expedition, that the Court consider disposing of the Nebraska and Wyoming petitions without calling for exceptions.

Both in 1945, when the Court set forth the test for taking jurisdiction in the original proceedings,[21] and in 1993 when the Court set forth its interpretation of the

---

[18] The Court did not hold a hearing in 1987 on whether to grant leave to file the initial pleadings in the case.

[19] July 26, 1994 Transcript and July 27, 1994 Transcript (Docket Item No. 688).

[20] Fourteenth Memorandum of Special Master *attached to* memorandum from Saône B. Crocker, Assistant to Special Master, to Distribution List (July 12, 1994) (Docket Item No. 677).

[21] That test is essentially whether the demands on the stream exceed the supply, that is whether it is overappropriated. *Nebraska v. Wyoming*, 325 U.S. at 610.

scope of the 1986 and 1987 pleadings,[22] the Court established the basis for taking jurisdiction of the North Platte controversies. Consonant with those foundations, I am recommending in this report that the Court largely grant the motions of both Nebraska and Wyoming to amend the pleadings with two major exceptions which are discussed at length below.

The decree presaged a period of more than forty years during which none of the parties came back to the Court to complain. It has become apparent during the current proceedings that the alleged problems caused by changed conditions on the North Platte, and especially by increasing demands from a greater array of interests, have greatly magnified the complexity of the controversies. I have, therefore, come to appreciate that the scope of issues addressed in this proceeding must be broader than those considered between 1934 and 1945 and even those specifically spelled out in the 1986 and 1987 pleadings. A broader scope now will afford greater prospects for another long litigation-free period.

II. HISTORY OF THE CASE

A. The Original Proceedings

During the original proceedings, the issues that the litigating states and the United States put before the Court involved mainly competing irrigation uses,[23] and

---

[22] *Nebraska v. Wyoming*, 113 S. Ct. at 1695. The parties may seek both to enforce and modify the decree, although the standards of proof differ.

[23] During the original proceedings, Special Master Doherty noted the critical need of irrigation to agriculture in Colorado, Wyoming and western Nebraska:

> Generally speaking, it may be said that the entire North Platte basin in Colorado and Wyoming is strictly arid, so that no considerable agriculture is possible without irrigation. Nebraska, on the other hand, from west to east along the North Platte and Platte Rivers, divides roughly into three zones, the

the decree, accordingly, centers on the irrigation season from May 1st to September 30th each year.[24] Municipal and industrial uses were secondary, and, since none of the now highly relevant federal environmental laws were in effect at that time, the important wildlife resources in the Big Bend reach in central Nebraska were entirely unaccounted for.[25] Relative to irrigation, other uses have become more significant since 1945, including wildlife habitat, water-cooled electric power production, and municipal, industrial and recreational uses.

The Court in 1945 expressly selected the principle of proportionate allocation as the basis for the equitable apportionment of the North Platte's natural flows in the pivotal reach, and it allocated those flows seventy-five percent to Nebraska and twenty-five percent to Wyoming.

> western third being arid to semi-arid, where irrigation is indispensable to the type of agriculture carried on, the middle third being sub-humid, where some crops can be raised with reasonable success without irrigation, but where lack of irrigation would seriously limit diversification, and the eastern third, which is sufficiently humid to render irrigation economically unjustified. . . . These belts or zones tend to move eastward in dry periods and westwards in wet cycles.

Report of the Honorable Michael J. Doherty, Special Master (1944) ("Doherty Report") at 26.

[24] There are some exceptions to the irrigation season focus, including, but not limited to: year around limitations in the stream's high mountain reaches constraining Colorado (decree Paragraph I), and Wyoming (decree Paragraph II). Decree Paragraph I(c) also enjoins Colorado from exporting more than 60,000 acre feet of water out of the North Platte basin in any consecutive ten-year period. Storage also takes place in the Inland Lakes in Nebraska during the off-irrigation season.

[25] There are over 200 species of birds that live or migrate in the Central Platte valley. It has over fifty mammals in its habitat, about a dozen amphibians and reptiles and over sixty species of fish in the river. In addition, the flood plain supports a wide variety of trees, shrubs, vines, grasses, sedges and herbs, many of which rely on the wetlands and prairie areas in the basin. *See* Paul A. Johnsgard, *The Platte: Channels In Time* 97-139 (1984).

The method of proportionate allocation was recommended by Special Master Doherty, and the Court adopted the Master's recommendation expressly rejecting Wyoming's contention for a fixed, mass allocation to Nebraska. The Court stated: "We have carefully considered these contentions of Wyoming and have concluded that they do not warrant a departure from the method of allocation proposed by the Special Master." [26]

The decree expressly recognizes some priorities across state lines.[27] For the rest, the decree imposes certain injunctions against Colorado and Wyoming in order to protect downstream equities, establishes certain priorities among federal reservoirs and between senior canals diverting in the pivotal reach and the federal reservoirs, and addresses several water administration issues.[28] While the decree apportions only natural flow waters, it contains some provisions limiting storage in the upper reaches in Colorado and Wyoming and also limiting transbasin diversions by Colorado.[29]

---

[26] *Nebraska v. Wyoming*, 325 U.S. at 626-27. *See also* Doherty Report at 113-14. Special Master Doherty noted (although a mass allocation had been adopted in the apportionment of the Laramie River between Wyoming and Colorado):

> [t]hat there is here no such possibility is conceded. The impossibility is strongly emphasized by Nebraska's Exhibit 432, which shows that the priorities on the main river fall into 113 different brackets or categories alternating among the three states and presenting insuperable difficulties to any attempt to make corresponding mass allocation of water. Even though priorities below Tri-State Dam be eliminated, the difficulty would still be prohibitive.

[27] *See, e.g.*, decree Paragraph IV. *See also infra* note 29.

[28] The North Platte River decree, as modified in 1953 by the Glendo stipulation among the parties, is at Appendix C.

[29] For the purposes of the pending petitions to amend the pleadings, significant elements of the decree include the following:

B. Changed Conditions

The physical history of the river and the new claims for wildlife resulting from federal environmental legislation passed since 1945 provide an important backdrop

---

NATURAL FLOW WATERS

- There is a proportionate allocation of the natural flows in the pivotal Guernsey Dam to Tri-State Dam section during the May 1st to September 30th irrigation season—seventy-five percent to Nebraska and twenty-five percent to Wyoming. Decree Paragraph V.
- Nebraska has the right to designate intrastate the share apportioned to the Nebraska State Line Canals for use on the Nebraska lands served by those canals at the state line. Decree Paragraph V.
- The decree establishes certain key interstate priorities. Decree Paragraph IV. The 1945 Court explained that:

> The combined storage capacity of the North Platte and Kendrick projects is equal to 175 per cent of the long-time annual average river run-off of the river at Pathfinder. We have here storage capacity in excess of the practicable limits of a dependable supply as that term has hitherto been construed. . . .
>
> . . . [A]ny allocation between Wyoming and Nebraska, if it is to be fair and just, must reflect the priorities of appropriators in the two states. Unless the priorities of the downstream canals senior to the four reservoirs and Casper Canal are determined, no allocation is possible.

Nebraska v. Wyoming, 325 U.S. at 626-27 (citation omitted).

STORAGE WATER

- Storage water is not apportioned by the decree and is to be distributed by the owners of storage water rights "in accordance with any lawful contracts." Decree Paragraph VI.
- The decree does not affect the ownership or operation by the United States of the various federal facilities including storage reservoirs and works. Decree Paragraph XII.
- Year around storage limitations are issued against Colorado (decree Paragraph I(b)) and Wyoming. Decree Paragraph II(b).

[Continued]

for understanding the motions to amend the pleadings, especially Count IV of Nebraska's 1994 motion. Alleged structural changes to the river's geomorphology and the

---

[29] [Continued]

- The decree defines priorities across state lines for the federal reservoirs in Wyoming. Decree Paragraph III. Pursuant to the Reclamation Act, 43 U.S.C. §§ 372, *et seq.*, the federal Bureau of Reclamation operates the North Platte and Kendrick Projects on the river. (*See* First Interim Report at Appendix A for a detailed explanation of the projects.) All of the federal reservoirs in Wyoming are junior to the senior appropriators of Nebraska lands supplied by the French Canal and by the State Line Canals diverting at and near Tri-State Dam. Decree Paragraph IV.
- Not more than 40,000 acre feet of the natural flow of the stream and its tributaries "which cannot be stored in upstream reservoirs under . . . this decree" may be stored in Glendo Reservoir during a water year in addition to evaporation losses. Decree Paragraph XVII(b).
- Never more than 100,000 acre feet of storage water may be held in Glendo Reservoir at any one time, "including carryover storage," except for flood water or water restored in Glendo Reservoir that was originally stored in Pathfinder Reservoir. Decree Paragraph XVII(b).

MUNICIPAL USES

- The decree "shall not affect or restrict the use or diversion of water . . . for ordinary and usual domestic, municipal and stock watering purposes and consumption." Decree Paragraph X. I see the proper interpretation and application of Paragraph X as a particularly vexing issue as did the Court in its 1993 opinion. *See Nebraska v. Wyoming*, 113 S. Ct. at 1699 ("We, too, are troubled by Paragraph X").

TRANSBASIN DIVERSION LIMITATION

- Colorado may export no more than 60,000 acre feet of water in any consecutive ten-year period. Decree Paragraph I(c).

ADMINISTRATION OF THE DECREE

- Daily flow computations are required. Decree Paragraph V.
- A formula is provided (adopted from a United States exhibit) to measure evaporation and transportation (river carriage)

wildlife claims are urged by some of the parties and *amici* as new conditions for the Court's consideration. Paragraph XIII(f) of the decree specifically provides for reopening the decree for "[a]ny change in conditions making modification of the decree or the granting of further relief necessary." Further, Paragraph XIII(c) of the decree provides that the decree may be reopened to examine questions related to new or proposed new storage capacity on tributaries between Pathfinder Reservoir and Guernsey Reservoir.

The source of the North Platte's headwaters is early summer snow melt above Pathfinder Dam which produces run-off to the stream's main tributaries in Colorado and in Wyoming. Because of Paragraph XIII(c), the decree's provisions concerning tributaries downstream of Pathfinder Dam, the major component of the North Platte Project, are central to this case.[30] The basis for Nebraska's proposed amendments to its pleadings is that "current and

---

losses unless Nebraska, Wyoming and the United States agree to a modified formula. Decree Paragraph V.

- Construction of additional gauging stations may be required if necessary at the Wyoming-Nebraska state line. Decree Paragraph VII.
- Accurate recordkeeping is required, which must be available for inspection at all times, of irrigated lands and storage by Colorado and Wyoming and exportation by Colorado respecting the higher river reaches governed by Paragraphs I and II. Decree Paragraph IX.

REOPENER CLAUSE

- A broad reopener clause "for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy," decree Paragraph XIII, including reopening the decree to deal with any change in conditions making further relief necessary. Decree Paragraph XIII(f).

[30] Maps of the North Platte River drainage basin are attached as Appendices A and B.

imminent actions" of Wyoming affecting tributary contributions to the mainstem threaten to "upset the equitable balance of the North Platte River established in the Decree." [31]

Moreover, Nebraska, and the United States and those *amici* representing the wildlife interests have asserted at various times during these proceedings that structural changes have occurred in the river basin that affect wildlife uses in downstream Nebraska. It is reasonable to assume that, at least where the non-irrigation season impacts of the issues already in the case are examined, some evidence of those changes and their impact on the critical habitat will be introduced.

In 1944, Special Master Doherty described the character of the stream thus:

> From North Park the North Platte River is a rapidly flowing stream which courses through a relatively narrow valley until it reaches eastern Wyoming, where it gradually broadens out, with accompanying loss of velocity. Proceeding through western and central Nebraska the channel becomes very wide, ranging from 3,000 to more than 6,000 feet. Frequently it divides into small channels separated by sand bars or islands, and in times of low water the stream becomes lost in the deep sands which form its bed. In these stretches it has become familiarly characterized as being "two miles wide and one inch deep." [32]

The physical character of the North Platte River underwent dramatic changes beginning with the federal Bureau

---

[31] Nebraska's Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River Below Wheatland and to Apportion the Unapportioned Natural Flows of the North Platte River (Feb. 18, 1994), Count I ¶ 13 (Docket Item No. 623); Appendix D p. D-4.

[32] Doherty Report at 19.

of Reclamation's construction of the large dams in the early part of this century. Some of the parties and *amici* suggest that there have been important additional changes since 1945 that might need to be explored at trial in the context of any relevant issues.

There appear to be several causes contributing to any changes that may have occurred in the Platte basin. Some of them—for example weather patterns [33]—are unrelated to the problems that form the basis for this litigation, but most of them are implicated in the issues being explored. Changes in administration and usage patterns have allegedly affected flows and stream geomorphology. Many such developments or proposed projects are issues in this case. Changes in the way a state administers water under state law can affect the yield of the river,[34] as can the

---

[33] Climatic conditions, particularly rainfall and snowfall, affect the shape of the river dramatically. *See, e.g.*, Doherty Report at 7 ("In 1930 began a period of extraordinary drouth [sic] in the entire North Platte and Platte River Valleys which has since continued and which has been accompanied by severe shortages of water throughout the three states. This was undoubtedly one of the main factors in the precipitation of the present litigation.")

[34] In the original proceedings, Nebraska complained of several Wyoming water administration practices. They were not specifically enjoined by the decree, however, and continue today. For example, Wyoming Statutes prohibit the regulation of water on the river in the absence of a call. Wyo. Water Admin. Memo. at 5-7 (Docket Item No. 565). Nebraska also complained about the practice in Wyoming of allowing irrigation diversions of more than one acre foot per second per seventy acres, a practice that continues since the 1945 decree. Wyoming state law has expanded this practice of excess diversions to include irrigation water rights with priority dates between March 1, 1945 and March 1, 1985. *Id.* at 11. Wyoming also continues not to observe stream-wide priorities and instead administers the stream by sections. *Id.* at 13-18. Further, "[c]onsistent with Wyoming's practice of not regulating tributaries for the mainstem or imposing any form of regulation without a call, Wyoming had not [before 1945] regulated diversions of junior appropriators for the benefit of Pathfinder." *Id.* at 18-19. This practice has also continued. *Id.* at 20.

exportation of water out of the North Platte Basin.[35] At trial, it is likely that evidence will be introduced respecting several other factors that may be shown to have affected drainage patterns in the North Platte River basin, including groundwater depletions, changes in usage patterns, changes in the character of irrigation and geomorphic changes.[36] The North Platte River has been intensely managed over the past century, inevitably causing permanent changes to the streambed.

Such changes have allegedly had an impact on wildlife habitat, especially in the Big Bend reach in central Nebraska. Traditionally, there were significant flow variations that served to maintain the character of the stream. The summer saw low flows after spring floodings which "carried a great deal of sediment from the sandy streambed, and carved new, braided river channels."[37] These flow variations served to maintain the wide, shallow, and unvegetated character of the streambed. The annual scouring away of the vegetation was important to maintain the predator-free zones on the river for wildlife protection. It also appears that the river has become a much narrower and deeper channel than it was formerly, with semi-permanent islands and sandbars in its center that are no longer regularly scoured by the annual flooding that used to occur,[38] and that this has also allegedly had a negative impact on wildlife habitat.

---

[35] Only Colorado exports water from the North Platte drainage basin and its exportation is limited by the decree to no more than 60,000 acre feet in any ten-year period. *See* Decree Paragraph I(c).

[36] *See generally* Richard A. Simms, *et al.*, *Interstate Compacts and Equitable Apportionment*, 34 Rocky Mtn. Min. L. Inst. § 23.01, § 23.03, at 23-25 to 23-26 (1988).

[37] Memorandum of Platte River Trust in Support of Motion for Leave to Intervene (Mar. 20, 1987) at 16 (Docket Item No. 7).

[38] *See generally* Paul J. Currier, *et al.*, *Migratory Bird Habitat on the Platte and North Platte Rivers in Nebraska* 93-98, 108-114, 119-120 (1985).

Because several key federal environmental laws had not been enacted at the time of the original proceedings, those statutes and the wildlife uses they recognize may also come before the Court now as changed conditions. The Big Bend reach of the stream in Nebraska is now subject to the operation of several federal statutes such as the Endangered Species Act of 1973 [39] and the National Environmental Policy Act of 1969.[40] Indeed, *amicus* The Platte River Whooping Crane Critical Maintenance Trust ("The Platte River Trust") has asserted that the 1945 decree is "not an equitable apportionment because it does not account for the wildlife needs of the habitat." [41]

I suggested in the Second Interim Report that applicable federal laws might result in the Court on occasion "qualify[ing] a state's apportionment with a proviso that the granting of the apportionment does not remove the need to comply with federal environmental laws, or cautioning that the state's apportioned share might have to remain in the stream to the extent instream flows are needed to safeguard environmental values protected by these laws." [42]

From the start, the potential wildlife issues in this case have sharply divided the parties and the *amici*. *Amici* National Audubon Society ("Audubon") and The Platte River Trust have consistently maintained that, although the Supreme Court may not be the ideal forum for the development of wildlife issues, it is the *only* forum that can look at the overall situation rather than at each project, development or license independently and that,

---

[39] 16 U.S.C. §§ 1531, *et seq.*

[40] 42 U.S.C. §§ 4321, *et seq.*

[41] July 26, 1994 Transcript at 137 (Ms. Davis for Platte River Trust) (Docket Item No. 688). *See* Second Interim Report at 6 n.10 (Docket Item No. 463) for the background of The Platte River Trust.

[42] Second Interim Report at 107 n.116 (Docket Item No. 463).

therefore, it alone can ensure that sufficient water is delivered downstream to supply the needs of wildlife.

Colorado and Wyoming, on the other hand, have steadfastly opposed any allocation of water for wildlife needs, or even the introduction of evidence on the instream flows needed to protect wildlife values, insisting that wildlife issues are better served in other forums and through other mechanisms, such as the governors' and the Secretary of the Interior's current wildlife recovery program initiative,[43] and consultation with the federal Fish and Wildlife Service pursuant to the Endangered Species Act, and cooperation between the Environmental Protection Agency and the Army Corps of Engineers under the Clean Water Act.[44]

Nebraska invoked wildlife needs in central Nebraska in both her 1988 and 1991 proposed amendments. Although her motions were denied, Nebraska has persisted in her attempts to have wildlife issues considered in this proceeding in order to protect that equity and to spread the burden of providing water for wildlife habitat.[45]

The United States, viewing the river wearing two different-looking hats—Bureau of Reclamation and Fish and Wildlife Service hats—expresses concern with wildlife issues but steadfastly maintains the view that they are best considered in other forums.[46]

---

[43] *See infra* note 72 for a discussion of this program. *See also, e.g.*, Colorado's Response to Nebraska's Motion for Leave To File Amended Petition at 3 (May 2, 1994) (Docket Item No. 645) ("Through [the contemplated recovery] program . . . the parties will be able to accomplish far more than the Court could grant as relief in this proceeding.").

[44] 33 U.S.C. §§ 1251, *et seq.*

[45] For example, Nebraska's current motion to amend the pleadings for an off-irrigation season apportionment keys on wildlife issues.

[46] *See, e.g.*, July 26, 1994 Transcript at 146-47 (Ms. Patricia Weiss for the United States) (Docket Item No. 688):

While I continue to believe that the time has not yet come for a global non-irrigation season apportionment for wildlife habitat and other uses,[47] I do not doubt that wildlife issues must be considered in, and evidence of the needs of these uses admitted into, this case in the context

---

> [W]e heard quite a bit of discussion in the earlier arguments on where, oh, where is the United States [on wildlife questions].
>
> Well, it seems to us that we're everywhere. We're in the FERC proceedings protecting . . . the needs of the habitat. We're, of course, the initiators or at least in the middle of the Memorandum of Agreement [among the three governors and the Secretary of the Interior]. . . . We have Section 7 consultations going on all the time on the needs of the endangered species. . . . We have 404 permit proceedings that take into account NEPA studies and also the needs of endangered species. . . .

[47] Nebraska, of course, disagrees and would like the Court pursuant to her proposed Count IV to provide for this equity through an off-irrigation season apportionment. *Amici* The Platte River Trust and Audubon also disagree. Not only do they regard the upstream states' participation in Secretary Babbitt's initiative described above as a delaying tactic rather than a genuine effort, but they urge that "[w]ildlife in Nebraska is in serious trouble," July 26, 1994 Transcript at 109 (Mr. Berle for Audubon) (Docket Item No. 688) and that "we are also in a situation where the cumulative effect has been disastrous for the habitat." July 26, 1994 Transcript at 142 (Ms. Davis for The Platte River Trust) (Docket Item No. 688). These *amici* believe that the problem is sufficiently bad to require an affirmative apportionment for wildlife. The Platte River Trust has suggested that, indeed, the Court should "back up the train" to be fair to wildlife:

> We submit that the historic use is not acceptable to wildlife. And that essentially, . . . where [you] . . . seem[] to be leaning is a continued acceptance of the historic use as the existing apportionment of the river.

July 26, 1994 Transcript at 137 (Ms. Davis for The Platte River Trust) (Docket Item No. 688). *Cf. New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Mr. Justice Holmes) ("A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it.").

of the controversies over the waters of the Laramie River and Deer Creek. In the meantime, as I indicated in my Second Interim Report, federal environmental statutes remain the law of the land and can be invoked as needed to prevent interference with downstream flows necessary to protect wildlife habitat.[48]

C. The Current Proceedings

After the Court granted Nebraska leave to file her 1986 petition and Wyoming leave to file her 1987 counterclaim, the case was referred to me [49] essentially containing the following issues: (1) five pending intervention motions; (2) the Inland Lakes issue; (3) tributary issues, including (i) Laramie River issues (Grayrocks and Corn Creek) and (ii) the Deer Creek issue; and (4) Wyoming's counterclaim issues.

1. *Present Status of the 1987 Issues*

a. *Intervention Issues*

The intervention motions were denied by the Court in 1993,[50] following the submission of my Second Interim Report. All five would-be intervenors have been accorded active *amicus* status since the start of these proceedings and have participated in briefings, hearings, and status conferences.[51]

The *amici* represent important interests and have added substantial factual information and learning. Indeed, it is contemplated that they may selectively be permitted to introduce evidence at trial to develop certain issues. *Amici* The Platte River Trust and Audubon represent the

---

[48] Second Interim Report at 107 n.116 (Docket Item No. 463).

[49] *Nebraska v. Wyoming & Colorado*, 483 U.S. 1002 (1987).

[50] *Nebraska v. Wyoming*, 113 S. Ct. at 1694.

[51] All of the *amici* have actively participated since then except for the Nebraska Public Power District.

wildlife interests. *Amicus* Basin Electric Power Cooperative ("Basin Electric") operates the coal-fired power project served by the Grayrocks Dam and Reservoir on the Laramie River.[52] *Amici* Nebraska Public Power District and Central Nebraska Public Power and Irrigation District ("Central Nebraska") are downstream water users in Nebraska. Central Nebraska is the owner and operator of Kingsley Dam, which impounds Lake McConaughy in Nebraska, a two million acre foot storage reservoir that has an important impact upon water supplies for many water uses in Nebraska.

b. *The Inland Lakes Issue*

As previously indicated, the Court fully disposed of the Island Lakes issue in its 1993 opinion.[53]

c. *Tributary Issues*

(1) *Laramie River Issues*

The Court in 1993 determined that the Court's 1922 Laramie River decree[54] apportioning the Laramie's flows

---

[52] *See* Second Interim Report at 6 n.10 (Docket Item No. 463). Initially, I recommended denying Basin Electric intervention rights primarily on the ground that its interests would be protected by Wyoming as its *parens patriae*. During the course of these proceedings, it has become apparent that Wyoming and Basin Electric have opposing interests on some key questions, notably the deliveries required to be made downstream all year around under the 1978 Grayrocks Settlement Agreement. It has also become apparent that Nebraska and Basin Electric have certain identities of interest, especially the notion of substantial injury to Nebraska on the Laramie on account of upstream developments. Thus, I have reopened the door for Basin Electric to petition to intervene as a party, but to date it has expressed contentment with its "position as the roving child of various parens patriae." July 27, 1994 Transcript at 230 (Mr. Weinberg for Basin Electric) (Docket Item No. 688).

[53] *Nebraska v. Wyoming*, 113 S. Ct. at 1696-97. *See supra* note 7.

[54] *Wyoming v. Colorado*, 259 U.S. 419, *amended*, 260 U.S. 1 (1922), *vacated and new decree entered*, 353 U.S. 953 (1957).

between Colorado and Wyoming "did not apportion *all* the waters of the Laramie; it dealt only with flows down to and including the Wheatland Project." [55] The Court further concluded that the 1945 Court "apparently expected that some Laramie water would contribute to the natural flows available for apportionment in the pivotal reach," and did not "affirmatively apportion Laramie flows to Nebraska." [56] Thus, the Court in 1945 "did not decide the fate of the excess Laramie waters." [57]

In light of its Laramie rulings, the Court concluded that Nebraska should come "forward with evidence sufficient to establish that Corn Creek (or some other project on the Laramie) poses a threat of injury serious enough to warrant modification of the decree." [58] Subsequent to the Court's 1993 opinion, I directed Nebraska to elaborate on her alleged Laramie injury threats.[59] Nebraska produced a memorandum on that subject,[60] which contained sufficient facts concerning alleged injury to discourage Wyoming from seeking summary judgment on that issue. It is now accepted that this case will go to trial on the question of whether actual and proposed developments on the Laramie pose substantial injury threats to Nebraska.[61]

---

[55] *Nebraska v. Wyoming*, 113 S. Ct. at 1698.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1699. If Nebraska did not come forward with such evidence, "summary judgment should be entered in favor of Wyoming." *Id.*

[59] Order of the Special Master (July 15, 1993) (Docket Item No. 555).

[60] Neb. Laramie Memo. (Docket Item No. 591). *See supra* note 14.

[61] *See, e.g.*, United States Response to Nebraska's Memorandum on the Status of the Laramie River Claims (December 10, 1993) (Docket Item No. 604) (the "described new uses for Laramie River flows . . . have the potential for significantly, perhaps totally,

(2) *The Deer Creek Issue*

In 1993 the Court declined to grant summary judgment in favor of Wyoming that the proposed new storage reservoir on Deer Creek was exempted from the decree's constraints by Paragraph X.[62] That paragraph provides that the decree "shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption."[63] That provision, which was added to the draft decree near the end of the original proceedings, presents difficult interpretitive and practical issues. At trial it may or may not be necessary to interpret Paragraph X depending on whether Nebraska can prove substantial injury and on whether Wyoming is able to prove that Deer Creek qualifies as an ordinary and usual municipal use. The parties and *amici* now accept that the Deer Creek issues will proceed to trial.

d. *Counterclaim Issues*

The United States has commented that there appears at this point to be "little, if anything, left" of Wyoming's

---

depleting Laramie River inflows to the North Platte River"); *see also* Basin Electric Cooperative's Response to Nebraska's Memorandum on the Status of the Laramie River Claims (December 9, 1993) at 2 (Docket item No. 601) ("Nebraska has now made a substantial showing that Wyoming has authorized . . . construction by the Goshen Irrigation District of new diversion works. . . . It is no longer undisputed that Wyoming is 'not currently interfering with' the releases Basin Electric is obligated to maintain from Grayrocks. . . .). *Id.* at 2 (citing *Nebraska v. Wyoming*, 113 S. Ct. at 1698).

[62] *Nebraska v. Wyoming*, 113 S. Ct. at 1692.

[63] *Nebraska v. Wyoming*, 325 U.S. at 670. The Court was "troubled by Paragraph X." *Nebraska v. Wyoming*, 113 S. Ct. at 1699. If literally applied as Wyoming urges, it could have far-reaching and perhaps unintended implications for the decree's apportionment.

1987 counterclaim after the 1993 opinion.[64] As a technical matter, however, the Court did not dispose of it. In addition, as I interpret the 1987 counterclaim and the 1993 opinion, Wyoming may still litigate whether she has been injured by excessive Nebraska upstream calls for the benefit of irrigation diversions below Tri-State Dam that were determined to have no "claim on water originating in Wyoming and Colorado." [65]

Wyoming alleged in her 1987 counterclaim that Nebraska was violating the decree by demanding North Platte flows for diversions by irrigation canals at and above Tri-State Dam in excess of "the present beneficial use requirements of the Nebraska lands entitled to water under the Decree"; by demanding natural flow and storage water from sources above the Tri-State Dam and diverting those waters to unrecognized and unauthorized uses below the Dam; and by using Glendo Reservoir water outside of the basin of the North Platte River in western Nebraska, for uses other than irrigation.[66]

The Court's 1993 holding respecting those issues, especially the absence of absolute ceilings on canal diversions, appears to have cut away much of the ground underlying the first two elements of the counterclaim. The Court held that Special Master Doherty's calculation of the irrigation requirements of the lands served by the canals in the pivotal reach was undertaken only to determine the "appropriate apportionment of the pivotal reach, not to impose a cap on the canals' total diversions, either individually, or cumulatively." [67] If Nebraska is free to allocate her proportion of the natural flows as she sees

---

[64] Reply Memorandum for the United States on Motions of Nebraska and Wyoming to File Amended Pleadings (May 16, 1994) at 6 (Docket Item No. 658).

[65] *Nebraska v. Wyoming*, 325 U.S. at 628.

[66] Wyo. 1987 Counterclaim at 8-9 (Docket Item No. 5).

[67] *Nebraska v. Wyoming*, 113 S. Ct. at 1701.

fit, then there no longer appears to be any tooth to the Wyoming allegation that Nebraska violates the decree by diverting part of her apportionment below Tri-State, unless calls by Nebraska are shown to be for the benefit of irrigation diversions downstream of Tri-State Dam. Similarly, if, as the Court also held, Paragraph IV of the decree does not limit the absolute quantities of water the canals may divert (but only limits the extent to which Nebraska canals may stop the federal reservoirs in Wyoming from storing pursuant to their junior priorities), then again the irrigation requirements of Nebraska lands served by the apportionment are not, as Wyoming continues to urge, a basis for setting a ceiling on Nebraska's apportionment.[68]

In any event, the counterclaims and cross-claims have raised a factual and legal issue—whether Nebraska canals have made excessive calls—which may be explored as part of Wyoming's defense to Nebraska's claims if not as part of her original counterclaim. To the extent that the Court determines that any surviving aspects of Wyoming's counterclaim implicate concepts of beneficial use and waste, Wyoming has declared that, if she is not permitted to prosecute her proffered new counterclaim and cross-claim on this issue, she will raise this issue as a defense to the claims of Nebraska and the United States.[69]

---

[68] *See* the discussion of Wyoming's beneficial use theories, *infra* note 151.

[69] *See* July 27, 1994 Transcript at 299-300 (Mr. Cook for Wyoming) (Docket Item No. 688).

> Let me also suggest to you that proof of waste will be part of Wyoming's defense of Nebraska's claimed need for new restrictions regarding the Deer Creek or any other depletive use they have now added to their list. . . .
>
> Also, proof of . . . the Bureau of Reclamation's inefficiency and waste will be part of Wyoming's defense to claims that new restrictions are predicated on injury to Nebraska's apportionment of storage.

2. The Motions to Amend the Pleadings

Because the many considerations affecting the status of flows and the stream are so complex, the 1945 decree—despite the absence of litigation for over forty years—turns out to have left open as many questions as it has answered. Thus, today, almost eight years after the filing of Nebraska's 1986 petition, and after much learning about the issues, the case comes before the Court on motions to amend the pleadings in some significant respects. The proposed amendments, if granted, have the potential to change the shape of the decree significantly.

a. *Nebraska's 1988 Proposed Amendment*

In 1988, Nebraska sought to amend her pleadings to modify the decree to require each of the three states to share the burden of providing instream flows necessary to preserve critical wildlife habitat on the North Platte River.[70] The Court denied that motion without opinion.[71] Despite the Court's denial of Nebraska's 1988 petition, wildlife habitat problems continue to present issues that ultimately cannot be ignored in these proceedings.[72]

---

[70] Motion to Amend Petition for an Order Enforcing Decree and for Injunctive Relief (Jan. 11, 1988) (Docket Item No. 47).

[71] *Nebraska v. Wyoming*, 485 U.S. 931 (1988).

[72] Several of the parties and *amici* have urged for my consideration materials in the record showing that, recently, in a similar vein to what Nebraska sought in 1988, the Secretary of the Interior has initiated a process with the governors of the three Platte Basin "to restore fish and wildlife habitat along the central Platte River in Nebraska." *See* Letter from Daniel P. Beard, Bureau of Reclamation, United States Department of the Interior to Dear Friend, June 16, 1994 attached to record submission of the National Audubon Society (July 21, 1994) (Docket Item No. 684). So far, this process appears to have resulted only in a general goal stated in a June 10, 1994 Memorandum of Agreement "to initiate the development of a mutually acceptable Platte River Basin Endangered Species Recovery Implementation Program." *See* Memorandum of Agreement for Central Platte River Basin Endangered Species Recovery Implementation Program, June 10, 1994, attached

b. *Nebraska's 1991 Proposed Amendments*

On October 9, 1991, Nebraska again sought leave to amend her original 1986 petition to state three new claims: Count I sought a global apportionment of the presently unapportioned non-irrigation season natural flows in the pivotal reach; Count II alleged decree violations by Wyoming through the excessive use of natural flow and groundwater for irrigation, depletion of storage water, depletion of return flows and excessive consumption of water on tributaries below Alcova Reservoir; and Count III, for the first time requesting relief against the United States, alleged that the United States was violating the decree by "[c]ontracting for the use of Glendo Reservoir water for other than authorized purposes." [73]

---

to record submission of the National Audubon Society (July 21, 1994) (Docket Item No. 684).

The promise of the project was on the same day undermined by a letter from Colorado Governor Romer to Secretary Babbitt, declaring that Colorado was not obliged by the Memorandum of Agreement "to deliver any more water at the Colorado-Nebraska State line than is provided by interstate compact." *See* Letter from Roy Romer, Governor of the State of Colorado, to the Honorable Bruce Babbitt, Secretary of the Interior, June 10, 1994, attached to record submission of the National Audubon Society (July 21, 1994) (Docket Item No. 684).

When questioned about that letter during the Denver hearing, counsel for Colorado responded, "my knowledge is that Governor Romer signed that agreement in good faith. I believe Governor Romer was being just fairly candid and I think the other states, too, are going to . . . be trying to protect apportionments that they have. Wyoming, I'm sure, will." July 26, 1994 Transcript at 87 (Mr. Seigneur for Colorado) (Docket Item No. 688).

[73] Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims, Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims and Brief in Support of Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims (Oct. 9, 1991) ("Neb. 1991 Proposed

In June, 1993, the Court denied Count I without prejudice and referred Counts II and III to me for my recommendations,[74] and that referral was still pending before me when Nebraska filed her February 1994 proposed amendments.[75]

c. *Nebraska's 1994 Proposed Amendments*

Nebraska's proposed amended pleadings present four claims, several of which have sub-parts.

Count I seeks injunctive relief against Wyoming "to protect and enforce the equitable apportionment and to restrain further violations of the Decree."[76] It reasserts and expands upon Nebraska's 1986 allegations of violations of the decree through proposed construction of tributary storage capacity and tributary development between Pathfinder and Guernsey Reservoirs[77] and specifically challenges Wyoming's proposed Deer Creek Project, and proposed reregulating reservoirs and canal linings in the

---

Amendments") (respectively, "Neb. 1991 Motion," "Neb. 1991 Am. Pet.," and "Neb. 1991 Brief in Support of Am. Pet.") (Docket Item No. 407).

[74] *Nebraska v. Wyoming*, 113 S. Ct. 1941 (1993).

[75] Motion for Leave to File Amended Petition, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River Below Wheatland and to Apportion the Unapportioned Natural Flows of the North Platte River, and Brief in Support of Motion for Leave to File Amended Petition (Feb. 18, 1994) ("Neb. 1994 Proposed Amendments") (respectively, "Neb. 1994 Motion," "Neb. 1994 Am. Pet." (Appendix D), and "Neb. 1994 Br. in Support of Am. Pet.") (Docket Item No. 623). *See* Neb. 1994 Br. in Support of Am. Pet. at 2-3 (Docket Item No. 623) ("To conform its pleadings to the Court's decisions and in the interest of clarity and conciseness, this Amended Petition would replace and supersede Nebraska's Petition [of 1986] and Nebraska's 1991 Amended Petition.").

[76] Neb. 1994 Am. Pet., Count I ¶ 16 (Docket Item No. 623); Appendix D p. D-6.

[77] *Id.* ¶ 11a; Appendix D p. D-4.

Goshen Irrigation District and the Horse Creek Conservancy District.[78]

Count I also reasserts claims presented in the still pending Count II of Nebraska's 1991 Proposed Amendments. Nebraska alleges that Wyoming is violating and threatening to violate the decree by depleting the natural flows of the North Platte by (i) reducing the flow of tributaries entering the stream below the Alcova Reservoir through groundwater development and the depletion of return flows and the construction of reservoirs and (ii) reducing the flow of tributaries and the mainstem as well as canal and lateral flows reaching Nebraska through the same sorts of actions.[79] It also alleges that Wyoming has failed to maintain complete and accurate records of water uses as required by the decree in order to monitor compliance.[80]

Count II requests injunctive relief against the United States for violation of Nebraska's equitable apportionment "by contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir." [81]

---

[78] *Id.* ¶ 12, Appendix D p. D-5. The Horse Creek tributary enters the stream in Nebraska approximately 5.5 miles downstream of Tri-State Dam.

[79] *Id.* ¶¶ 11b, 11c, and 12; Appendix D p. D-5.

[80] *Id.* ¶ 11d; Appendix D p. D-5.

[81] *Id.* Count II ¶ 4; Appendix D p. D-7. Count III of Nebraska's 1991 Proposed Amendments stated this claim and an additional claim concerning the Bureau's allocation of natural flows among its contractors in water-short years contrary to the decree. Nebraska has withdrawn that second part of her 1991 claim against the United States. *See* Neb. 1994 Br. in Support of Am. Pet. at 3. (Docket Item No. 623). *See also* Letter from Richard Simms for Nebraska to Saône B. Crocker, Assistant to Special Master (Aug. 29, 1994) (Docket Item No. 698).

Count III seeks a Nebraska apportionment of Laramie River flows below Wheatland [82] and injunctive relief preventing Wyoming from "impeding or interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement." [83]

Count IV, like the first count of Nebraska's 1991 Proposed Amendment, seeks a global non-irrigation season apportionment due to "changes in conditions" since 1945.[84] Count IV alleges that various Nebraska claims and uses have relied on non-irrigation season flows since 1945, "including irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation, and fish and wildlife, including endangered and threatened species." [85] Nebraska also alleges that demand for the natural flows exceeds supply during the non-irrigation season.[86]

In sum, Nebraska's 1994 Proposed Amendments include those claims from her 1986 petition that remain

---

[82] Neb. 1994 Am. Pet., Count III ¶ 12 (Docket Item No. 623); Appendix D p. D-12.

[83] *Id.* The 1978 Grayrocks Settlement Agreement resulted from litigation over Basin Electric's then proposed development on the Laramie. It limits Grayrocks' consumption of water and requires Basin Electric to release certain minimum flows all year around to the Laramie's confluence with the North Platte. In my Second Interim Report, I recommended that the Court amend the Paragraph XIII reopener clause to countenance possible relief should Wyoming interfere with Basin Electric's performance of its obligations under the Grayrocks Settlement Agreement. Second Interim Report at 110 (Docket Item No. 463). The Court declined, holding that it already had such authority under subparagraph XIII(f). *Nebraska v. Wyoming*, 113 S. Ct. at 1698.

[84] Neb. 1994 Am. Pet., Count IV ¶ 6 (Docket Item No. 623); Appendix D p. D-13.

[85] *Id.* ¶ 7; Appendix D p. D-13.

[86] *Id.* ¶ 8; Appendix D p. D-13. This was the standard for an exercise of original jurisdiction articulated by the Court in 1945. *Nebraska v. Wyoming*, 325 U.S. at 610.

unresolved following the Court's 1993 opinion, all of the claims in her 1991 Proposed Amendments,[87] and some new requests for relief, notably a Laramie apportionment and specific relief enjoining Wyoming from interfering with the Grayrocks Settlement Agreement, as well as relief related to alleged injury from present and threatened pumping of hydrologically connected groundwater, depletion of return flows and inadequate record-keeping.

d. *Wyoming's 1994 Proposed Amendments*

For the first time, Wyoming seeks to amend her 1987 pleadings by adding several new counterclaims and several cross-claims against the United States.[88]

Wyoming's First Counterclaim and First Cross-Claim seek similar relief against Nebraska and the United States. These new claims seek to modify the decree to confirm that Nebraska cannot

> demand direct flow water from Wyoming for use below Tri-State Dam and to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree.[89]

---

[87] Nebraska has not pleaded one aspect of 1991's Count III, complaining against the United States for allocating natural flows among its Warren Act contractors in water-short years, but has withdrawn that aspect of the count. *See supra* note 81.

[88] Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims (Feb. 18, 1994) ("Wyo. 1994 Proposed Amendments") (respectively, "Wyo. 1994 Motion," "Wyo. 1994 Am. Counterclaims And Cross-Claims" (Appendix E), and "Wyo. 1994 Br. in Support of Am. Counterclaims and Cross-Claims") (Docket Item No. 624).

[89] Wyo. 1994 Am. Counterclaims and Cross-Claims at 6 (Docket Item No. 624); Appendix E p. E-6. *See* discussion *infra* pp. 55-64.

Wyoming's Second and Third Counterclaims and Second and Third Cross-Claims concern uses of storage water in Glendo Reservoir. Wyoming alleges that Nebraska and the United States have violated the decree by permitting delivery of 8,000 acre feet of storage water from Glendo Reservoir each year to Central Nebraska Public Power and Irrigation District for non-irrigation uses.[90] In the alternative, by her Third Counterclaim and Cross-Claim, Wyoming asks for an amendment to Paragraph XVII of the decree alleging that its terms are "no longer equitable" due to changed conditions.[91] The Third Cross-Claim is asserted against the United States and Colorado, while the Second Cross-Claim is alleged only against the United States.

Wyoming's Fourth Counterclaim and Fifth Cross-Claim seek to rescind the decree's provisions for determining transportation or carriage losses under Paragraph V "and to leave such determination to state officials under state law."[92] The Fifth Cross-Claim is asserted against Nebraska, Colorado and the United States.

Finally, Wyoming's Fourth Cross-Claim alleges that the United States has not operated the upstream federal reservoirs in Wyoming "in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs."[93] It seeks declaratory and injunctive relief solely against the United States.[94]

---

[90] Wyo. 1994 Am. Counterclaims and Cross-claims, Second Counterclaim ¶ 15 (Docket Item No. 624); Appendix E p. E-6. *See also id.*, Second Cross-Claim ¶ 28, Appendix E pp. E-10 to E-11.

[91] *Id.* Third Counterclaim ¶ 16; Appendix E p. E-6. *See also id.*, Third Cross-Claim ¶ 29; Appendix E p. E-11.

[92] *Id.* Fourth Counterclaim ¶¶ 19-24, Appendix E pp. E-7 to E-8; *id.* Fifth Cross-Claim ¶ 33, Appendix E p. E-12.

[93] Wyo. 1994 Am. Counterclaims and Cross-Claims, Fourth Cross-Claim ¶¶ 30-31 (Docket Item No. 624); Appendix E pp. E-10 to E-11.

[94] *Id.* at 13 (Docket Item No. 624); Appendix E p. E-12.

In sum, Wyoming's proposed counterclaims and cross-claims would replace her 1987 counterclaims, request relief against the United States for the manner in which it has operated federal reservoirs in Wyoming, request relief for the ways in which Nebraska and the United States have managed storage water in Glendo Reservoir and seek to modify the decree for calculating carriage losses.

III. BASIS FOR AND SUMMARY OF RECOMMENDATIONS

In making my recommendations to the Court on the motions to amend the pleadings, I have used the following principles as my guide.

In 1993 the Court set forth the standards for its jurisdiction in this case and for shaping the scope of this litigation. Noting that "nothing would prevent Nebraska from submitting a new petition if we deemed the original one deficient," [95] the Court "decline[d] the invitation, at this late date, to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings." [96]

---

[95] *Nebraska v. Wyoming*, 113 S. Ct. at 1695.

[96] *Id.* The Court also declared the standards for obtaining relief after trial in this proceeding. To *enforce* existing rights in the decree injury need not be shown. A party need show only that alleged conduct, if admitted, violates a right established by the decree. *Id.* The right a party seeks to enforce "need not be stated explicitly in the decree;" if the decree "is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue." *Id.* "[A] higher standard of proof applies" when a state seeks "*modification* . . . rather than enforcement." *Id.* (emphasis added). When what is sought is essentially "a reweighing of equities and an injunction declaring new rights and responsibilities," a showing of "substantial injury" is required for a party to be entitled to new equitable relief. *Id.* at 1696.

With respect to the jurisdictional test for this particular original case, the Court commented that Paragraph XIII's reopener clause

> perhaps eases a plaintiff's burden of establishing, as an initial matter, that a claim falling within its purview is "of that character and dignity which makes the controversy a justiciable one under our original jurisdiction." *Nebraska v. Wyoming*, 325 U.S. at 610. . . . After all, a variety of changed conditions may "promise to disturb the delicate balance of the river" created by the decree. *Id.* at 625.[97]

Previously, the 1945 Court articulated a standard for its exercise of original jurisdiction in the case of an over-appropriated stream that remains part of the law of this case:

> What we have then is a situation where three States assert against a river, whose dependable natural flow during the irrigation season has long been over appropriated, claims based not only on present uses but on projected additional uses as well. . . . [W]here the claims to the water of a river exceed the supply a controversy exists appropriate for judicial determination.

Nebraska v. Wyoming, 325 U.S. at 610.

Based on these standards, with only two key exceptions I am recommending that the Court grant leave to file Nebraska's and Wyoming's proposed amendments to the pleadings.

A. Amendments That I Recommend Be Granted

I recommend that the following Nebraska counts be granted:

- *Count I* (raises both enforcement and modification issues; largely restates and elaborates upon Ne-

---

[97] *Nebraska v. Wyoming*, 113 S. Ct. at 1696.

braska's 1986 pleadings; is based upon changed circumstances that are set forth in some detail and makes allegations that, if supported at trial, suggest substantial injury).

- *Count II* (raises a modification issue respecting Glendo storage that all the parties find appropriate for resolution in the context of this proceeding).

- *Count III* (seeks modification of the decree with respect to Laramie River issues owing to changed conditions, including the changes inhering in the Court's 1993 opinion; in her pleading, and in her Laramie River memorandum, Nebraska makes allegations that, if proved at trial, could cause substantial injury to her apportionment).

I recommend that the following Wyoming counts be granted:

- *Second and Third Counterclaims and Second and Third Cross-Claims* (raise factual issues concerning Glendo storage water suitable for trial in the context of a proceeding enforcing Paragraph XVII of the decree).

- *Fourth Counterclaim and Fifth Cross-Claim* (pray for a modification of the carriage loss formula due to changed conditions).

- *Fourth Cross-Claim* (against the United States alleges unlawful action regarding federal storage water deliveries; also raises factual issues related to enforcement of the decree that are suitable for trial).

B. Amendments That I Recomend Be Denied

First, I am recommending, that the Court exercise its discretion to deny, without prejudice, Nebraska's petition as to Count IV which seeks a global non-irrigation season apportionment. My recommendation to deny is grounded in several considerations concerning the development of

the case. I believe that the trial on issues already in the case, such as Wyoming's proposed developments on the Laramie River and Deer Creek, will inform any later case that the Court may find justiciable concerning non-irrigation season flows, and that the case before me is sufficiently complex to merit attention before turning to any new non-irrigation apportionment case. This is especially so because Nebraska now concedes she will not be seriously threatened by the prospect of a several-year delay on a non-irrigation season apportionment case. Count IV, therefore, is not ripe at present.

Second, I recommended that the Court deny with limited exceptions, with prejudice, Wyoming's First Counterclaim and First Cross-Claim. These are ultimately based on the premise that Nebraska should have a fixed and defined apportionment akin to a mass apportionment based upon principles of beneficial use. There is no question, however, that the Court intended to allocate available supplies in the pivotal reach proportionately between Nebraska and Wyoming and that it rejected Wyoming's mass allocation proposals as unworkable.[98]

IV. RECOMMENDED DISPOSITION OF NEBRASKA'S PROPOSED AMENDMENTS TO THE PLEADINGS

A. Count I

I recommend that the Court grant the first count of Nebraska's motion to amend her pleadings. Count I, is in large measure, a restatement and elaboration of Nebraska's main injury claim "to account for the changed circumstances" since the case was filed in 1986.[99] If the Court permits this amendment, it will replace Nebraska's 1986 pleadings and her 1991 proposed amended plead-

---

[98] *See supra* pp. 9-10 & n.26 and *infra* pp. 56-57.

[99] Nebraska 1994 Proposed Amendments; Neb. 1994 Br. in Support of Am. Pet. at 15 (Docket Item No. 623).

ings. This count will then embody the core of Nebraska's case.

After reciting the basic elements of her 1986 claim and recounting circumstances that have changed in the more than seven plus ensuing years, most notably the issuance of the Court's 1993 opinion, Nebraska complains that Wyoming presently is violating and threatening to violate Nebraska's equitable apportionment by depleting the natural flows of the North Platte River through:

a. The proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

b. Reducing the flow of tributaries entering the North Platte River below Alcova by means of groundwater development, the depletion of return flows, and the construction of reservoirs;

c. Reducing the flow of tributaries and the mainstem in Wyoming, as well as canal and lateral flows reaching Nebraska, by the present and future effects of existing groundwater development and by potential groundwater development for municipal, industrial, and irrigation purposes which would result from favorable action on pending applications to appropriate; and

d. Failing to maintain complete and accurate records of water uses set forth in the decree as is necessary to monitor compliance with the decree.[100]

Initially, both Wyoming and the United States objected to Nebraska's proposal to include a groundwater pumping claim.[101] Upon further consideration, the United

---

[100] Nebraska 1994 Am. Pet. at 4-5 (Docket Item No. 623).

[101] *See* Memorandum for the United States on Motions of Nebraska and Wyoming to File Amended Pleadings (May 2, 1994) ("U.S. May 2, 1994 Memo.") at 2-5 (Docket Item No. 646).

States changed its position and now agrees that Nebraska should have the opportunity to prove injury from present and prospective Wyoming groundwater pumping.[102]

In addition to objecting to Nebraska's attempt to raise the groundwater pumping issue, Wyoming and the United States object to Nebraska's request for specific relief with respect to proposed Wyoming actions that are alleged to threaten depletions of flows of Horse Creek, a tributary of the North Platte River that flows through southeastern Wyoming and enters the mainstem in Nebraska below the pivotal reach, a few miles downstream of Tri-State Dam.

1. *Groundwater Pumping Issues*

Wyoming concedes that groundwater and surface waters are connected and further admits that groundwater pumping in Wyoming can and does in fact deplete surface water flows in the North Platte River. Further, Wyoming concedes that water taken by groundwater pumping and used solely in Wyoming is not counted as part of the supply in the pivotal reach that is divided seventy-five percent, twenty-five percent by the decree. Despite these admissions of critical physical facts, Wyoming takes the position that Nebraska's groundwater claims "FAIL IN BOTH LAW AND EQUITY." [103]

Wyoming argues, first, that Nebraska has no basis in law to assert a groundwater claim because the decree did not limit the use of groundwater in any of the three states but apportioned only surface waters. Wyoming points to the Court's refusal in 1945 to consider groundwater pumping in discrete contexts of the decree. She notes that the Court declined to consider groundwater resources

---

[102] Supplemental Memorandum of the United States on Proposed Amended Claims of Wyoming and Nebraska (July 1, 1994) at 5-6 (Docket Item No. 675).

[103] Wyoming Response to Nebraska's Motion for Leave to File Amended Petition (May 2, 1994) ("Wyoming 1994 Response") at 29-31 (Docket Item No. 651).

available in Nebraska to meet Nebraska users' water requirements and also did not reduce surface water requirements of the Interstate Canal by the available groundwater supplies Nebraska irrigators used to supplement surface diversions.[104]

Wyoming's legal position is flawed in two respects. First, learning and experience since 1945 teaches that the physical facts that she admits are critical when viewed against the clear modern trend in water law to take account of the connection between groundwaters and surface waters. Water law scholars have noted and endorsed the shift to "conjunctive use" of surface waters and groundwaters.[105]

Nebraska and the United States have presented affidavits of experts showing that groundwater pumping in Wyoming sections of the North Platte Basin, both present and threatened, has the potential to deplete significantly the surface flows that are subject to the decree's seventy-five percent, twenty-five percent split. The showing made thus far warrants granting the parties the opportunity to present their case on the impacts of Wyoming groundwater pumping.

---

[104] *Id.* at 30.

[105] *See, e.g.*, Joseph L. Sax, *et al.*, *Legal Controls of Water Resources* 464 (2d ed. 1991) (citation omitted).

> Given the hydrogeologic fact that much groundwater and surface water is linked, governing law should take cognizance of their relationship. . . . [T]he separation of groundwater law from surface water led to the possibility, or even the probability, that hydrologically interconnected waters would be subject to inconsistent legal claims. Courts muddled through, making rules adequate to decide cases, but lacking in overall coherence. Over time, the need for integrated legal governance and management of groundwater and surface water has been acknowledged and has been labelled "conjunctive water use." The term has been defined as "the name applied to several different practices and processes employed to coordinate the use of ground and surface waters in order to get the maximum economic benefit from both resources."

Second, invoking equitable principles, Wyoming asserts that "Nebraska cannot overcome the legal obstacle presented by the fact that Nebraska's own law does not recognize the very injury of which Nebraska complains." [106] Claiming that Nebraska has long been the only western state with virtually no statutory or common law acknowledging the physical interrelationships between surface and groundwater, Wyoming argues that Nebraska's benighted approach is such that she cannot expect the Court to impose groundwater restrictions on other states "as a matter of interstate apportionment." [107]

Nebraska provides a sufficient answer to Wyoming's equitable argument by noting that Wyoming "forgets that it is the upstream state which is subject to decreed restrictions designed to protect the natural flows of the North Platte River in the reach above the state line." [108] At oral argument Nebraska amplified by asking rhetorically, "whether or not ground water in Nebraska is . . . depleting surface flows owed to another state." [109]

Because Wyoming acknowledges that her groundwater pumping has impacts on flows in the pivotal reach, and

---

[106] Wyoming 1994 Response at 29 (Docket Item No. 651).

[107] *Id.* at 31.

[108] Nebraska's Reply to Wyoming's, Colorado's and the United States' Responses to Nebraska's Motion for Leave to File an Amended Petition (May 16, 1994) at 9 ("Neb. 1994 Reply to Responses") (Docket Item No. 659).

[109] July 26, 1994 Transcript at 12 (Mr. Simms for Nebraska) (Docket Item No. 688).

> I do not intend to suggest that Wyoming can in no circumstances make out a claim or defense based on groundwater pumping practices in Nebraska if they can be shown to have an effect on the water apportioned by the decree. For example, during oral argument Nebraska counsel alluded to a possible issue whether groundwater diversions within Nebraska might increase "the frequency of demand or the quantity of demand of natural flow and storage water."

Id. at 12-13.

because there is no legal or equitable basis to exclude evidence respecting injury to Nebraska, Nebraska should have the opportunity to present her injury case at trial respecting present and threatened Wyoming groundwater pumping.

2. *Horse Creek Issue*

Wyoming objects strenuously and the United States objects less strenuously to Nebraska's request for a trial to secure injunctions barring Wyoming depletions of Horse Creek, a south bank tributary of the North Platte River that arises in southeastern Wyoming and flows first east and then north before entering the North Platte River in Nebraska approximately 5.4 miles downstream of the Wyoming-Nebraska state line and approximately 3 miles below the Tri-State Dam. The United States' objection voices both a general concern for a sparing exercise of the Court's original jurisdiction and a concern about injecting claims over depletions stemming from "conservation of water to avoid waste, a practice which would appear praiseworthy." Thus, the United States counsels against adding Nebraska's Horse Creek claims to this case absent a Nebraska showing of substantial injury.[110]

Wyoming's objections to the Horse Creek claim are more specific and focused. She argues, first, that the Court's 1993 opinion rejecting Nebraska's claim to an apportionment of Laramie River flows applies *a fortiori* because Horse Creek enters the mainstem downstream of the apportioned Guernsey to Tri-State section. Second, Wyoming contends that a Nebraska request for an apportionment of Horse Creek does not present a case or controversy worthy of the Court's original jurisdiction because Nebraska fails to show how she could be injured by any proposed Wyoming actions on Horse Creek. Wyoming's no-injury argument is grounded in the fact that Horse Creek enters the North Platte River below the ap-

---

[110] U.S. May 2, 1994 Memo. at 10 (Docket Item No. 646).

portioned reach, that the stream's historical contribution to the mainstem has allegedly been negligible, and that the impacts of Wyoming's proposed re-regulating reservoir and captures of return flows are expected to be small. Wyoming further suggests that the adjudication of Nebraska's claims to Horse Creek would require a separate original action that the Court should accept only if Nebraska can make the requisite showing of need for a Horse Creek apportionment.[111]

Although, according to the Court's standards outlined above,[112] Nebraska is not required to show injury to get into court, the objections of both Wyoming and the United States are in any event largely answered by the showing that Nebraska has made concerning Horse Creek's contribution to the natural flows in the pivotal reach. Nebraska has produced evidence from the original proceedings showing Horse Creek's then substantial average annual contributions of 21,900 acre feet of water annually to the North Platte during the irrigation season and 13,900 acre feet during the non-irrigation season.[113] Nebraska has also alleged proposed actions of Wyoming that threaten to deplete those contributions.

The United States is, of course, correct that water conservation measures are generally praiseworthy, but an important predicate to the decree was the assumed continuation of return flows of the sort provided by Horse Creek to meet the needs of Nebraska irrigators diverting from the mainstem downstream of Tri-State Dam. In its 1945 opinion, the Court agreed with Special Master Doherty's conclusion that the Tri-State Dam to Bridgeport section of the river in Nebraska should be excluded from the apportionment for irrigation purposes "on the grounds that its canals are adequately supplied from return

---

[111] Wyoming 1994 Response at 24-28 (Docket Item No. 651).

[112] *See supra* pp. 33-34.

[113] Neb. 1994 Reply to Responses at 21-22 (Docket Item No. 659).

flows and other local sources." [114] Because return flows from streams such as Horse Creek furnished the predicate for limiting Nebraska's apportionment to the canals diverting at and above Tri-State Dam, Nebraska should have the opportunity to present evidence of significant depletions of those return flows. Stated another way, if Wyoming were allowed with impunity to deplete flows that were a predicate for the geographic limits of Nebraska's apportionment, Nebraska could argue persuasively that the geographic limits of her apportionment should be extended to the river sections downstream of Tri-State Dam.

Thus, Nebraska should have the opportunity to show that she will suffer substantial injury from Wyoming's proposed Horse Creek developments or, for that matter, from Wyoming actions threatening depletions of significant sources of supply flowing out of Wyoming and entering the North Platte below Tri-State Dam.[115]

B. Count II

I also recommend that the Court grant the second count of Nebraska's motion to amend her pleadings. This count alleges violations of the decree by the United States in contracting for the use of Glendo Reservoir storage water in a manner contrary to the stipulated amendment entered in 1953 in anticipation of the reservoir's construction.[116] Nebraska also claims that the United States is violating and threatening to violate Nebraska's decreed rights by contracting for Wyoming uses

---

[114] *Nebraska v. Wyoming*, 325 U.S. at 654-55.

[115] *Cf. Nebraska v. Wyoming*, 113 S. Ct. at 1698-99 (Nebraska should come "forward with evidence sufficient to establish that Corn Creek (*or some other project on the Laramie*) poses a threat of injury serious enough to warrant modification of the decree") (emphasis added).

[116] *See Nebraska v. Wyoming*, 345 U.S. 981 (1953); the stipulated amendment is incorporated into the modified decree at Appendix C.

of Glendo storage water other than for authorized purposes in the basin of the North Platte in southeastern Wyoming below Guernsey Reservoir.

While denying that its Glendo contracting violates the 1953 decree amendment, the United States does not object to adding Count II because it agrees that all parties would benefit from a modification of the Glendo decree provisions. There seems to be a consensus among those concerned that the relevant provisions of the decree should be amended, and there is some prospect that the issue raised in Count II may be resolved by stipulation. If the Count II issues are not so resolved, they are appropriate for addition to the case.[117]

C. Count III

I recommend that the Court grant the third count of Nebraska's motion to amend her pleadings. By Count III Nebraska seeks to amend her claims respecting the Laramie River in light of the Court's 1993 opinion.[118] Count III prays that the Court (i) specify that the inflows of the Laramie below Wheatland are part of the natural flows in the pivotal Guernsey to Tri-State reach of the North Platte apportioned seventy-five percent to Nebraska and twenty-five percent to Wyoming, (ii) enjoin Wyoming from depleting Nebraska's equitable share of the Laramie's contribution to the North Platte, and (iii) enjoin Wyoming from impeding or interfering with releases from Basin Electric's Grayrocks Dam and Reservoir pursuant to the 1978 Grayrocks Settlement Agreement.

The justiciability of Count III is supported by the United States and *amici* Audubon and Basin Electric and

---

[117] Wyoming's proposed Second Counterclaim and Second Cross-Claim or, in the alternative, Third Counterclaim and Third Cross-Claim also implicate Glendo issues. As indicated below, I also recommend that the Court grant those proposed amendments.

[118] *See* discussion *supra* pp. 21-22.

is opposed by Wyoming, essentially on the ground that Nebraska seeks an equitable apportionment of a river that "lies wholly within the states of Wyoming and Colorado." [119]

In 1993 the Court contemplated that Nebraska should have the opportunity to show injury from actions and threatened actions interfering with Laramie River contributions to the North Platte which were counted in the original apportionment and upon which Nebraska has relied.[120] Should Nebraska make the requisite injury showing, she may establish an entitlement to relief although, as a technical matter, I agree with Wyoming that such relief should not take the form of an affirmative Nebraska apportionment of Laramie natural flows. The equitable apportionment doctrine has been employed to apportion interstate water bodies, and it should not be contorted to grant a state an "apportionment" of waters of a stream lying wholly outside that state's boundaries.[121]

---

[119] Wyoming 1994 Response at 33 (Docket Item No. 651).

[120] *Nebraska v. Wyoming*, 113 S. Ct. at 1698-99; *see also* discussion *supra* pp. 21-22. The Laramie is the largest contributor of natural flows entering the mainstem in the critical reach.

[121] For a lucid articulation of this issue, see Basin Electric Power Cooperative's Memorandum in Response to Motions for Leave to Amend Pleadings (Apr. 29, 1994) at 4 n.4 (Docket Item No. 642).

> Reference is sometimes made to "apportioning" the water of the Laramie below the Wheatland Project between Wyoming and Nebraska. *See* Nebr. Amend. Pet. 1; Nebr. Br. 17 (Feb. 18, 1994). Basin submits that, technically, the water of the Laramie cannot be "apportioned" between Wyoming and Nebraska because the Laramie does not extend into Nebraska and is a tributary of a river, the North Platte, the water of which is apportioned among Colorado, Wyoming and Nebraska. To the extent that Nebraska's claims of injury by Wyoming's actions on the Laramie are sustained, Nebraska's rights to have water of the Laramie below Wheatland flow into the North Platte should be secured by appropriate injunction against Wyoming,

As a practical matter, however, there would not appear to be any difference between injunctive relief granted Nebraska against Wyoming's developments on the Laramie and an apportionment of Laramie flows below Wheatland for the benefit of Nebraska. Counsel for Wyoming addressed this question during the July 26, 1994, Denver hearing when pressed to acknowledge the purely semantic character of the debate. Asked whether there was a practical distinction in the relief that could be afforded Nebraska, counsel responded:

> It would if the new apportionment were used as a vehicle to explore the needs of the Laramie River to meet downstream issues, wildlife issues that have heretofore been denied Nebraska in this case.
>
> . . . .
>
> . . . I see the Laramie River issue as I see the Deer Creek or the contributions of ground water. Something that is impacting the flows in the North Platte that may ultimately be divided 75-25 between Nebraska and Wyoming. We don't see it as something separate and unique from beyond that.[122]

Thus Wyoming, through reasoning that is not transparent, fears that a Nebraska "apportionment" of Laramie water could create Nebraska rights that are somehow greater than could be afforded through injunctive relief.

---

not by undertaking to "apportion" such water in the proper sense of that term.

See also Reply Memorandum for the United States (May 16, 1994) at 4 n.3 (Docket Item No. 658) (the United States agrees with Wyoming and Basin Electric "that technically Nebraska cannot request apportionment of a stream that does not flow into Nebraska." Nonetheless the United States concurs with Basin that "whatever it is called, the factual inquiry in determining whether Wyoming should be enjoined from further development of the Laramie is the same.").

[122] July 26, 1994 Transcript at 51-52 (Mr. Cook for Wyoming) (Docket Item No. 688). *See also* Wyoming 1994 Response at 32-34 (Docket Item No. 651).

The Court's 1993 opinion provides no support for the distinction Wyoming would draw between the scope of relief potentially available via apportionment on the one hand or injunctions on the other. While it is too early to forecast what relief will be appropriate or, indeed, whether Nebraska will offer proof of injury that will entitle her to any relief at all, it is not too early to disagree with Wyoming's suggestion that there is an alchemy that limits the Court's injunctive powers in a way that renders those powers incapable of achieving the same results as an equitable apportionment.[123]

D. Count IV

For lack of ripeness, I recommend that the Court exercise its discretion to deny, without prejudice, the fourth count of Nebraska's petition which seeks an equitable apportionment of non-irrigation season natural flows of the North Platte River.

The petition to add Count IV to the pleadings is supported by *amici* Audubon and The Platte River Trust and is opposed by Wyoming, Colorado, and the United States and by *amici* Basin Electric and Central Nebraska.[124]

As previously explained, the 1945 decree equitably apportioned the natural flows of the North Platte River in the pivotal Guernsey to Tri-State reach *only* during the

---

[123] Perhaps Wyoming's real fear is that non-irrigation season injury will be fair game in the Laramie trial, and, of course, it will. The 1978 Grayrocks Settlement Agreement explicitly assures year-round Laramie releases to the North Platte, and, as indicated in the discussion of Nebraska's Count IV, *infra* pp. 50-51, proof of injury from diminished non-irrigation season flows into Nebraska will be part of the Laramie trial.

[124] In opposing Nebraska's Count IV, Central Nebraska strays from the camp of its *parens patriae*, Nebraska, for the first time, agreeing with the United States that Count IV is not yet ripe. *See* July 26, 1994 Transcript at 126-27 (Mr. Hultman for Central Nebraska) (Docket Item No. 688).

five-month irrigation season between May 1st and September 30th. By her Count IV, Nebraska now seeks to take the next step and obtain an apportionment of the heretofore unapportioned non-irrigation season flows.

In 1988, the Court denied without opinion a Nebraska petition to amend the decree to add an apportionment of instream flows for wildlife during the irrigation season.[125] In 1991, Nebraska again petitioned to amend and for the first time asked for an apportionment of non-irrigation season flows for various uses in Nebraska including wildlife habitat uses.

I recommended that Nebraska's 1991 amendment be denied on ripeness grounds and suggested that the discrete issues then in the case be resolved before adding the complex allocation and administration issues that would necessarily be presented in fashioning a global non-irrigation season apportionment. I allowed, however, that "[t]he time will likely come when a year around apportionment will be needed."[126] Within a week after the Court issued its April 1993 opinion it entered an order denying Nebraska's 1991 motion.[127]

Nebraska's submission of Count IV on February 18, 1994, is a renewal of the same motion made in 1991 for a non-irrigation season apportionment. Nebraska urges that new factual development through formal discovery subsequent to the denial of her 1991 motion calls for granting the 1994 motion. Nebraska points to "numerous water development projects" in various stages of development or consideration by the Wyoming Water Development Commission, a Wyoming state agency funded and charged to develop the state's water resources. Nebraska

---

[125] *Nebraska v. Wyoming*, 485 U.S. 931 (1988).

[126] Letter from Special Master Owen Olpin to Justice White (Apr. 9, 1992) at 6 (Docket Item No. 464).

[127] *Nebraska v. Wyoming*, 113 S. Ct. 1941 (1993).

argues that the sheer number of possible Wyoming projects identified through discovery renders her "apprehension . . . well-founded." [128] Apart from the Laramie River and Deer Creek projects already in the case, however, Nebraska makes no allegations that any of the enumerated projects will actually be implemented or concerning the magnitude of the threat to North Platte depletions were they to be implemented. In short, Nebraska has made no meaningful showing of changed circumstances since the Court denied her previous amendment on April 26, 1993.

The Court recently expressed its reluctance to revisit a prior decision respecting its original jurisdiction absent a showing of "any change of circumstance, whether of fact or law." [129] The Court declined to reconsider its previous decision accepting Wyoming's filing against Oklahoma which challenged the constitutionality of Oklahoma's legislative attempt to reduce out-of-state coal shipments into the state. The minimal showing Nebraska has made since the Court's April 26, 1993 denial of her 1991 motion fits within the doctrine of the *Wyoming v. Oklahoma* case.

Moreover, the examination during trial of concrete non-irrigation season injury claims asserted by Nebraska with respect to both the Laramie River, Deer Creek, and other issues in the case will inform any subsequent case there may be on the non-irrigation season. And, as Nebraska's counsel finally conceded during the recent Denver hearing, the near-term threat to her interests from projects other than those "is probably not much." [130] There does not appear to be, therefore, great urgency at this time to revisit the Court's denial of Nebraska's previous

---

[128] Neb. 1994 Br. In Support of Am. Pet. at 28 (Docket Item No. 623).

[129] *Wyoming v. Oklahoma*, 112 S. Ct. 789, 796 (1992).

[130] July 26, 1994 Transcript at 157 (Mr. Simms for Nebraska) (Docket Item No. 688).

petition and to broaden this case to litigate an apportionment case for wildlife or non-irrigation season flows.[131]

With respect to the Laramie, Nebraska has already identified three issues with the potential for near-term significant impacts on year around flows. First, the Grayrocks Settlement Agreement requires Basin Electric to deliver minimum flows downstream to the North Platte mainstem throughout the year. Wyoming, not a party to the 1978 agreement, does not concede that the settlement constrains her water users.[132] The case on the Laramie

---

[131] The Court has more than once validated the concept of ripeness as a prerequisite to assertion of jurisdiction in original cases. In *California v. Texas*, 437 U.S. 601 (1978), the Court denied *per curiam* a motion by California to file a bill of complaint against Texas. The bill asked the Court to settle a dispute over which state had the power to collect death taxes from Howard Hughes. Justice Stewart concurred stating that the denial was due to lack of ripeness of California's claims. The basic problem, according to the concurrence, was that there was no way to be certain whether California would suffer any injury (*i.e.*, whether Mr. Hughes's estate would have insufficient resources to pay California taxes). Justice Stewart noted that even though the "risk of conflict" between the states might have been sufficient for an assertion of jurisdiction by the federal district court, "that risk certainly does not amount to 'clear and convincing evidence' of an actual injury of 'serious magnitude' inflicted by one State upon another"—and hence was insufficiently ripe for review by the Court. *Id.* at 614.

Another original jurisdiction case suggests the same rationale, although it did not explicitly mention the ripeness concept. In *New York v. New Jersey*, 256 U.S. 296, 309 (1921), the Supreme Court refused to assert jurisdiction over New York's request for an injunction barring New Jersey from further discharges of raw sewage into the Upper Bay. The evidence introduced by New York in support of its claims was found "much too meager and indefinite" to support an assertion of jurisdiction. Importantly, however, the Court decreed that the bill be denied without prejudice so that, if New York's proofs of injury were further buttressed at a later date, New York could petition again for relief (in essence the same resolution as proposed herein).

[132] *See* Wyo. Water Admin. Memo. at 61-62 (Docket Item No. 565).

> Wyoming has consistently stated that its water officials are bound by Wyoming law to administer Grayrocks Reservoir in

would examine whether Wyoming should be enjoined from actions that impede or interfere with Basin Electric's guaranteed deliveries in all twelve months. In addition, the proposed Corn Creek and Goshen Irrigation District projects on the Laramie will be examined for their potential to cause year around injury to Nebraska.[133]

In a like manner, Wyoming's proposed storage project on the Deer Creek tributary entering the North Platte between Pathfinder and Guernsey Reservoirs also implicates Nebraska's claims of substantial injury during both the irrigation and non-irrigation seasons. In 1993, the Court resolved an important non-irrigation season issue that is connected to the Deer Creek project[134] when it confirmed a 1904 North Platte Project priority for the storage of 46,000 acre feet annually in the Inland Lakes in Nebraska during the non-irrigation season months of October, November, and April. The remaining Deer Creek issues in the case will also be tried without limiting the evidence to impacts or injury solely during the irrigation season.

Nebraska herself finally conceded that the Laramie, Deer Creek, and other issues that will be addressed in these proceedings abate the urgency of apportioning non-

---

> accordance with its water rights permits and to administer the Laramie River both above and below Grayrocks Reservoir among the various priorities entitled thereto under Wyoming law. . . . Basin Electric entered into the Grayrocks Settlement Agreement in full recognition of Wyoming law. . . .
>
> . . . .
>
> . . . In these matters, Basin Electric will be treated like any other appropriator under Wyoming law.

[133] Those claims would be tried in conjunction with Nebraska's Count III if the Court follows my recommendation to grant it.

[134] Because the Interstate Canal, which delivers water to the Inland Lakes is downstream of Deer Creek, depletion of the non-irrigation season flows of Deer Creek could adversely affect Inland Lakes storage.

irrigation season flows. When pressed during the Denver hearing to provide more specifics and to comment on the likely consequences of a hypothetical three-year delay in litigating the non-irrigation season flows, counsel for Nebraska responded:

> I think the answer to that question, given your tentative decision [to address the non-irrigation season impacts of the Laramie and Deer Creek issues] . . . is probably not much. . . .
>
> . . . But when Count IV was redone . . . we did not know that you would take the view that the non-irrigation season ramifications of the other elements of the case that are either already in the case or may get placed in the case [would be addressed at trial]. . . .[135]

Despite Nebraska's failure to show meaningful change in circumstances since the Court's denial of her most recent amendment, fairness requires that I acknowledge the strong contrary argument made in support of the Court's granting Count IV. In my letter to Justice White in which I recommended denial of the previous amendment, I noted the convincing showing that Nebraska had made at that time respecting the importance of non-irrigation season flows and that Nebraska's proffered pleading arguably met the standard for justiciability adopted by the Court in this case in 1945. Nebraska then as now alleged that the claims to the water during the non-irrigation season exceed the supply, thus bringing her pleading within the Court's 1945 ruling that "[W]here the claims to the water of a river exceed the supply, a controversy exists appropriate for judicial resolution." [136] She then as now alleged substantial injury to various

---

[135] July 26, 1994 Transcript at 157-58 (Mr. Simms for Nebraska) (Docket Item No. 688).

[136] *Nebraska v. Wyoming*, 325 U.S. at 610.

interests in the state. The 1945 opinion certainly affords a ready rationale for the Court to grant Count IV and afford Nebraska the opportunity to present her evidence on whether the North Platte is overappropriated during the non-irrigation season.

The environmental *amici* strongly support Nebraska's motion and argue persuasively for the outcome supported by the Court's 1945 jurisdictional ruling. They argue that there is need for an overall framework for evaluation of each upstream project in lieu of examining them one at a time. That end can be achieved, it is urged, by apportioning the non-irrigation flows and, in that context, establishing what flows are needed overall to protect wildlife habitat and other Nebraska equities. The Court would thus determine what amounts of water the upstream states must contribute downstream to serve those equities and issue appropriate injunctions.

Looking at these issues purely on a case-by-case basis, the argument continues, only allows the effects of one development, one project or one threatened injury to be reviewed. That approach affords no opportunity to measure overall needs as well as supplies for wildlife habitat and other downstream uses in Nebraska because those needs were not established in 1945 and have not been established since.[137]

---

[137] *See supra* pp. 16-20. Apparently, much of the data evidencing necessary flows for wildlife has already been developed. *See* July 27, 1994 Transcript at 269 (Ms. Davis for the Platte River Trust) (Docket Item No. 688).

> And I think that as apocolyptic [sic] as the State of Wyoming tried to paint the complexities and perhaps some of the delays that might occur [if wildlife issues are in this case], I think that there has been quite a bit of data that has already been generated on instream flows and habitat needs through the FERC proceeding and through the work of National Audubon and Platte and others, as well as the states.

See also July 27, 1994 Transcript at 273-74 ("We would hope that you would see this as a matter, if necessary, of crystallization

As indicated at the outset of this Report, the Court could well accept this contrary argument respecting Count IV and grant Nebraska's petition based on the record that is presently before it without the need to invite exceptions. The argument has considerable merit and the Court could well be persuaded by it even though I ultimately was not.

The Court has always exercised its original jurisdiction sparingly and has reserved "substantial discretion" to accept or reject cases proffered to it.[138] In this instance I urge the Court to exercise its discretion to deny Count IV for the reasons set forth above as well as the following reasons.

First, and most important, if the non-irrigation season flows are ever to be apportioned, that apportionment case would be informed—and perhaps even the need for it obviated—by the current proceedings. As I already intend to examine the non-irrigation season impacts of the proposed Wyoming actions that will be tried, there is the prospect for valuable teachings in aid of a future apportionment or forging of interstate accommodations to avoid the need for a further judicial apportionment.

Second, apportioning the non-irrigation season flows will be an entirely new and extremely complex original jurisdiction case. As a practical matter, and given the acknowledged lack of urgency for the non-irrigation season case, there is already a long and complex task still

---

[rather than ripeness] because we think the facts are there.") (Mr. Berle for Audubon) (Docket Item No. 688).

[138] *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). In the *Texas* case, the Court exercised its discretion to take jurisdiction. The Court stated, "In recent years, we have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction." *Id.*

ahead as the case is presently postured even though almost eight years have passed since Nebraska filed her 1986 petition. To add Count IV would surely bring about further delay and complexity.

V. RECOMMENDED DISPOSITION OF WYOMING'S PROPOSED AMENDMENTS TO THE PLEADINGS

A. First Counterclaim and First Cross-Claim

I recommend that the Court deny Wyoming's motion to add her proposed First Counterclaim and First Cross-Claim except in some specific respects discussed below.

Wyoming's First Counterclaim against Nebraska essentially seeks to transform the 1945 equitable apportionment in the pivotal reach from a proportionate sharing of the natural flows into a defined and quantified apportionment that would limit Nebraska's share by a beneficial use standard.[139] This would amount to much more than a modified decree; it would require relitigating matters that were litigated and determined in the original case in 1945 and largely reaffirmed in the Court's 1993 opinion. Similarly, Wyoming's proposed First Cross-Claim against the United States is premised on imposing new beneficial use limitations on Nebraska's apportionment.

Nebraska, the United States and *amici* Central Nebraska, Audubon, and The Platte River Trust all oppose Wyoming's First Counterclaim and First Cross-Claim.

---

[139] Wyoming makes no mention of modifying Nebraska's seventy-five percent share of the natural flows in the pivotal reach of the North Platte. It would seem to follow, therefore, that what Wyoming actually seeks is a decree modification that would give Nebraska seventy-five percent of the natural flows or a quantity of water limited by a beneficial use standard, whichever is less. Any water exceeding either ceiling would presumably be solely Wyoming's.

1. *Restructuring of the Decree*

Wyoming defends her proposed amendments as a quest for "a clearer definition of Nebraska's apportionment" [140] so that Wyoming will not continue to face uncertainty and costly litigation threats whenever Wyoming water users "propose some change of use or new development in the North Platte basin." [141] That quest for certainty is, in actuality, a plea for restructuring the decree in ways that were considered and expressly rejected in the original proceedings. Further, if the relief requested by Wyoming were to be granted, there would necessarily be an intrusion by the Court into Nebraska's intrastate water administration far beyond what the Court was willing to consider in 1945.

The decree that Special Master Doherty recommended and that the Court entered in 1945 expressly rejected Wyoming's proposal at the time for a mass allocation to Nebraska of a defined annual quantity of water:

> Wyoming argues for a mass allocation, e.g. 705,000 acre feet to be allocated to Nebraska for diversion in this section during the irrigation season for Nebraska lands. The Special Master rejected that method. He concluded that it was based on an assumption of dependability of flow which would be bound to result in injustice to one or other of the States. . . . We repeat that the inadequacy of the

---

[140] Wyo. 1994 Br. in Support of Am. Counterclaims and Cross-Claims at 6 (Docket Item No. 624).

[141] *Id.* When asked at oral argument whether Wyoming seeks freedom to use everything except that which might be defined as the Nebraska apportionment and then subtracted from the total flows, counsel for Wyoming responded, "That's the very heart of it. It may not be a specific amount that applies year to year. It may depend on meteorological conditions, snow packs. But that goes to our proof and our evidence. . . ." (July 27, 1994 Transcript at 258-59 (Mr. Cook for Wyoming) (Docket Item No. 688).

supply is too clear to permit adoption of Wyoming's formula.[142]

Wyoming is forthright in stating that she does, indeed, seek a decree modification despite her steadfast position at the start of these proceedings that this case was accepted by the Court only to *enforce* and not to *modify* the decree. Wyoming's position quite understandably changed when the Court confirmed that the scope of this case is not confined to enforcement and countenances possible modifications if the Court's substantial injury test is met.[143]

2. *Relationship of Proposed Amended Counterclaim and Cross-Claim to Wyoming's 1987 Counterclaim*

Wyoming protests that her proposed First Counterclaim and First Cross-Claim ought readily to be granted "[b]ecause there is no substantive change in the [1987] counterclaim that would enlarge the Court's jurisdiction or the scope of relief sought." [144] She goes even further in claiming that she simply seeks to modify the existing decree through the imposition of new injunctions that could just as well have been recommended and adopted "if Wyoming proved its existing counterclaim." [145] I agree with Nebraska and the United States that Wyoming's position in this regard is unconvincing.

The wording of the existing Wyoming counterclaim, which the Court granted leave to file in 1987, gave no signal that Wyoming would seek to reopen the apportionment formula. In the counterclaim, Wyoming simply claimed that Nebraska is violating the decree by "demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use

---

[142] *Nebraska v. Wyoming*, 325 U.S. at 642. *See also supra* pp. 9-10 & n.26.

[143] *Nebraska v. Wyoming*, 113 S. Ct. at 1696.

[144] Wyo. 1994 Br. in Support of Am. Counterclaims and Cross-Claims at 14 (Docket Item No. 624).

[145] *Id.* at 13-14.

requirements of the Nebraska lands entitled to water from those canals under the Decree" and "by demanding natural flow and storage water from sources above Tri-State Dam and bypassing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree." [146] That claim is entirely consistent with a straightforward argument, probably intended at the time, that Nebraska should not be able to block Wyoming's proposed upstream water projects if Wyoming can demonstrate unjustified waste of water supplies that could meet Nebraska users' needs.

Similarly, the Wyoming claim that Nebraska is demanding water and "by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized" [147] gave no signal that Wyoming wished to relitigate the apportionment formula. That language, in the context of the decree, suggests only that Wyoming wished to prevent Nebraska from circumventing the geographic limits the Court imposed on Nebraska's apportionment, that is preventing Nebraska from making upstream calls for the benefit of Nebraska irrigation diversions downstream of Tri-State Dam.

Indeed, during the original proceedings, the United States expressed concern over possible circumvention, and the Court responded, "If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree." [148] Reading the Wyoming 1987 Counterclaim in that context, Nebraska and the United States would likely have obtained no inkling that the counterclaim did any more than accept the Court's invitation to

---

[146] Wyo. 1987 Counterclaim at 8-9 (Docket Item No. 5).

[147] *Id.*

[148] *Nebraska v. Wyoming*, 325 U.S. at 628-29.

address a claimed circumvention of the decree's geographic limits.[149]

---

[149] Against this backdrop, Nebraska has expressed outrage at Wyoming's assertion that the proposed amended First Counterclaim adds nothing to the Wyoming 1987 Counterclaim and that Wyoming believed it would be able to offer the same proof and secure the same relief regardless of whether its present petition for leave were to be granted.

At oral argument, Nebraska's counsel complained of having been snookered:

> Wyoming now explains for the first time this morning that the initial first counterclaim was broader. That it encompassed . . . a theory of beneficial use based on modern standards.
>
> . . . .
>
> Back in late 1986 [sic. 1987], Wyoming knew full well that it could not present a counterclaim to the Court in the first instance that sought to fundamentally change the apportionment that was accomplished in 1945 after 15 years of proceedings. . . .
>
> Consequently, Wyoming couched its initial counterclaim in ambiguous language and hoped that Nebraska wouldn't thoroughly discern what was going on.

July 27, 1994 Transcript at 310-12 (Mr. Simms for Nebraska) (Docket Item No. 688).

Earlier in the day counsel for Wyoming had protested:

> [L]et me assure you, as silly as we are, we prepared for our counterclaims and we have a great investment in evidence that we find will be revealing to you and so we have marched mightily along for this last six and a half years since our counterclaims were accepted or nearly seven with the notion that we were going to have a trial on that and we have prepared to have a trial on that.
>
> And the disappointment would be that somehow, by your actions on Cross-claim—or Counterclaim One, that you would not only deny that amended counterclaim, but somehow, that would preclude us proceeding even on our initial counterclaim. And that is disturbing.

July 27, 1994 Transcript at 259 (Mr. Cook for Wyoming) (Docket Item No. 688).

If Nebraska's suspicions are well-founded, there is little reason to give much credence to Wyoming's protestations that she has

3. *The Court's 1993 Opinion*

The Court in 1993 also addressed the nature of Nebraska's apportionment. Wyoming had claimed that the decree imposed absolute ceilings on diversions by individual canals in the pivotal reach and that Nebraska was barred from requesting diversions in excess of the "irrigation requirements" calculated by Special Master Doherty and relied upon by the Court in framing the decree. Responding to Wyoming's contention, the Court in 1993 concluded:

> But the requirements were calculated for the purpose of determining the appropriate apportionment of the pivotal reach, not to impose a cap on the canals' total diversions, either individually or cumulatively. See Doherty Report 161 . . . Paragraph V of the decree, which sets forth the apportionment, makes no mention of diversion ceilings and expressly states that Nebraska is free to allocate its share among its canals as it sees fit. See 325 U.S., at 667.[150]

This holding and its rationale substantially undercut Wyoming's proposed First Counterclaim and First Cross-Claim. Wyoming in fact is now proposing to have the Court do exactly what Doherty and the Court expressly determined not to do, that is to elevate Doherty's calculation of *requirements*[151] to an absolute ceiling on Ne-

---

devoted great effort to preparing for the trial of her beneficial use limitation thesis.

[150] *Nebraska v. Wyoming*, 113 S. Ct. at 1701.

[151] The decree adopted the proportionate allocation or flat percentage method based upon Special Master Doherty's calculations of the dependable supply from 1931-1940. *Nebraska v. Wyoming*, 325 U.S. at 626. Although the words "beneficial use" appear in both Special Master Doherty's Report and in the original opinion, they are not tied to defined standards in the decree. There are no criteria for nor definitions of waste or beneficial use in either the Report or the decree. Special Master Doherty did, however, devote considerable energy to addressing historic diversions. *See, e.g.*, Doherty Report at 76-79 and 247-252. He concluded "that an ap-

braska's apportionment. While the holding in 1993 only answered the narrow question whether there were diversion limits on a canal-by-canal basis, Wyoming does not now dispute that presently there is no defined ceiling to Nebraska's apportionment and that Wyoming is asking the Court to modify the decree and impose a ceiling for the first time.

Wyoming attempts to deal with the 1993 holding by arguing that the Court acknowledged "the continuing dispute over the extent to which Paragraph IV limits the call of the Nebraska State Line Canals against the federal reservoirs." [152] The dispute over Paragraph IV that the 1993 opinion left open, however, does not support the granting of Wyoming's First Counterclaim and First Cross-Claim. In responding to Wyoming's request for a ruling that the federal reservoirs have no obligation to bypass natural flow to a senior canal making excessive calls, the Court simply declined to make a ruling at that time, "[b]ecause there is as yet inadequate factual development on the question whether Nebraska canals have in fact made excessive calls." [153] The possibility of proof of viola-

---

portionment now made should be based *primarily* upon the conditions of water supply which have prevailed since 1930." *Id.* at 10 (emphasis added). This disturbed Justice Roberts. In dissenting, he stated, "[T]he Court now undertakes to assume jurisdiction over three quasi-sovereign states and to supervise, for all time, their respective uses of an interstate stream on the basis of past use." *Nebraska v. Wyoming*, 325 U.S. at 657 (Roberts, J., dissenting). Justice Roberts noted further that some of the natural flows "went to waste in the area [the Special Master] considered critical." *Id.* at 663. Thus, the dissent certainly assumed that proportionate allocation was the basis for the decree, and that it was not grounded in the concept of beneficial use. To the extent that Special Master Doherty quantified historic uses, he apparently did so to gain a sense of what the ratio for allocation should be.

[152] Wyo. 1994 First Counterclaim ¶ 10 (Docket Item No. 624); Appendix E pp. E-3 to E-4.

[153] *Nebraska v. Wyoming*, 113 S. Ct. at 1701.

tion of Paragraph IV priorities, of course, remains open, but proving such violations would not establish beneficial use limits on the canals "either individually or cumulatively." [154]

4. *Practical and Policy Considerations*

Practical and policy considerations also counsel against imposing mass allocation, beneficial use, or kindred ceilings on Nebraska's apportionment.

First, the Nebraska lands served by diversions in the pivotal reach (or, for that matter, Wyoming lands served by those same canals) do not by any means receive all the water they need solely from the apportioned natural flows. As Special Master Doherty's report makes clear, fully half and even more of the annual water needs of these lands is frequently supplied by storage water which is not allocated by the decree. Thus to allocate natural flows on a "beneficial use" basis would necessarily require a consideration of more than the amount of the natural flows that would be needed for crop production on Nebraska's lands. It would be necessary to factor in widely varying storage water supplies, meteorological conditions, and doubtless other imponderables as well.

Second, any limitation based on beneficial uses would require far-reaching Court policing of water rights administration within Nebraska to ensure that Nebraska's diversions did not exceed the beneficial use limitations, an exercise that is totally at odds with the holding of the Court in 1993 that Paragraph V of the decree gives Nebraska freedom to allocate water among canals as she sees fit.[155]

---

[154] *Id.*

[155] *Nebraska v. Wyoming*, 113 S. Ct. at 1701. The 1945 Court was also concerned about intruding on intra-state water administration. Commenting on a proposal by the United States and Nebraska for allocating "blocks" of water on a priority basis, the Court observed that the proposal had the virtue of preserving "the

Third, any defined ceiling grounded solely in beneficial irrigation use requirements, as Wyoming proposes, would take no account of the non-irrigation water uses that are served by Nebraska's share of North Platte waters, including domestic, municipal, and industrial uses and wildlife habitat needs.[156]

5. *Remaining Elements of the Proposed Amended First Counterclaim and First Cross-Claim*

While I recommend denial of Wyoming's First Counterclaim and the First Cross-Claim insofar as they amount to a request to relitigate the apportionment formula, that denial should not foreclose Wyoming from litigating certain discrete issues contained within those pleading amendments, including issues such as the following.

First, Wyoming (and indeed Colorado and the United States) should have the opportunity to litigate whether Nebraska has circumvented the decree by unlawfully calling for upstream flows for the use of irrigators diverting below Tri-State contrary to the geographic limitation in the 1945 apportionment.[157]

Second, Wyoming should be allowed to defend against relevant Nebraska claims seeking to constrain Wyoming's

---

full control of each State over the internal administration of her water supply." *Nebraska v. Wyoming*, 325 U.S. at 644. The flat percentage method the Court ultimately adopted had that same virtue.

[156] Wyoming contests Nebraska's petition for a non-irrigation season apportionment arguing that "the Court has not accepted any claims to relitigate matters that were previously determined." Wyo. 1944 Br. in Support of Am. Counterclaims and Cross-Claims at 3 (Docket Item No. 624). That principle has no clearer application than to Wyoming's own attempt to relitigate the allocation formula for the decree's apportionment of natural flows in the pivotal reach.

[157] *Nebraska v. Wyoming*, 325 U.S. at 628-29.

upstream uses by introducing evidence of Nebraska's waste of water supplies which, if they were not wasted, might obviate the need for Nebraska's upstream calls. This defensive use of evidence of waste is, of course, quite different from affirmatively fixing Nebraska's overall apportionment by summing beneficial use requirements of the various Nebraska canals as Wyoming proposes.[158]

Third, Wyoming should be entitled to offer evidence of violations of Paragraph IV of the decree via excess Nebraska canal calls or natural flow bypasses by the United States in contravention of the priorities established in Paragraph IV of the decree.

The foregoing enumeration is not intended to be exhaustive and does not foreclose the possibility of Wyoming pursuing other issues within the First Counterclaim and First Cross-Claim that do not amount to an attempt to relitigate the basic apportionment formula that was settled in 1945.

B. Wyoming Second and Third Counterclaims and Wyoming Second and Third Cross-Claims

I recommend that the Court grant Wyoming's Second and Third Counterclaims and her Second and Third Cross-Claims. Wyoming's Second Counterclaim against Nebraska and Second Cross-Claim against the United States allege violations of Paragraph XVII of the decree

---

[158] On this point I disagree with the apparent thrust of an argument made by counsel for Nebraska at the Denver hearing. Against the prospect that Wyoming might attempt to present such defensive evidence, Nebraska's counsel stated: "[I]n answer to that, I think the Court's ruling on whether or not the first counterclaim is let in in the first place will control *in limine* anything that happens in that regard later on." July 27, 1994 Transcript at 313 (Mr. Simms for Nebraska) (Docket Item No. 688).

Without prejudging any ruling that might be required on objections to evidence, the denial of the First Counterclaim would not necessarily bar Wyoming from introducing evidence of waste in all circumstances of the case.

which governs Glendo Reservoir storage water deliveries and uses. Wyoming claims that both Nebraska and the United States have violated the decree through water deliveries "for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements." [159] Wyoming seeks injunctions against further such violations.

In the alternative, Wyoming's Third Counterclaim and Third Cross-Claim seek an amendment of Paragraph XVII on the ground that Wyoming and Nebraska have been unable fully to use their respective shares of Glendo storage water under the constraints that the decree presently imposes. Accordingly, Wyoming asks for a modification to remove the decree's restrictions on the place and manner of use of water stored in Glendo.

No objections have been raised to these counterclaims and cross-claims. At the present time, the prospect of settling this issue is high as all parties seem to agree that the Glendo storage water delivery restrictions have outlived their usefulness. The granting of Wyoming's petition will enable the trial of this issue to proceed if there is no settlement.

C. Wyoming Fourth Counterclaim and Wyoming Fifth Cross-Claim

I recommend that the Court grant Wyoming's petition with respect to her Fourth Counterclaim against Nebraska and Fifth Cross-Claim against the United States.

Wyoming complains that the procedure for determining transportation or "carriage" losses adopted in Paragraph V of the decree is no longer factually accurate or equitable and prays that the Court amend Paragraph V "to remove the provisions for determination of carriage losses and to leave such determination to state officials under

---

[159] Wyo. 1994 Am. Counterclaims and Cross-Claims, Second Counterclaim ¶ 15 (Docket Item No. 624); Appendix E p. E-6.

state law." [160] Determining transportation losses is a matter of importance under the decree because it is key to dividing storage waters which are not apportioned by the decree from natural flow waters which are apportioned.

Nebraska does not dispute that the issue of transportation losses is justiciable under the Court's original jurisdiction and would not oppose Wyoming's Fourth Counterclaim "if Wyoming sought a judicial resolution of the issue." Nebraska does, however, object to the relief for which Wyoming prays which would leave the determination of transportation losses to the Wyoming State Engineer, "an agency of one of the interested parties." [161]

Nebraska's concern about turning transportation loss determinations over to the Wyoming State Engineer goes to the appropriate relief to be granted *if* Wyoming's evidence establishes a case for modifying the transportation loss formula. The Court's granting of Wyoming's petition, however, would certainly not foreordain the relief to be granted. Accordingly, if Wyoming makes the case for changing the transportation loss calculation procedure, all the parties should be heard on how such losses should be determined in the future.

The United States differs from Nebraska in arguing that it is premature for the Court to take jurisdiction of the transportation loss issue absent "an adequate development of the facts . . . to demonstrate [a] case or controversy." The United States advises of ongoing negotiations in which the parties are attempting to reach agreement on this matter.[162]

---

[160] Wyo. 1994 Am. Counterclaims and Cross-Claims, Fourth Counterclaim at 9 (Docket Item No. 624); Appendix E p. E-8.

[161] Nebraska's Response to Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims (May 2, 1994) at 22 ("Neb. 1994 Response to Wyo. Motion for Leave to File") (Docket Item No. 650).

[162] U.S. May 2, 1994 Memo. at 16-18 (Docket Item No. 646).

I find Nebraska's position more persuasive than that of the United States as I agree that Wyoming has presented a justiciable controversy. It seems more efficent to bring this controversy into the case now so that Wyoming will not be required to petition the Court again if the issue is not resolved in the ongoing negotiations.[163] I have urged the parties to persevere in attempting to resolve this issue on its technical merits, but it is an appropriate issue for resolution in these proceedings if it is not resolved consensually.

D. Wyoming Fourth Cross-Claim

I recommend that the Court grant Wyoming's Fourth Cross-Claim against the United States.

Wyoming's Fourth Cross-Claim states a claim solely against the United States for alleged failure to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by the contracts governing water use from those reservoirs. More specifically Wyoming alleges:

> [T]he United States has allocated storage water in a manner which (a) upsets the equitable balance on which the apportionment of natural flow was based, (b) results in the allocation of natural flow contrary

---

[163] The United States also contends that under Paragraph V of the decree the carriage loss problem Wyoming raises is already addressed by language vesting authority in the Bureau of Reclamation to determine time intervals for passage of water from point to point from day to day in the absence of agreement on that matter among Nebraska, Wyoming, and the United States. *Id.* at 17. There are at least two responses to that. First, the United States does not provide assurance that the issues presently under discussion among the parties are confined merely to the time intervals for passage of water from point to point, the only issue on which the decree empowers the Bureau of Reclamation to act in the event of an *impasse*. Second, the vesting of sole authority in the United States on any transportation loss issue is subject to the same objections that Nebraska raises about leaving the sole determination of a transport loss formula to the Wyoming State Engineer.

> to the provisions of the Decree and contrary to the equitable apportionment, (c) promotes inefficiency and waste of water contrary to federal and state law, (d) violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. § 523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under the project" and (e) exceeds the limitations in the contracts under the Warren Act.[164]

Wyoming asks for injunctions against future violations of law and a declaration requiring the United States to comply with the terms of its contracts.[165]

The United States and Nebraska oppose Wyoming's Fourth Cross-Claim, while *amicus* Basin Electric supports it. The opposition is grounded on essentially two arguments. First, the United States and Nebraska contend that the claimed violations of law and contracts should not be drawn into this case because storage water was omitted from the decree's apportionment. Second, they contend that the federal compliance issue is already before another forum, the Wyoming federal district court in *Goshen Irrigation District v. United States*, No. C89-0161-J, and that the issue, therefore, should be left for resolution by the federal district court.[166] These argu-

---

[164] Wyo. 1994 Am. Counterclaims and Cross-Claims, Fourth Cross-Claim ¶ 31 (Docket Item No. 624); Appendix E p. E-11.

[165] *Id.* at 13; Appendix E p. E-12.

[166] Nebraska asserts a third argument that can summarily be dismissed. She perceives that the real Wyoming agenda is to restrict Nebraska's use of storage water so that any "saved" water can be stored upstream for possible use in Wyoming. Thus, Nebraska complains that the net effect would be less water for Nebraska and more water for Wyoming. That the consequence of the United States' improper conduct, if proved, allows Nebraska to use more storage water than she should under the decree ought to result in more water for Wyoming.

ments will be addressed in turn.[167]

1. *Storage Water Not Apportioned*

While the decree did not apportion storage water among the three states, Wyoming correctly points out that the availability of storage water from federal reservoirs was part of the calculus for the final equitable apportionment of natural flows under the decree. Special Master Doherty made the point in his report to the Court:

> [I]n an equitable distribution of natural flow between States, where the ultimate question is the State's share, and the rights of individual appropriators are taken into account only for their bearing on the larger right of the State, storage water available to the appropriators of each State may be considered in determining the State's equitable share of the natural flow.[168]

Even more to the point, Special Master Doherty observed that, because storage water was disposed of under the North Platte Project and Warren Act contracts, "the obli-

---

[167] U.S. May 2, 1994 Memo. at 18-26 (Docket Item No. 646); Neb. 1994 Response to Wyo. Motion for Leave to File at 23-26 (Docket Item No. 650); Reply Memorandum for the United States (May 16, 1994) at 7-8 (Docket Item No. 658).

[168] Doherty Report at 156. The 1945 Court agreed with Special Master Doherty on this issue:

> As we have said, storage water, though not apportioned, may be taken into account in determining each State's equitable share of the natural flow. . . . Our problem involves . . . an appraisal of the equities between the claimants whom Wyoming represents on the one hand and those represented by Nebraska on the other. We conclude that the early Wyoming uses, the return flows, and the greater storage water rights which Nebraska appropriators have in this section [the Guernsey to Tri-State reach] compared with those of Wyoming appropriators tip the scales in favor of the flat percentage system recommended by the Special Master.

Nebraska v. Wyoming, 325 U.S. at 645 (citation omitted).

gation and necessity of performance of these contracts must be recognized by the decree." [169]

Thus, even though the decree did not apportion storage water, it was framed based in part on assumptions about storage water rights and deliveries, and, therefore, Wyoming should have the opportunity to go forward with her claims that the United States has violated the law and contracts rights and that such violations have the effect of undermining Wyoming's apportionment.[170] It should not be assumed that any relief to which Wyoming might be entitled would interfere with the United States' ownership and operation of the federal reservoirs.[171]

2. *Availability of Alternative Forum*

The second ground urged against Wyoming's Fourth Cross-Claim is that the proper forum for resolving controversies involving federal contracts is the federal district court. The United States, citing the pendency of the *Goshen Irrigation District* case, is particularly insistent that "[i]t is inappropriate to invoke the original jurisdic-

---

[169] *Id.* at 69.

[170] In this respect, Wyoming's position is not unlike Nebraska's position in attempting to prevent depletions of Horse Creek flows into the mainstem below Tri-State Dam. In that instance Nebraska argues that the continuation of return flows below Tri-State Dam was a predicate for Nebraska's apportionment being limited to reaches of the North Platte upriver from the dam. In a like vein, Wyoming argues that a predicate for the apportionment she received under the decree was an assumed delivery of storage water by the United States in accordance with law and United States compliance with the North Platte Project and with the Warren Act contracts.

[171] The Court in 1945 assumed that the decree would not "interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities. We repeat that the decree is restricted to an apportionment of the natural flow." *Nebraska v. Wyoming*, 325 U.S. at 630.

tion of this Court to consider the issue already presented to the federal district court." [172]

This second ground is unpersuasive when account is taken of the *Goshen Irrigation District* case. Most important, neither Wyoming nor Nebraska are parties to the case, and the federal district court, therefore, does not have jurisdiction to consider whether any violations that may be proven on the part of the United States will have the effect of undermining the 1945 apportionment decree. The situation is comparable to the Court's previous taking of jurisdiction over the Inland Lakes issue even though at the time of Nebraska's initial petition in 1986 a case was pending in Wyoming federal district court in which the Wyoming State Engineer was attempting to litigate the same question against the Bureau of Reclamation.[173]

Respectfully submitted,

OWEN OLPIN
Special Master

---

[172] U.S. May 2, 1994 Memo. at 25-26 (Docket Item No. 646).

[173] Further, Basin Electric attacks the United States' opposition to the Fourth Cross-Claim by noting that there is a pending United States motion to dismiss *Goshen Irrigation District* on sovereign immunity grounds after four years of litigation and after submission of the case to the court for decision. Basin Electric observes:

> [W]hile urging this Court not to take jurisdiction because the issue is pending in the federal district court, the government is seeking to defeat that court's jurisdiction. The advice of an earlier attorney general, "Watch what we do, not what we say," if heeded here, discloses that the government's objection is substantially duplicitous and unworthy of credence.

Basin Electric Power Cooperative's Memorandum Replying to Responses to Motion for Leave to Amend Pleadings (May 13, 1994) at 6 (Docket Item No. 655).

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1-2

APPENDIX C

The North Platte Decree
325 U.S. 665 (1945),
as modified
345 U.S. 981 (1953).

DECREE.

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 145,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys,

agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals. Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova, and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to

this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Fleet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,740	43	61	70	61	45
Guernsey Reservoir to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off-set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder reservoir—considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used

as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platt River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities[;]

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River

from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies[;]

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953 the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596; upon the rights of Colorado and its water users when and if water hereafter is available for storage and used in connection with the Kendrick Project in Wyoming[;]

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming, and Nebraska, copies of this decree fully authenticated under the seal of this Court.

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When the Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado or Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and, further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored

in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

APPENDIX D

No. 108, Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

AMENDED PETITION FOR AN ORDER ENFORCING DECREE, FOR INJUNCTIVE RELIEF, AND FOR MODIFICATION OF THE DECREE TO SPECIFY AN OPPORTIONMENT OF THE NATURAL FLOWS OF THE LARAMIE RIVER BELOW WHEATLAND AND TO APPORTION THE UNAPPORTIONED NATURAL FLOWS OF THE NORTH PLATTE RIVER

The State of Nebraska hereby petitions the Court for an order protecting and enforcing the equitable apportionment established by the Court through the provisions of its Decree of October 8, 1945, *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted on April 20, 1993, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), granting injunctive relief against the State of Wyoming and the United States of America, modifying the Decree to specify an apportionment of the natural flows of the Laramie River below Wheatland during the irrigation season, and apportion-

ing the unapportioned natural flows of the North Platte River during the non-irrigation season. In support hereof, Nebraska states:

COUNT I

1. In *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), the Court equitably apportioned the natural flows of the North Platte River during the irrigation season, and partially apportioned the natural flows during the non-irrigation season, among the states of Nebraska, Wyoming, and Colorado, except that it did not affirmatively preclude depletion of the contributions of the Laramie River to the critical Guernsey Dam to Tri-State Dam reach of the North Platte River, notwithstanding that such flows were expected to continue.

2. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season, by enjoining Colorado: (a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 145,000 acres of land in Jackson County, Colorado, during any one irrigation season; (b) from storing more than 17,000 acre feet of water from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year; and (c) from exporting more than 60,000 acre feet of water out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, in any period of 10 consecutive years.

3. In *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Court equitably apportioned the natural flows of the North Platte River during the irrigation season in the Guernsey Dam

to Tri-State Dam reach of the river, 75% to Nebraska and 25% to Wyoming, and imposed restrictions on the use of the waters of the North Platte River and certain of its tributaries in Wyoming to ensure, to the extent possible, that dependable and usable inflows would accrue to the reach from the upstream reaches and through accretions within the reach.

4. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), contained only those injunctions deemed necessary in 1945 to ensure that dependable and usable inflows would accrue to the Guernsey Dam to Tri-State Dam reach from the upstream reaches and through accretions within the reach to effectuate the apportionment of the total natural flows in the reach.

5. The Court in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953), expressly declined to impose additional injunctions on the use or development of the natural flows arising above and within the Guernsey Dam to Tri-State Dam reach of the river in the absence of a contemporaneous threat of development, notwithstanding that the flows were expected to continue to provide dependable and usable inflows that would accrue to the reach from upstream reaches and through accretions within the reach.

6. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981, as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), did not specify the apportionment of the contributions of the Laramie River accruing within the Guernsey Dam to Tri-State Dam reach by injunction or other restrictions because there was no contemporaneous threat of further depletions to those flows.

7. While the Court in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), did not apportion storage water, except as specified in

¶ XVII of the Decree, the equitable apportionment was premised on the recognition that Pathfinder, Seminoe, Alcova, Guernsey, and Glendo reservoirs store North Platte River water and would be operated to serve the same lands for which natural flows are apportioned, as well as for certain other lands in Nebraska and Wyoming.

8. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Decree enjoins the storage of waters other than in accordance with the relative priorities, as among themselves, of Pathfinder, Guernsey, Seminoe, Alcova, and Glendo reservoirs, defined and fixed in that order, and provides that these reservoirs be operated junior to the priorities of the French Canal and the State Line Canals.

9. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589 (1945), *modified* 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), the Inland Lakes have a right to accrue 46,000 acre feet of natural flow in the lakes during the months of October, November, and April, with a priority date of December 6, 1904, and to temporarily store the water in Glendo and Guernsey reservoirs during the non-irrigation season.

10. Pursuant to *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), the Decree requires Wyoming to prepare and maintain complete and accurate records of the total area of land irrigated and the storage of the water of the North Platte River and its tributaries.

11. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Court by depleting the natural flows of the North Platte River by:

a. The proposed construction of storage capacity on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

b. Reducing the flow of tributaries entering the North Platte River below Alcova by means of groundwater development, the depletion of return flows, and the construction of reservoirs;

c. Reducing the flow of tributaries and the mainstem in Wyoming, as well as canal and lateral flows reaching Nebraska, by the present and future effects of existing groundwater development and by potential groundwater development for municipal, industrial, and irrigation purposes which would result from favorable action on pending applications to appropriate; and

d. Failing to maintain complete and accurate records of water uses set forth in the Decree as is necessary to monitor compliance with the Decree.

12. The State of Wyoming is presently violating and threatens to violate the State of Nebraska's equitable apportionment established by the Court by depleting the natural flows of the North Platte River by such projects as the proposed Deer Creek Project, reregulating reservoirs and canal linings in the Goshen Irrigation District and the Horse Creek Conservancy District, and by permitting unlimited depletion of groundwater that is hydrologically connected to the North Platte River and its tributaries.

13. The current and imminent actions of the State of Wyoming contravene the Court's opinions in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and the Court's decision in *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), and upset the equitable balance of the North Platte River established in the Decree.

14. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and continues to upset the equitable appor-

tionment established by the Court through the provisions of its Decree.

15. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

16. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to protect and enforce the equitable apportionment and to restrain further violations of the Decree by the State of Wyoming.

17. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modication of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court enter its order requiring the State of Wyoming to

comply with the provisions of the Decree of October 8, 1945, as modified on June 15, 1953, and interpreted on April 20, 1993, and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree.

COUNT II

1. The allegations of Count I are adopted and incorporated herein.

2. The Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), apportioned the natural flows of the North Platte River among the states of Nebraska, Wyoming, and Colorado during the irrigation season, except for the inflows of the Laramie River to the Guernsey Dam to Tri-State Dam reach, and partially apportioned the natural flows during the non-irrigation season.

3. As amended in *Nebraska v. Wyoming*, 345 U.S. 981 (1953), the Decree states that the State of Wyoming, pursuant to contracts entered between irrigation water users and the U.S. Bureau of Reclamation, is entitled to 15,000 acre feet of Glendo Reservoir storage water to be used for the irrigation of lands in the North Platte River Basin in southeastern Wyoming below Guernsey Dam.

4. The United States is presently violating and threatens to violate the State of Nebraska's equitable apportionment established in the Decree by contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir.

5. The current and imminent actions of the United States violate the Decree and upset the equitable balance of the North Platte River established by the Court.

6. Despite the State of Nebraska's efforts to resolve these matters, the United States has refused to alter its actions and continues to violate the Decree.

7. The United States' present and threatened violations of the Decree are causing and will cause irreparable injury to the State of Nebraska and its citizens.

8. The State of Nebraska has no effective remedy at law to enforce its rights against the United States. Injunctive relief is necessary to enforce the Decree and to restrain further violations by the United States.

WHEREFORE, the State of Nebraska prays that the Court enter its order construing the Decree and requiring the United States to comply with the provisions of the Decree in *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953), and enjoining the United States from violating the State of Nebraska's apportionment under the Decree.

COUNT III

1. The allegations of Counts I and II are adopted and incorporated herein.

2. While the Court's decision in *Nebraska v. Wyoming,* 113 S.Ct. 1689 (1993), establishes that the inflows of the Laramie River to the Guernsey Dam to Tri-State Dam reach of the North Platte River during the irrigation season were not affirmatively specified as part of the apportionment of the inflows accruing to the reach from the upstream reaches and the other accretions within the reach, the decision recognizes that the Court in 1945 "expected that some Laramie water would contribute to the natural flows available for apportionment in the [Guernsey Dam to Tri-State Dam] reach." *Nebraska v. Wyoming,* 113 S.Ct. at 1698.

3. The Grayrocks Project is a post-Decree reservoir located in Wyoming on the Laramie River below Wheat-

land, operated by Basin Electric Power Cooperative. During construction of the project, the State of Nebraska challenged its legality. *Nebraska v. Rural Electrification Admin.*, 12 Env't Rep. Cas. (BNA) 1156 (D. Neb. 1978), *appeal dismissed,* 594 F.2d 870 (8th Cir. 1979). The litigation was settled by an agreement entitled Agreement of Settlement and Compromise dated December 4, 1978 ("Grayrocks Settlement Agreement"). In exchange for Basin Electric guaranteeing to operate the project to ensure the delivery of specified quantities of water to the confluence of the Laramie and North Platte rivers, Nebraska and other plaintiffs agreed to withdraw their objections to the project. The State of Wyoming, while encouraged to participate in the Agreement in order to resolve any outstanding controversies, refused to become a party to the litigation or the Grayrocks Settlement Agreement.

4. The State of Nebraska has historically relied on and continues to rely on the contributions of the Laramie River to the North Platte River as an important component of the natural flows apportioned in the critical Guernsey Dam to Tri-State Dam reach, in satisfaction of the guaranteed minimum stream flows set forth in the Grayrocks Settlement Agreement, and for other equities below Tri-State Dam in Nebraska that rely on the Laramie inflows to the North Platte River during the irrigation and non-irrigation seasons.

5. Wyoming has refused to honor, and has in fact sanctioned depletions, of the minimum flows guaranteed by the Grayrocks Settlement Agreement.

6. The State of Wyoming is presently causing injury to and threatens to further injure beneficial uses of and equitable reliance on the inflows of the Laramie River in existence before and after the entry of the Decree in 1945, including depletions of the minimum flows guaranteed by the Grayrocks Settlement Agreement by:

a. The proposed construction of additional river pumping, diversion, and storage facilities at the confluence of the Laramie and the North Platte rivers;

b. The construction and use of new pumping facilities on the Laramie River;

c. The construction of facilities to reregulate, store, and consume return flows;

d. Reducing the inflows of the Laramie River and its tributaries in Wyoming by the present and future effects of existing and threatened groundwater development; and

e. Additional activities which reduce the natural flows of the Laramie River to the North Platte River.

7. The State of Wyoming is presently causing injury to and threatens to further injure beneficial uses of and equitable reliance on the inflows of the Laramie River in existence before and after the entry of the Decree in 1945, including depletions of the minimum flows guaranteed by the Grayrocks Settlement Agreement, by such projects as the proposed Corn Creek Project, Goshen Irrigation District's river pumps, groundwater pumping, and surface water depletions.

8. The current and imminent actions of the State of Wyoming contravene the Court's opinions in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945), *modified*, 345 U.S. 981 (1953), and the Court's recent decision, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), upset the equitable balance of the North Platte River established in the Decree, threaten the continuation of the guaranteed minimum flows set forth in the Grayrocks Settlement Agreement, and threaten to upset the equitable reliance on North Platte River waters in Nebraska.

9. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter

its actions and continues to upset Nebraska's equitable apportionment and threaten Nebraska's equitable reliance on these waters.

10. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

11. The State of Nebraska has no effective remedy at law to enforce its rights against the State of Wyoming. Injunctive relief is necessary to protect equitable interests in Nebraska and to restrain further violations by the State of Wyoming.

12. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (f) Any change in conditions making modifications of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court specify that the inflows of the Laramie River below Wheatland are a component of the equitable apportionment of the natural flows in the Guernsey Dam to Tri-State Dam reach, 75% to Nebraska and 25% to Wyoming, and enjoin the State of Wyoming from depleting Nebraska's equitable share of the Laramie River's contribution to the North Platte River and from impeding or

interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement.

COUNT IV

1. The allegations of Counts I, II, and III are adopted and incorporated herein.

2. The Decree in *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953), equitably apportions the natural flows of the North Platte River during the irrigation season among the states of Nebraska, Wyoming, and Colorado, except that it does not specify an apportionment of the contributions of the Laramie River to the critical Guernsey Dam to Tri-State Dam reach of the North Platte River, notwithstanding that such flows were expected to continue.

3. The Court in *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953), partially apportioned the natural flows of the North Platte River during the non-irrigation season by regulating the storage or accrual of natural flow by:

a. Enjoining Wyoming from storing more than 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above Pathfinder Reservoir during each water year, *i.e.,* October 1 through September 30;

b. Enjoining Colorado from storing more than 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, during each water year;

c. Enjoining Wyoming from storing water out of priority with respect to specified reservoirs, except for out of priority storage or releases from Seminoe Reservoir for the generation of electricity if such storage or releases do not materially interfere with irrigation by the French Canal and the State Line Canals;

d. Enjoining Colorado from exporting more than 60,000 acre feet of water out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, in any period of 10 consecutive years; and

e. Apportioning the accrual of 46,000 acre feet during the months of October, November, and April to Nebraska for storage in the Inland Lakes.

4. The Decree specifies the State of Colorado's equitable apportionment in its entirety, during the irrigation season and during the non-irrigation season.

5. Except as specified in ¶ 3, *supra,* the non-irrigation season flows of the North Platte River were not equitably apportioned in *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953), as interpreted in *Nebraska v. Wyoming,* 113 S.Ct. 1689 (1993), notwithstanding that the Court sought to balance the equities among the states of Nebraska, Wyoming, and Colorado to provide certainty and resolve future disputes.

6. Since the equitable apportionment was effectuated in *Nebraska v. Wyoming,* 325 U.S. 589, 665 (1945), *modified,* 345 U.S. 981 (1953), there have been changes in conditions making modification of the Decree or the granting of further relief necessary and appropriate.

7. Since the entry of the Decree, the unapportioned non-irrigation season flows of the North Platte River have been and continue to be relied upon by equitable interests in the State of Nebraska, including irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation, and fish and wildlife, including endangered and threatened species.

8. The demand for unapportioned non-irrigation season flows by equities in Nebraska presently beneficially using such water exceeds the supply.

9. Numerous existing and proposed developments in Wyoming threaten to utilize and deplete the unapportioned non-irrigation season flows of the North Platte River.

10. It is necessary to apportion the unapportioned non-irrigation season flows of the North Platte River to protect downstream equities in Nebraska from upstream development in Wyoming which threatens to deplete these critical but unprotected non-irrigation season flows.

11. As part of the Grayrocks Settlement Agreement entered in 1978, Basin Electric guaranteed to operate the Grayrocks Project to deliver specified quantities of water to the confluence of the Laramie and North Platte rivers during the non-irrigation season.

12. The State of Nebraska has historically relied on and continues to rely on the non-irrigation season contributions of the Laramie River to the North Platte River guaranteed by the Grayrocks Settlement Agreement.

13. The State of Wyoming's existing and proposed actions have depleted and threaten to further deplete the minimum non-irrigation season flows guaranteed by the Grayrocks Settlement Agreement.

14. The allegations contained in this count do not constitute assertions by the State of Nebraska that the storage of water in Grayrocks Reservoir, the present depletions therefrom for the purposes of the Grayrocks Project or the passage through or release of waters from the Grayrocks Reservoir in accordance with the Grayrocks Settlement Agreement, constitute injuries to Nebraska's claim to an equitable share of the non-irrigation season flows of the North Platte River.

15. The current and imminent actions of the State of Wyoming infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

16. Despite the State of Nebraska's efforts to resolve these matters, the State of Wyoming has refused to alter its actions and has continued to assert its alleged right to infringe upon Nebraska's equitable share of the North Platte River during the non-irrigation season.

17. The State of Wyoming's present and threatened actions are causing and will cause irreparable injury to the State of Nebraska and its citizens.

18. The State of Nebraska has no effective remedy at law to enforce its equitable rights against the State of Wyoming. A determination of each state's equitable share and injunctive relief are necessary to restrain further in-infringement by Wyoming on Nebraska's equitable share of the North Platte River.

19. The Court expressly retained jurisdiction to resolve the present controversy in ¶ XIII of the Decree of October 8, 1945, as modified on June 15, 1953, which provides:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:
>
> * * *
>
> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 671-72.

WHEREFORE, the State of Nebraska prays that the Court equitably apportion the unapportioned non-irrigation season flows of the North Platte River between Nebraska and Wyoming and that the Court enjoin the State

of Wyoming from depleting Nebraska's equitable share of the North Platte River during the non-irrigation season.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

/s/ Richard A. Simms
RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN

SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

APPENDIX E

No. 108, Original

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

WYOMING AMENDED COUNTERCLAIMS AND CROSS-CLAIMS

DEFINITIONS

The terms "Nebraska", "the United States" and "federal reservoirs", as used in this document, are defined as follows:

"Nebraska" means the State of Nebraska, its officials and representatives as well as individual and collective users of water within its borders.

"United States" means the United States of America and each of its agencies, representatives or officials having responsibility for administration or operation of any of the federal reservoirs.

"Federal reserviors" refers to those reservoirs and related facilities on the North Platte River owned and operated by the United States Bureau of Reclamation as part of the North Platte Project, the Kendrick Project or

the Kortes or Glendo units of the Pick-Sloan Missouri Basin Program.

GENERAL ALLEGATIONS

The General Allegations in paragraphs 1 through 8 and in paragraphs 34 and 35 are incorporated in each of the counterclaims and cross-claims herein.

1. The Court has jurisdiction of the counterclaims asserted against Nebraska and the cross-claims asserted against Colorado under U.S. Const. art. III, § 2, cl. 2, under 28 U.S.C. § 1251(a), and under Paragraph XIII of the decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945) ("the Decree").

2. The Court has jurisdiction of the cross-claims asserted against the United States herein under U.S. Const. art. III, § 2, cl. 2, under 28 U.S.C. § 1251(b)(2), and under Paragraph XIII of the Decree.

3. In accepting this case, the Court has exercised its retained jurisdiction pursuant to Paragraph XIII of the Decree to consider the need for modification of the Decree in response to a change of conditions that might render the Decree inequitable. Included within the relief available in this case is the addition of injunctive relief or the release of restrictions as necessary to give effect to the apportionment.

4. In 1945, the Court determined that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. 589, 628 (1945). The Court also held,

> If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

Id. at 628-629.

5. The equitable apportionment implemented by the Decree was intended to protect the supply of irrigation water to meet the reasonable beneficial use requirements of the Nebraska lands under canals that divert from the North Platte River at and upstream of Tri-State Dam.

6. The Decree is being administered by Nebraska and the United States in such a way as to result in natural flow and federal storage water from Wyoming being delivered to uses in Nebraska diverting below Tri-State Dam that were not included as part of Nebraska's equitable apportionment of the North Platte River.

7. The United States was granted leave to intervene as a party to this case and, as a result, is bound by the Court's Decree and has consented to the full and complete adjudication of all matters and issues determined in the earlier litigation or reasonably incidental thereto.

8. The cross-claims against the United States are for the purpose of carrying into effect the apportionment determined by the Court in 1945, as modified in 1953. As such, they are assertable against the United States as a party.

FIRST COUNTERCLAIM

9. Nebraska has circumvented and violated the equitable apportionment effected by the Decree, and continues to do so, by the actions set forth in this first counterclaim. Such actions have either violated the Decree or prevented the Decree from carrying into effect the apportionment determined by the Court in its 1945 opinion. As a consequence, the Decree must be enforced, interpreted and modified to add appropriate relief that gives full effect to the apportionment determined by the Court's 1945 opinion.

10. The Court in its April 20, 1993 opinion, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), concluded that Paragraph IV of the Decree does not impose individual ceilings on the amount of water that may be diverted by an individual canal in Nebraska. The Court acknowl-

edged the continuing dispute over the extent to which Paragraph IV limits the call of the Nebraska State Line Canals against the federal reservoirs. Under Paragraph IV, Wyoming is enjoined to administer the federal reservoirs in priority as to the Nebraska State Line Canals only up to the diversion limits fixed in Paragraph IV. When those diversion limits are exceeded, Wyoming is under no obligation to regulate the storage of water in the federal reservoirs to make water available for diversion by the State Line Canals.

11. Nebraska has circumvented and violated the equitable apportionment by demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree and by demanding that the federal reservoirs in Wyoming, which are described in Paragraph IV of the Decree, bypass water to the Nebraska State Line Canals in excess of the diversion limitations and seasonal volumetric limitations fixed in Paragraph IV of the Decree.

12. In recent years the United States has placed a call against water rights in Wyoming that are junior to the water storage rights of the federal reservoirs and Wyoming officials have administered that call by regulating or curtailing such junior diversions in Wyoming. No such call had ever been placed before 1988.

13. As a result of Nebraska demanding and the United States delivering more water through the federal reservoirs than the Nebraska canals are entitled to under the equitable apportionment, storage in the federal reservoirs has been depleted or foregone, thereby increasing the call by the federal reservoirs to the injury of junior water rights in Wyoming. Nebraska and the United States have failed and refused to recognize or enforce reasonable limits on the diversions by the Nebraska canals.

14. Nebraska has circumvented and violated the equitable apportionment, and continues to do so, by demand-

ing natural flow and storage water from sources above Tri-State Dam and bypassing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree. Specific examples of such action include,

a. Diverting more water than needed for beneficial, irrigation use and returning such water unused through wasteways to the North Platte River below Tri-State Dam;

b. Knowingly using substantially inflated estimates of the amount of irrigated acreage on which the allowable diversion rates are determined and thereby allowing diversions substantially in excess of the reasonable water requirements of the lands actually irrigated;

c. Failing to adequately monitor and measure the use of water on Nebraska lands under canals diverting in the Guernsey to Tri-State Dam section of the North Platte River;

d. Assuming and applying unreasonably large and unsubstantiated transportation losses in the administration of storage water deliveries below Tri-State Dam, resulting in substantial quantities of storage water being passed below Tri-State Dam where such storage water is not used in accordance with the contracts governing its use but is converted from storage water to water available for appropriation by other uses below Tri-State Dam;

e. Allowing excessive diversions into the Interstate Canal which result in the storage of natural flow in the Inland Lakes during the irrigation season (1) in excess of the right to store up to 46,000 acre-feet of water during October, November and April each year for the Inland Lakes as established by the Court's April 20, 1993 opinion and (2) without regard to whether such water is needed to meet the beneficial use requirements of the lands using water from the Inland Lakes.

WHEREFORE, Wyoming requests the Court to enjoin Nebraska's continuing circumvention and violation of the apportionment, to modify the Decree as necessary to confirm that equitable apportionment does not allow Nebraska to demand direct flow water from Wyoming for use below Tri-State Dam and to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree.

SECOND COUNTERCLAIM

15. Nebraska has violated Paragraph XVII of the Decree by permitting the delivery of storage water from Glendo Reservoir in the amount of 8,000 acre-feet per year to the Central Nebraska Public Power and Irrigation District for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements.

WHEREFORE, Wyoming requests the Court to enjoin further violations of Paragraph XVII of the Decree by Nebraska.

THIRD COUNTERCLAIM

16. In the alternative to the second counterclaim, Wyoming asserts that the restrictions on the place and manner of use of water stored in Glendo Reservoir set forth in Paragraph XVII of the Decree are no longer equitable. Conditions have changed so that such limitations on the place and manner of use of Glendo Reservoir storage water prevent the equitable apportionment of the water storable in Glendo Reservoir as originally intended by the parties and the Court when the Decree was amended in 1953.

17. The intent and purpose of the stipulation modifying the Decree in 1953 was to apportion the use of water

stored in Glendo Reservoir in the amount of 25,000 acre-feet per year to Nebraska and 15,000 acre-feet per year to Wyoming.

18. Wyoming and Nebraska have been unable to fully use their respective shares of the Glendo storage water under Paragraph XVII of the Decree within the limitations on place and manner of use imposed by Paragraph XVII. The Decree has failed to carry out the apportionment intended by the 1953 stipulation. The Decree therefore should be modified to remove the restrictions in Paragraph XVII on the place and manner of use of water stored in Glendo Reservoir.

WHEREFORE, Wyoming requests the Court to modify Paragraph XVII of the Decree to allow the 15,000 acre-feet of storage water in Glendo Reservoir allocated to Wyoming and the 25,000 acre-feet of storage water in Glendo Reservoir allocated to Nebraska to be used directly or by exchange for all beneficial uses under the laws of the respective states.

FOURTH COUNTERCLAIM

19. The procedure for determining transportation or "carriage" losses set forth in Paragraph V of the Decree is no longer factually accurate or equitable.

20. The States of Nebraska and Wyoming and the United States have jointly funded technical studies of the transportation losses addressed in Paragraph V. Such studies demonstrate that sufficient data and technology is now available to make a more accurate estimate of transportation losses than the estimate produced by use of the procedure required by Paragraph V of the Decree.

21. The parties have been unable to agree on a procedure for determining transportation losses that would replace those required by Paragraph V of the Decree.

22. The administration of the apportionment of natural flow under the Decree requires the daily segregation

of natural flow and storage water in the river. A reasonably accurate determination of carriage losses is essential to that administration. In order to carry into effect the apportionment determined by the Court in 1945, as modified in 1953, more accurate procedures and data should be used in determining and assessing transportation losses.

23. Failure to properly assess transportation losses invalidates the segregation of natural flow and storage necessary to administer the decreed apportionment, upsets the equitable balance of the apportionment and injures Wyoming users.

24. The provision in Paragraph V of the Decree dictating the formula for determination of carriage losses is not necessary and unduly complicates the Decree. The State of Wyoming, through the office of the Wyoming State Engineer, has the authority and duty to determine and assess carriage losses for storage water deliveries on every stream in Wyoming.

WHEREFORE, Wyoming requests the Court to amend Paragraph V of the Decree to remove the provisions for determination of carriage losses and to leave such determination to state officials under state law.

FIRST CROSS-CLAIM

25. The allegations in paragraphs 9 through 14 of the first counterclaim are hereby incorporated in this first cross-claim.

26. The United States has circumvented and violated the equitable apportionment, and continues to do so, by operating the federal reservoirs to deliver natural flow water for diversion by Nebraska irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the lands entitled to water from those canals under the Decree, by failing to store water in the federal reservoirs when available under Paragraph IV

of the Decree and by bypassing or releasing water to the Nebraska State Line Canals in excess of the diversion limitations and seasonal volumetric limitations fixed in Paragraph IV of the Decree.

27. The United States has circumvented and violated the equitable apportionment, and continues to do so, by operating the federal reservoirs to bypass river flows and release storage water from sources above Tri-State Dam with knowledge of and acquiescence in the bypass or diversion of such water for uses below Tri-State Dam that are not recognized or authorized by the Decree. Specific examples of actions by the United States that undermine the decreed apportionment include,

a. Operating the federal reservoirs to deliver to Nebraska users more water than is reasonably required when such deliveries result in the return of water unused through wasteways to the North Platte River below Tri-State Dam;

b. Delivering water substantially in excess of the beneficial use requirements of the lands actually irrigated in Nebraska by honoring demands for water delivery to Nebraska water users based on irrigated acreage estimates that Nebraska and United States officials know are substantially inflated but which Nebraska officials nevertheless use to set the allowable diversion rates;

c. Failing to require adequate monitoring and measuring of uses of water on Nebraska lands under canals diverting in the Guernsey to Tri-State Dam section of the North Platte River;

d. Delivering excessive amounts of Glendo Reservoir storage water and North Platte Project storage water under the Warren Act to Nebraska irrigators and acquiescing in the application by Nebraska officials of unreasonably large and unsubstantiated transportation losses in the administration of storage water deliveries below Tri-State Dam, all of which results in substantial quanti-

ties of storage water being passed below Tri-State Dam where such storage water is not used in accordance with the contracts governing its use but is converted from storage water to water available for appropriation by other uses below Tri-State Dam;

e. Operating the federal reservoirs and canals so as to deliver excessive amounts of natural flow for diversion by the Interstate Canal, resulting in the storage of water in the Inland Lakes during the irrigation season in excess of the storage rights of the Inland Lakes determined by the Court and without regard to whether such water is needed to meet the beneficial use requirements of the lands using water from the Inland Lakes;

f. Operating the federal reservoirs for the generation of electric power in a manner which interferes with the primary use of the reservoirs for irrigation.

WHEREFORE, Wyoming requests the Court (1) to enjoin the United States' continuing violations of the apportionment, (2) to modify the Decree as necessary to confirm that the equitable apportionment does not allow Nebraska to demand water from Wyoming for use below Tri-State Dam, (3) to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass natural flow to the Nebraska State Line Canals in excess of the diversion limits or annual volumetric limitations fixed in Paragraph IV of the Decree and (4) to enjoin the United States and its officials to operate and administer the federal reservoirs so that water is not released to Nebraska canals in a manner that circumvents the equitable apportionment.

SECOND CROSS-CLAIM

28. The United States has violated Paragraph XVII of the Decree and the federal law governing use of Glendo Reservoir by delivering storage water from Glendo Reser-

voir in the amount of 8,000 acre-feet per year to the Central Nebraska Public Power and Irrigation District for uses other than irrigation and for use as a substitute for storage water previously available under permanent arrangements.

WHEREFORE, Wyoming requests the Court to enjoin further violations of Paragraph XVII of the Decree and federal law by the United States.

THIRD CROSS-CLAIM

29. In the alternative to the second cross-claim, Wyoming incorporates by reference the third counterclaim, including paragraphs 16 through 18, *supra,* and asserts the claim for modification of Paragraph XVII of the Decree set forth therein as a cross-claim against the United States and the State of Colorado.

FOURTH CROSS-CLAIM

30. The equitable apportionment which the Decree was intended to carry into effect was premised in part on the assumption that the United States would operate the federal reservoirs and deliver storage water in accordance with applicable federal and state law and in accordance with the contracts governing use of water from the federal reservoirs.

31. The United States has failed to operate the federal reservoirs in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs. Specifically, the United States has allocated storage water in a manner which (a) upsets the equitable balance on which the apportionment of natural flow was based, (b) results in the allocation of natural flow contrary to the provisions of the Decree and contrary to the equitable apportionment, (c) promotes inefficiency and waste of water contrary to federal and state law, (d) violates the

contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. § 523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under any project" after "preserving a first right to lands and entrymen under the project" and (e) exceeds the limitations in the contracts under the Warren Act.

32. Such action by the United States has caused water shortages to occur more frequently and to be more severe, thereby causing injury to Wyoming and its water users.

WHEREFORE, Wyoming requests the Court (1) to declare that the United States' allocation procedure is contrary to the equitable apportionment, to applicable federal and state law and to the contracts governing use of water from the North Platte Project, (2) to enjoin the United States' continuing violations of federal and state law and (3) to direct the United States to comply with the terms of its contracts.

FIFTH CROSS-CLAIM

33. The fourth counterclaim, including paragraphs 19-24, *supra,* is hereby incorporated and the claim for modification of Paragraph V of the Decree to provide for more accurate determination of transportation losses is asserted as a cross-claim against the United States and the State of Colorado.

FURTHER GENERAL ALLEGATIONS

34. The past and continuing violations of the Decree or the equitable apportionment intended to be effected by the Decree by Nebraska and the United States have caused and continue to cause irreparable injury to Wyoming and its citizens. The waste of water delivered to Nebraska canals has caused water shortages to occur more frequently and to be more severe, has resulted in calls by the United States for regulation or curtailment

of Wyoming water rights that are junior to the federal reservoirs, and has interfered with potential water development in Wyoming that would have otherwise taken place under the equitable apportionment.

35. Wyoming has no adequate remedy at law to enforce its rights against Nebraska and the United States. Injunctive relief is necessary to enforce the Decree, to modify the Decree where necessary to carry out the previously determined equitable apportionment and to restrain further circumvention and violation of that apportionment by Nebraska and the United States.

WHEREFORE, Wyoming prays that the Court enter an order granting judgment for Wyoming on the counterclaims and cross-claims asserted herein, enjoining Nebraska and the United States from further violations of the Decree, providing for additional relief as necessary to carry into effect the previously determined equitable apportionment of the North Platte River and granting such further relief as the Court may deem just and proper.

Respectfully submitted,

JOSEPH M. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
Counsel of Record
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

/s/ Dennis C. Cook
DENNIS C. COOK
Special Assistant Attorney General
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

Attorneys for the State of
Wyoming

61

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER ON MOTIONS TO AMEND THE PLEADINGS AND BRIEF IN SUPPORT OF EXCEPTIONS

DON STENBERG
Attorney General of Nebraska

MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

RECEIVED
NOV 22 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

November 22, 1994

Bowne of Phoenix, Inc., Law Printers (602) 223-4455

BEST AVAILABLE COPY

43 pp

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER ON MOTIONS TO AMEND THE PLEADINGS

The State of Nebraska takes exception to the recommendation in Special Master Olpin's Third Interim Report of September 9, 1994, that the Court should exercise jurisdiction over Wyoming's Fourth Cross-Claim against the United States, *viz.*, the alleged failure to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by the contracts governing water use from those reservoirs.

The State of Nebraska urges the Court to decline to exercise jurisdiction over Wyoming's Fourth Cross-Claim because by fixing canal requirements Wyoming seeks to effectively change ¶ V of the Decree from a percentage apportionment of natural flow to a mass allocation of natu-

ral flow and storage water. The Court expressly rejected a mass allocation in 1945.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska

MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER ON MOTIONS TO AMEND THE PLEADINGS

DON STENBERG
Attorney General of Nebraska

MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

November 22, 1994

Bowne of Phoenix, Inc., Law Printers (602) 223-4455

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER ON MOTIONS TO AMEND THE PLEADINGS

QUESTIONS PRESENTED

1. Whether the Court should relitigate Wyoming's attempt in the original proceedings to replace the percentage apportionment in ¶ V of the Decree with a mass allocation of natural flow and storage water based on quantitative limitations on water uses in Nebraska?

2. Whether the Court can logically reject the imposition of quantitative limitations with respect to natural flow and accept them with respect to storage water?

3. Should the interpretation of storage water contracts between the Bureau of Reclamation and individual irrigation districts be construed in this Court's original jurisdiction or by the federal district court for the district of Wyoming?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
PARTIES INVOLVED	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	
I. WHILE WYOMING'S FOURTH CROSS-CLAIM IS ASSERTED AGAINST THE UNITED STATES, IT IS DESIGNED TO OBTAIN A NEW AND CONCEPTUALLY DIFFERENT APPORTIONMENT AS AGAINST NEBRASKA	9
A. The Original Litigation	10
B. Wyoming's Present Position	14
II. THE COURT CANNOT REJECT THE IMPOSITION OF QUANTITATIVE LIMITATIONS WITH RESPECT TO NATURAL FLOW AND ACCEPT THEM WITH RESPECT TO STORAGE WATER	16
III. AN ALTERNATIVE FORUM EXISTS FOR ANY LEGITIMATE CONTRACTUAL DISPUTE CONTAINED IN WYOMING'S FOURTH CROSS-CLAIM	19
CONCLUSION	20
APPENDIX	

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Nebraska v. Wyoming, 296 U.S. 553 (1935) 1

Nebraska v. Wyoming, 304 U.S. 545 (1938) 1

Nebraska v. Wyoming, 325 U.S. 589 (1945) 1

Nebraska v. Wyoming, 325 U.S. 589, 665 (1945), *modified, Nebraska v. Wyoming*, 345 U.S. 981 (1953) 2, 7, 11, 12, 13, 14

Nebraska v. Wyoming, 326 U.S. 683 (1945) 1

Nebraska v. Wyoming, 345 U.S. 981 (1953) 1

Nebraska v. Wyoming, 479 U.S. 1051 (1987) 1, 3

Nebraska v. Wyoming, 481 U.S. 1011 (1987) 1

Nebraska v. Wyoming, 483 U.S. 1002 (1987) 3

Nebraska v. Wyoming, 112 S. Ct. 1930 (1992) 4

Nebraska v. Wyoming, 113 S. Ct. 1689 (1993) 4, 5

Nebraska v. Wyoming, 63 U.S.L.W. 3292 (1994) 7

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 19

DOCKETED CASES

Goshen Irrigation District v. United States, Case No. C89-0161J (D. Wyo. complaint filed June 23, 1989) 20

CONSTITUTIONS AND STATUTES

U.S. Const. art. III, § 2, cl. 2 2

Judiciary Act, 28 U.S.C. § 1251(a) (1993) 2

Warren Act, 43 U.S.C. § 523 (1986) 9, 11, 19

PARTIES INVOLVED

This suit was commenced in 1934 by the State of Nebraska against the State of Wyoming. Following the denial of Wyoming's motion to dismiss, which was predicated on the indispensability of the State of Colorado and the United States of America, Colorado was impleaded as a defendant and the United States was granted leave to intervene. *Nebraska v. Wyoming*, 296 U.S. 553 (1935); *Nebraska v. Wyoming*, 304 U.S. 545 (1938). The Court entered its original opinion and decree in 1945. *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945); *Nebraska v. Wyoming*, 326 U.S. 683 (1945). The Decree has been modified once by stipulation of the parties.[1] *Nebraska v. Wyoming*, 345 U.S. 981 (1953).

On October 7, 1986, Nebraska filed its motion for leave to reopen the case, seeking relief solely against Wyoming. The motion was granted on January 20, 1987. *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a).[2] Wyoming filed an answer and a motion for leave to file a counterclaim which the Court granted on April 20, 1987. *Nebraska v. Wyoming*, 481 U.S. 1011 (1987). Colorado and the United States have participated as parties as they did in the original proceedings.

Five entities have actively participated in the litigation as *amici, viz.*, Basin Electric Power Cooperative ("Basin"), Central Nebraska Public Power and Irrigation District ("Central"), the Nebraska Public Power District ("NPPD"), the Platte River Whooping Crane Critical

---

[1] As used in this brief, the "Decree" refers to the 1945 decree, 325 U.S. 665, as modified by the Court's order in 1953, 345 U.S. 981.

[2] By agreement of the parties and the Special Master, pleadings and documents contained in the Special Master's Docket are identified by docket number in parenthesis.

Habitat Maintenance Trust ("Trust"), and the National Audubon Society ("Audubon").[3]

JURISDICTION

The Decree in the original litigation was entered under Article III, Section 2, Clause 2, of the United States Constitution and the Judiciary Act, 28 U.S.C. § 1251(a) (1993). In 1986, the State of Nebraska invoked the original jurisdiction of the Court pursuant to ¶ XIII of the Decree in *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified, Nebraska v. Wyoming*, 345 U.S. 981 (1953). Paragraph XIII retained the Court's jurisdiction "for the purpose of any order, direction, or modification of the decree" to address future developments or "[a]ny change in conditions making modification . . . or the granting of further relief necessary or appropriate." 325 U.S. at 671-72.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case does not directly involve constitutional or statutory provisions. The North Platte River Decree is reprinted in the Appendix. *See* A-1-15.

STATEMENT OF THE CASE

Nebraska v. Wyoming was initially docketed as No. 6, Original. The case was redocketed as No. 108, Original, when it

---

[3] Special Master Olpin has twice denied motions to intervene by various *amici*. *See* Owen Olpin, Special Master, First Interim Report at 6-14 (June 14, 1989) (Docket No. 140) ("First Interim Report"); Owen Olpin, Special Master, Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 101-09 (Apr. 9, 1992) (Docket No. 463) ("Second Interim Report").

was reopened on January 20, 1987.[4] *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). On June 22, 1987, the Court appointed the Honorable Owen Olpin as Special Master. *Nebraska v. Wyoming*, 483 U.S. 1002 (1987) (Docket No. 20a).

Shortly after the suit was filed, Wyoming filed a motion for summary judgment seeking to dispose of the case in its entirety, except for its counterclaim.[5] Master Olpin denied Wyoming's motion in his First Interim Report on June 14, 1989. *See* First Interim Report. Following discovery, Colorado, Wyoming, Nebraska, and the United States filed cross-motions for summary judgment in February and March of 1991.[6] After briefing and oral argument, Master Olpin recommended that portions of Nebraska's and the United States' motions for summary judgment be granted. *See* Second Interim Report. He also recommended that the Court deny all aspects of Wyoming's and Colorado's motions. *Id.*

---

[4] For a summary of the federal common law of equitable apportionment, the doctrine of priority of appropriation, a general physical description of the North Platte River basin and its major features, the original litigation, aspects of post-Decree administration, and what precipitated the current litigation, *see* Nebraska's Exceptions to the First and Second Interim Reports of the Special Master and Brief in Support of Exceptions at 4-14 (July 1, 1992) (Docket No. 491).

[5] *See* Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion (Sept. 11, 1987) (Docket No. 23).

[6] *See* Colorado's Motion for Partial Summary Judgment (Feb. 22, 1991) (Docket No. 292); Wyoming Second Motion for Summary Judgment and Brief in Support (Feb. 22, 1991) (Docket No. 294); Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296); and United States Motion for Summary Judgment on the Inland Lakes and Brief in Support of Motion (Mar. 4, 1991) (Docket No. 297).

The Court allowed the parties and the *amici* the opportunity to file exceptions to Master Olpin's First and Second Interim Reports. *Nebraska v. Wyoming*, 112 S. Ct. 1930 (1992) (Docket No. 477). Wyoming, Colorado, Basin Electric, and Nebraska filed exceptions.[7] On January 13, 1993, oral argument was heard before the Court, and the Court's decision was released on April 20, 1993. *Nebraska v. Wyoming*, 113 S. Ct. 1689 (1993) (Docket No. 533).

Following the Court's decision on the cross-motions for summary judgment, the Special Master inquired of the parties whether they intended to amend their pleadings. At a status conference convened in June, 1993, Nebraska and Wyoming were asked by the Master to file briefs clarifying certain claims.[8] Based on the Court's decision, the clarifying briefs, and the parties' on-going discovery, Nebraska and Wyoming filed motions for leave to file amended pleadings.

Nebraska filed a motion for leave to file an amended petition on February 18, 1994.[9] It contains four counts —

---

[7] *See* Exceptions of Basin Electric Power Cooperative to Second Interim Report of Special Master and Brief in Support of Exceptions (July 1, 1992) (Docket No. 490); Nebraska's Exceptions to the First and Second Interim Reports of the Special Master and Brief in Support of Exceptions (July 1, 1992) (Docket No. 491); Exceptions of the State of Wyoming to the First and Second Interim Reports of the Special Master and Brief in Support (July 2, 1992) (Docket No. 492); and Colorado's Exception to Special Master's First and Second Interim Reports (July 1, 1992) (Docket No. 493).

[8] *See* Nebraska's Memorandum on the Status of the Laramie River Claims (Nov. 12, 1993) (Docket No. 591); Wyoming Memorandum Describing the Administration of Water Rights in the North Platte Basin (Sept. 17, 1993) (Docket No. 565).

[9] *See* Nebraska's Motion for Leave to File Amended Petition, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River below Wheatland and to Apportion the Unapportioned Natural Flows

continued

three against Wyoming and one against the United States. Count I is a restatement and elaboration of Nebraska's primary injury claim against Wyoming. It alleges actual and threatened depletions of the North Platte River and its tributaries. Nebraska's Amended Petition at 2-6. Count II alleges that the United States has contracted for Glendo Reservoir storage water in violation of the Decree. *Id.* at 7-8.

In Count III, Nebraska seeks to establish an entitlement to the unapportioned flows of the Laramie River. *Id.* at 8-11. In its decision on the cross-motions for summary judgment, the Court determined that all of the waters of the Laramie River had not been apportioned by the Laramie Decree. The Court also held that the contribution of the Laramie River to the North Platte River had not been apportioned by the North Platte Decree, though it had been expected that theses Laramie flows would continue to contribute to the natural flows of the North Platte River available for apportionment. 113 S. Ct. at 1697-98. Count III seeks to clarify the status of the Laramie River inflows to the North Platte. Count IV requests an equitable apportionment of previously unapportioned nonirrigation season flows of the North Platte River. Nebraska's Amended Petition at 11-15. Counts III and IV seek injunctive relief against Wyoming to curtail depletions in violation of Nebraska's equitable share of the natural flows.

Master Olpin recommended that the Court grant Nebraska's motion for leave to file with respect to Counts I, II, and III, and that the Court deny without prejudice Nebraska's motion with respect to Count IV. *See* Owen Olpin, Special Master, Third Interim Report on Motions to Amend the Pleadings at 36-55 (Sept. 9, 1994) ("Third Interim Report").

---

of the North Platte River, and Brief in Support of Motion for Leave to File Amended Petition (Feb. 18, 1994) (Docket No. 623) ("Nebraska's Amended Petition" or "Nebraska's Brief in Support of Amended Petition").

Wyoming filed a motion for leave to file an amended counterclaim against Nebraska and, for the first time, cross-claims against the United States and Colorado.[10] Four of the five cross-claims against the United States essentially mirror the four counterclaims against Nebraska. The two cross-claims against Colorado involve proposed modifications of the Decree.

Wyoming's First Counterclaim and First Cross-Claim contain allegations and requests for relief against Nebraska and the United States which would place new restrictions on Nebraska's apportioned share of natural flow. Wyoming's Amended Counterclaims and Cross-Claims at 3-6, 9-11. By filing these claims, Wyoming seeks to relitigate the apportionment of natural flow in ¶ V of the Decree.

Wyoming's Second and Third Counterclaims and Second and Third Cross-Claims contain allegations against Nebraska and the United States, respectively, relating to Glendo Reservoir storage water.[11] *Id.* at 6-7, 11-12. The Second Counterclaim and Second Cross-Claim seek enforcement of the Decree, and in the alternative, the Third Counterclaim and Third Cross-Claim seek modification of the Decree to ease certain restrictions on the use of the Glendo storage water.

Wyoming's Fourth Counterclaim and Fifth Cross-Claim are alleged against Nebraska, the United States, and Colorado. *Id.* at 8-9, 13. Wyoming seeks modification of the Decree to allegedly provide a more accurate determination of transportation losses.

---

[10] *See* Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims (Feb. 18, 1994) (Docket No. 624) ("Wyoming's Amended Counterclaims and Cross-Claims" or "Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims").

[11] The Third Cross-Claim is also asserted against Colorado.

Finally, in its Fourth Cross-Claim against the United States, Wyoming asserts violations of its equitable apportionment and of state and federal law in the use and administration of storage water.[12] *Id.* at 12-13. Like Wyoming's First Counterclaim and First Cross-Claim, the relief Wyoming seeks in its Fourth Cross-Claim would result in a mass allocation to Nebraska, thereby reducing the amount of water available for users in Nebraska.

Master Olpin recommended that the Court grant Wyoming's motion for leave to file with respect to the Second, Third, and Fourth Counterclaims, and the Second, Third, Fourth, and Fifth Cross-Claims. *See* Third Interim Report at 55-71. He recommended that the Court deny with prejudice Wyoming's motion for leave to file its First Counterclaim and First Cross-Claim. *Id.* at 36.

The Court allowed the parties the opportunity to file exceptions to the Master's Third Interim Report on October 11, 1994. *Nebraska v. Wyoming*, 63 U.S.L.W. 3292 (1994). Nebraska takes exception to the Master's recommendation that the Court grant Wyoming's motion for leave to file with respect to its Fourth Cross-Claim.

SUMMARY OF ARGUMENT

Wyoming's Fourth Cross-Claim, which relates only to storage waters, appears to be directed solely against the United States. Its purpose, however, is to impose quantitative limitations on the use of storage waters released from federal reservoirs for use on lands in Nebraska. The Fourth Cross-Claim is the flipside of Wyoming's First Counterclaim

---

[12] Storage water was defined by the Court in 1945 "as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet the requirements of any canal as recognized in the decree." 325 U.S. at 631. The Court held that "[t]his definition does not adversely affect rights recognized in the decree." *Id.*

and First Cross-Claim, the latter two of which seek to transform the equitable apportionment in 1945 from a proportionate sharing of natural flows into a quantified apportionment that would limit Nebraska's share of natural flow by a newly imposed standard of beneficial use. In its First Counterclaim and First Cross-Claim, Wyoming seeks to impose a quantified limit on the use of natural flow waters; in its Fourth Cross-Claim, Wyoming seeks to impose the same quantified limit on storage waters. To do so would not only contravene the Court's rejection of Wyoming's identical proposal in 1945, but would also disturb the socio-economic dependence that has developed in reliance on the Court's resolution of the matter in 1945.

The Special Master has recommended that the Court decline to hear Wyoming's First Counterclaim and First Cross-Claim because they seek to place new constraints on Nebraska's use of natural flow through the imposition of beneficial use limitations on Nebraska's canal diversions. Wyoming's Fourth Cross-Claim, however, seeks the same relief with respect to the use of storage water. While Special Master Olpin has rejected the imposition of beneficial use limitations on Nebraska lands insofar as the application of natural flow is concerned, he recommends that such limitations be pursued with respect to the application of storage water on the same lands. All of the reasons for avoiding a new apportionment of natural flow, however, apply to avoiding a new apportionment of storage water. The Court should not reverse its decision in 1945 to apportion the waters of the North Platte on a percentage basis and adopt instead a mass allocation of natural flow and storage water based on beneficial use limitations.

While the principal issue raised by Wyoming's Fourth Cross-Claim turns on whether the Court is willing to replace the 1945 apportionment with a categorically different apportionment after the passage of 50 years, certain issues turn on an interpretation of the storage water contracts between the United States and various irrigation districts in Wyoming and Nebraska. In 1945, the Court determined

that the construction of the storage contracts was not embraced by the federal common law of equitable apportionment, but rather was a matter of unrelated state and federal law. To the extent these issues have any substance, they should be litigated in federal district court.

ARGUMENT

POINT I

WHILE WYOMING'S FOURTH CROSS-CLAIM IS ASSERTED AGAINST THE UNITED STATES, IT IS DESIGNED TO OBTAIN A NEW AND CONCEPTUALLY DIFFERENT APPORTIONMENT AS AGAINST NEBRASKA

In its Fourth Cross-Claim, Wyoming seeks to change the equitable apportionment in the guise of protecting the existing apportionment. Wyoming states that the United States has "allocated storage water in a manner which (a) upsets the equitable balance on which the apportionment of natural flow was based, [and] (b) results in the allocation of natural flow contrary to the provisions of the Decree and contrary to the equitable apportionment." Wyoming's Amended Counterclaims and Cross-Claims at 12 (¶ 31(a) & (b)). While the claim appears to seek protection of Wyoming's apportionment, the relief associated with the claim could only result in the prospect of a conceptually different apportionment.

Specifically, Wyoming contends that the United States has allocated storage water in a manner which:

> (c) promotes inefficiency and waste of water contrary to federal and state law, (d) violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. § 523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under any

> project" after "preserving a first right to lands and entrymen under the project" and (e) exceeds the limitations in the contracts under the Warren Act.

Id. at 12 (¶ 31(c), (d), & (e)). The actions which Wyoming alleges upset the apportionment, however, were either litigated in the original proceedings or are purely contractual matters appropriate for an alternative forum, *viz.*, a federal district court.

A. The Original Litigation.

When this case was originally litigated in the 1930s and 1940s, the fundamental dispute framed by the evidence was whether quantitative limits should be placed on the uses of the waters of the North Platte River in each state or whether the dependable water supply — which was over-appropriated — should be shared in proportion to historical demands.

Wyoming took the position that the natural flow and storage water should be pooled and apportioned without distinction, urging a quantitative determination of the individual uses or requirements in each state. Only if this were done, according to Wyoming, could the storage supplies in the federal reservoirs be conserved over time. *See* Brief of Defendant, State of Wyoming at 37-38, 82 (Jan. 29, 1945). It was Wyoming's position that a "limitation to beneficial use [was] an integral part of the North Platte Project and Warren Act contracts." *Id.* at 52. Wyoming knew that without a mass allocation, the beneficial use limitations in the storage contracts would not be enforceable under the Decree. *Id.* at 54. Accordingly, Wyoming advocated that "[a] mass allocation of these [aggregate] requirements should be made, resulting in an allocation of 790,000 acre feet to Nebraska and . . . 405,000 to Wyoming." *Id.* at 37.

Instead of placing use limitations on the Nebraska canals for any purpose, including the conservation of storage water as Wyoming had argued, Special Master Doherty

declined "to define the rights of individual appropriators," either as to natural flow or storage water. *See* Doherty Report at 161. Refusing to pool storage water with natural flow, Master Doherty distinguished between the two, leaving the federal storage contracts intact, and apportioning the natural flow 75% to Nebraska and 25% to Wyoming. *Id.* at 148-62; *see also* 325 U.S. at 667 (¶ V). In doing so, Master Doherty understood the effect of not apportioning storage water on the concepts advanced by Wyoming, specifically individual canal limitations and beneficial use. The full text of the Master Doherty's report is important:

> This apportionment assumes that the distribution of storage water is controlled by the various storage contracts and that such water would be delivered in accordance with the terms of those contracts. In that connection the following question arises: All of the storage water contracts (Project and Warren Act) limit the total water, natural flow and storage, which the holder of any contract may demand, to that for which his land has beneficial use. In arriving at the equitable share of each State I have first determined for that purpose the *requirements* of the various canals or districts. Is this to be taken as a determination of the limits of beneficial use for the purpose of intra-state administration? If so, those limits would apply to both storage and natural flow water.
>
> Wyoming feels that such a limitation should be placed on the Nebraska State Line Canals for its effect upon the conservation of storage water. From a practical standpoint, and perhaps from an equitable standpoint, this might be a proper and desirable measure. From a legal standpoint, I doubt the jurisdiction of this Court to fix such limitations upon individual canals. The suit is between States and jurisdiction is invoked to determine the equitable rights of the States, that is, to determine the proper apportionment of water be-

> tween them. The requirements of individual appropriators in each State being one of the elements in the ascertainment of the State's equitable share, they are incidentally a proper matter for investigation and determination for their bearing on the ultimate issue. But it would be quite a different matter to undertake to define the rights of individual appropriators between each other or between them and their State, or to determine what portion of the State's share must be allocated to any appropriator or group of appropriators, or to place a limit upon the participation of any appropriator or group in such allocation. That, in the absence of the appropriators as parties, would, I apprehend, as to them amount to a denial of due process of law. Consequently, the findings herein as to *requirements* cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, *either as to natural flow or storage water*, nor do I think any such limitations can properly be imposed by the decree.

Doherty Report at 160-61 (third emphasis added). *See also id.* at 189-95.

Accordingly, Master Doherty concluded that neither the equitable apportionment nor the storage water contracts could limit individual canal diversions through the concept of beneficial use. The result of interpreting the storage water contracts in a different manner would be to completely undermine the equitable apportionment that Doherty recommended to the Court — to turn it into a mass allocation. In other words, it would have been inconsistent for Doherty to have stated that the Decree did not contain individual canal limitations, but that the storage water contracts did.

Confirming Master Doherty's recommendation in 1945, the Court expressly excluded the use and administration of storage water from the equitable apportionment. 325 U.S.

at 638-40. Initially, the Court paraphrased Wyoming's position:

> The argument is that each State should be restricted to the use of such supplies only as are necessary to provide their respective irrigators, including those receiving water under contracts, with such amounts as are necessary for beneficial use. The large excesses diverted by Nebraska are adverted to as showing the degree to which carry-over storage in the upper reservoirs has been diminished and the supply for Kendrick exhausted.

Id. at 638-39. Wyoming argued that unless beneficial use limitations were determined for the various canals, irrigators would not be encouraged to conserve storage water. Wyoming continued to believe that individual canal caps, combined with an apportionment of storage water, would result in less consumption of storage water and more carry-over storage in the upstream reservoirs, ultimately allowing Wyoming junior appropriators to come into priority sooner.

The Court understood that Wyoming wanted to pool natural flow and storage water into a common fund and then allocate to Nebraska a specified amount of water. It also knew that excessive or improper use of storage water could decrease the total water supply. Nonetheless, the Court believed that the use of storage water had to be governed by the applicable contracts that were in place. The Court found that the United States owned the storage water and that its use and administration were a matter of state and federal law as opposed to the federal common law of equitable apportionment. *Id.* at 629-30. Specifically, the Court stated: "Nor will the decree interfere with the ownership and operation by the United States of the various federal storage and power plants, works, and facilities." *Id.* at 630. Additionally, the Court found that "an apportionment of storage water would disrupt the system of water administration which ha[d] become established pursuant to the mandate of Congress in § 8 of the Reclamation Act that the Secretary of the Interior in the construction of these

federal projects should proceed in conformity with state law."[13] *Id.* at 639.

B. Wyoming's Present Position.

Wyoming's Fourth Cross-Claim reasserts the position that Wyoming took in the original litigation which was rejected by the Court with respect to storage water. The cross-claim alleges "inefficiency and waste of water," *i.e.*, the lack of beneficial use. Wyoming's Amended Counterclaims and Cross-Claims at 12 (¶ 31(c)). It alleges that limitations in the contracts are not being followed. *Id.* at 12 (¶ 31(e)). Basically, Wyoming still asserts that beneficial use is the controlling principle in each of the North Platte Project contracts, as well as the Warren Act contracts. Through its Fourth Cross-Claim, Wyoming seeks to discard the existing apportionment, which is based on a percentage distribution

---

[13] The Court continued:

> In pursuance thereto all of the storage water is disposed of under contracts with project users and Warren Act canals. It appears that under that system of administration of storage water no State and no water users within a State are entitled to the use of storage facilities or storage water unless they contract for the use. See Wyo. Rev. Stats. (1931), §§ 122-1504, 122-1508, 122-1602. If storage water is not segregated, storage water contractors in times of shortage of the total supply will be deprived of the use of a part of the storage supply for which they pay. If storage water is not segregated, those who have not contracted for the storage supply will receive at the expense of those who have contracted for it a substantial increment to the natural flow supply which, as we have seen, has been insufficient to go around. In *Wyoming v. Colorado, supra,* the Court did not apportion storage water. It apportioned natural flow only. It took into account when it made that apportionment the effects of storage in equalizing natural flow in Wyoming. We think no more should be done here to effect an equitable apportionment.

325 U.S. at 639-40.

of daily natural flow, and to replace it with a division of water based on beneficial use, *i.e.*, to set fixed limitations on individual canal diversions. Wyoming's Fourth Cross-Claim necessarily seeks to pool storage water with natural flow in "defining" the respective rights of the states.[14]

The issues presently raised by Wyoming were raised by Wyoming in the original litigation, considered by the Court, and rejected in the Court's determination that a mass allocation was not appropriate. Instead, the Court adopted Special Master Doherty's recommendation of an equitable apportionment based on a proportionate sharing of the fluctuating supply.

Since the Decree was entered in 1945, the percentage apportionment of the natural flows of the North Platte River has been administered on a daily basis, premised on the segregation of natural flow and storage water. Storage water has been distributed separately pursuant to contracts between the United States and irrigation districts in Wyoming and Nebraska. For fifty years, the regional economy has been dependant on this regimen of the river. In combination with Wyoming's First Counterclaim and First Cross-Claim, Wyoming's Fourth Cross-Claim seeks to change the apportionment created in 1945 and to cause a radical shift in the equitable benefits of the North Platte River.

---

[14] Wyoming states that it does not seek "to go beyond the confines of the existing apportionment," but rather to further "define" or "fully carry out" the existing apportionment. Wyoming's Motion for Leave to File Amended Counterclaims and Cross-Claims at 1-2. In reality, however, Wyoming is asking the Court to permit it to pursue a categorically different apportionment.

POINT II

THE COURT CANNOT REJECT THE IMPOSITION OF QUANTITATIVE LIMITATIONS WITH RESPECT TO NATURAL FLOW AND ACCEPT THEM WITH RESPECT TO STORAGE WATER

In its First Counterclaim and First Cross-Claim, which relate to natural flow only, Wyoming seeks to place new constraints on Nebraska's use of its natural flow through the imposition of beneficial use limitations on individual canal diversions. In his Third Interim Report, Special Master Olpin recommended that the Court deny Wyoming's motion "to add her proposed First Counterclaim and First Cross-Claim . . .." Third Interim Report at 55. His recommendation was based on sound reasoning:

> Wyoming's First Counterclaim against Nebraska essentially seeks to transform the 1945 equitable apportionment in the pivotal reach from a proportionate sharing of the natural flows into a defined and quantified apportionment that would limit Nebraska's share by a beneficial use standard. This would amount to much more than a modified decree; it would require relitigating matters that were litigated and determined in the original case in 1945 and largely reaffirmed in the Court's 1993 opinion. Similarly, Wyoming's proposed First Cross-Claim against the United States is premised on imposing new beneficial use limitations on Nebraska's apportionment.
>
> * * *
>
> Wyoming defends her proposed amendments as a quest for "a clearer definition of Nebraska's apportionment" so that Wyoming will not continue to face uncertainty and costly litigation threats whenever Wyoming water users "propose some change of use or new development in the North Platte Basin. That quest for certainty is, in actuality, a plea for restructuring the decree in ways that

> were considered and expressly rejected in the original proceedings. Further, if the relief requested by Wyoming were to be granted, there would necessarily be an intrusion by the Court into Nebraska's intrastate water administration far beyond what the Court was willing to consider in 1945.

Id. at 55, 56 (footnotes omitted).

The underlying cause of action stated in Wyoming's Fourth Cross-Claim, which relates to storage water only, is the same as the cause of action stated in its First Counterclaim and First Cross-Claim, *i.e.*, that "[t]he equitable apportionment . . . was intended to protect the supply of irrigation water to meet the reasonable beneficial use requirements of the Nebraska lands . . .." *See* Wyoming's Amended Counterclaims and Cross-Claims at 3 (¶ 5). Wyoming states that "[t]he fourth cross-claim is an extension of the first counterclaim . . .," under which the United States must operate the federal reservoirs "in accordance with the storage contracts and applicable federal and state laws." Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims at 26. Through its Fourth Cross-Claim, Wyoming seeks the same relief as to storage water that the First Counterclaim and First Cross-Claim seek with regard to natural flow, *i.e.*, the imposition of beneficial use limitations on individual canal diversions. While Special Master Olpin has rejected the imposition of beneficial use limitations on Nebraska lands insofar as the application of natural flow is concerned, he recommends that such limitations be examined with respect to the application of storage water on the same lands. That his recommendations are inconsistent is illustrated by the fact that "beneficial use" is conceptually blind to a distinction between natural flow and storage water.

In recommending denial of Wyoming's First Counterclaim and First Cross-Claim, Master Olpin stated: "Practical and policy considerations also counsel against imposing mass allocation, beneficial use, or kindred ceilings on Nebraska's apportionment." Third Interim Report at 62.

These same considerations apply equally to the Fourth Cross-Claim. First, in recommending denial of Wyoming's motion for leave to file its First Counterclaim and First Cross-Claim, the Master believed that he could not assess beneficial use by considering the use of natural flow in a vacuum. *Id.* Relief could not be fashioned relating only to natural flow. The same logic explains why it would not be possible to attempt to assess the beneficial use of storage water alone. Second, Master Olpin reasoned that any limitation of natural flow based on beneficial use would require the Court to become involved in Nebraska's intrastate water administration, directly contrary to the Court's previous holdings. *Id.* The Master's logic applies equally to limitations on storage water. The relief Wyoming requests in its Fourth Cross-Claim would deprive Nebraska of its freedom of intrastate administration and place the federal government in a position of imposing standards for water use in Nebraska. Third, Master Olpin believed that limitations on natural flow grounded solely on beneficial use requirements would ignore nonirrigation season water uses that are incidentally served. *Id.* at 63. The same is true for storage water. In sum, the logic that the Master used to recommend denial of Wyoming's First Counterclaim and First Cross-Claim counsels against granting Wyoming's Fourth Cross-Claim.

Given that Wyoming's First Counterclaim and Fourth Cross-Claim articulate the same cause of action, *i.e.*, that the use of North Platte waters should be governed by newly imposed quantitative limitations based solely on beneficial use standards, the Court should not exercise jurisdiction over the Fourth Cross-Claim. In other words, in the guise of protecting or defining the existing apportionment, the Court should not reverse its decision in 1945 to apportion the waters of the North Platte on a percentage basis and replace it with a mass allocation of natural flow and storage water based on beneficial use limitations.

POINT III

AN ALTERNATIVE FORUM EXISTS FOR ANY LEGITIMATE CONTRACTUAL DISPUTE CONTAINED IN WYOMING'S FOURTH CROSS-CLAIM

While Wyoming's Fourth Cross-Claim raises issues which were litigated in the original proceedings and are identical to issues raised in its First Counterclaim and its First Cross-Claim, it also raises a contractual issue which can and should be resolved in an alternative forum. In its Fourth Cross-Claim, Wyoming alleges that the United States:

> . . . violates the contract rights of the North Platte Project Irrigation Districts and violates the provisions of the Warren Act, 43 U.S.C. § 523, which provide for sale of storage water to non-project users only if there is available water "in excess of the requirements of the lands to be irrigated under any project" after "preserving a first right to lands and entrymen under the project".

Wyoming's Amended Counterclaims and Cross-Claims at 12 (¶ 31(d)). Wyoming argues that according to the language of the various contracts and one federal statute, a certain group of storage water users is entitled to water before another group of storage water users. *See* Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims at 27. Specifically, Wyoming states that the United States' practice of allocating storage water is "contrary to the plain language of the Warren Act contracts" and that the "interpretation and administration of the storage contracts is flatly contrary to the Warren Act." *Id.*

The Court does not exercise its original jurisdiction when an alternative forum is available. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). A federal district court is the appropriate judicial forum to resolve issues of contract interpretation. Indeed, the federal district court for the district of Wyoming has concluded trial among various storage water contractors and the United States on

one of the issues raised by Wyoming in its Fourth Cross-Claim, *viz.*, the allocation procedure between the North Platte Project contractors and the Warren Act contractors. *See Goshen Irrigation District v. United States*, Case No. C89-0161J (D. Wyo. complaint filed June 23, 1989). The matter has been submitted to the court and is pending decision. Judicial economy would not be served by litigating the matter twice.

In his Third Interim Report, Master Olpin concludes that the federal district court is not an adequate alternative forum because neither Wyoming nor Nebraska is a party to *Goshen Irrigation District*, leaving the district court without jurisdiction to consider the potential effects of the resolution of the storage contract issue on the equitable apportionment. Third Interim Report at 70-71. As explained in Point I, however, Wyoming's Fourth Cross-Claim seeks a reapportionment of flows previously apportioned as opposed to protection of the existing apportionment. Whether the existing apportionment should be replaced with one that was rejected in 1945 is a question that can only be decided by this Court. Issues which are purely matters of contract interpretation can be litigated before a lower court.

CONCLUSION

In considering whether the percentage apportionment adopted by the Court in 1945 should be replaced with an apportionment based on newly imposed quantitative limitations on Nebraska's diversions, the Court should not focus on the distinction between natural flow and storage water. Beneficial use is a concept that derives from the requirements of particular crops on particular lands under particular climatological conditions. It cuts across the administrative distinction between natural flow and storage water.

The reasons for declining to hear a case designed to overturn the Court's decision in 1945 apply to both natural flow and storage water. Accordingly, the Court should

decline to exercise jurisdiction over Wyoming's Fourth Cross-Claim. The Court should also decline to resolve contract disputes that can and should be heard in federal district court.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska

MARIE C. PAWOL
Assistant Attorney General
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

APPENDIX

TABLE OF CONTENTS

	Page
North Platte River Decree	A-1-15

NEBRASKA v. WYOMING
(325 U.S. 665)

DECREE.
(Entered October 8, 1945)

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a

total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which

said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five percent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be com-

puted in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses
Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder Reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Losses-Second Feet				
		May	June	July	Aug.	Sept.
Alcova to Wendover ..	8,360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder Dam to head of Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir, and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint

and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to September 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the

rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible;

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two- fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming and Nebraska, copies of this decree duly authenticated under the seal of this Court.

NEBRASKA v. WYOMING
(345 U.S. 981)

Order Modifying and Supplementing Decree.
(Entered June 15, 1953)

No. 5, Original. Nebraska v. Wyoming (Colorado, Impleaded Defendant, and the United States, Intervenor.)

The joint motion for approval of a stipulation and to modify and supplement the decree is granted and the following order is entered in compliance with the stipulation:

The parties to this cause having filed a stipulation, dated January 14, 1953, and a joint motion for approval of the stipulation and to modify and supplement the decree entered on October 8, 1945 (325 U.S. 665) and the Court being fully advised:

The stipulation dated January 14, 1953, is approved; and

IT IS ORDERED that the decree of October 8, 1945, is hereby modified and supplemented as follows:

1. In paragraph I(a) of the decree the figure "145,000" is substituted for the figure "135,000."

2. Paragraph XIII is amended by striking the first sentence and substituting for it the following:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief, except that for a period of five years from and after June 15, 1953, the State of Colorado shall not institute any proceedings for the amendment of the decree or for further relief. In the event that within said period of five years any other party applies for an amendment of the decree or for further relief, then the State of Colorado may assert any and all rights, claims or defenses available to it under the decree as amended.

3. Two new paragraphs, as follows, are added to the decree:

XVI. Whatever claims or defenses the parties or any of them may have in respect to the application, interpretation or construction of the Act of August 9, 1937 (50 Stat. 564-595) shall be determined without prejudice to any party arising because of any development of the Kendrick Project occurring subsequent to October 1, 1951.

XVII. When Glendo Dam and Reservoir are constructed, the following provisions shall be effective:

(a) The construction and operation of the Glendo Project shall not impose any demand on areas at or above Seminoe Reservoir which will prejudice any rights that the States of Colorado and Wyoming might have to secure a modification of the decree permitting an expansion of water uses in the natural basin of the North Platte River in Colorado or above Seminoe Reservoir in Wyoming.

(b) The construction and operation of Glendo Reservoir shall not affect the regimen of the natural flow of the North Platte River above Pathfinder Dam. The regimen of the natural flow of the North Platte River below Pathfinder Dam shall not be changed, except that not more than 40,000 acre feet of the natural flow of the North Platte River and its tributaries which cannot be stored in upstream reservoirs under the provisions of this decree may be stored in the Glendo Reservoir during any water year, in addition to evaporation losses on such storage, and further, the amount of such storage water that may be held in storage at any one time, including carryover storage, shall never exceed 100,000 acre feet. Such storage water shall be disposed of in accordance with contracts to be hereafter executed, and it may be used for the irrigation of lands in the basin of the North Platte River in western Nebraska to the extent of 25,000 acre feet annually, and for the irrigation of lands in the

basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir to the extent of 15,000 acre feet annually, provided that it shall not be used as a substitute for storage water contracted for under any existing permanent arrangements. The above limitation on storage of natural flow does not apply to flood water which may be temporarily stored in any capacity allocated for flood control in the Glendo Reservoir, nor to water originally stored in Pathfinder Reservoir which may be temporarily re-stored in Glendo Reservoir after its release from Pathfinder and before its delivery pursuant to contract; nor to water which may be impounded behind Glendo Dam, as provided in the Bureau of Reclamation Definite Plan Report for the Glendo Unit dated December 1952, for the purpose of creating a head for the development of water power.

(c) Paragraph III of the decree is amended to read as follows:

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir;
Fourth, Alcova Reservoir; and
Fifth, Glendo Reservoir;

Provided, however that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the

priority decreed for the French Canal and the State Line Canals.

Storage rights of Glendo Reservoir shall be subject to the provisions of this paragraph III.

(d) Paragraph IV of the decree is amended to read as follows:

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjusted to be senior to said five reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and denied, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1,025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

(e) Paragraph V of the decree is amended to read as follows:

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring

Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming and seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the appropriation of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A and the stipulation of the parties dated January 14, 1953, and filed on January 30, 1953:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoir.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder Reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Glendo and Guernsey Reservoirs.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a coefficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Losses-Second Feet May	June	July	Aug.	Sept.
Alcova to Glendo Reservoir	6,470	43	61	70	61	45
Guernsey Res. to Whalen ...	560	4	5	6	5	4
Whalen to State Line	2,430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Glendo Dam to head of Guernsey Reservoir (area 680 acres) because this area is less than submerged area of original river bed (940 acres) in Glendo Reservoir and is, therefore, considered as off- set.

Above table does not contain computed loss for section of river from Pathfinder Dam to head to Alcova Reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova Reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe Dam and head of Pathfinder Reservoir is less than area of original river bed through Pathfinder Reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be deter-

mined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

Clarence S. Beck, Attorney General, and *Bert L. Overcash*, Assistant Attorney General, for the State of Nebraska, *Howard B. Black*, Attorney General, for the State of Wyoming, *Duke W. Dunbar*, Attorney General, *H. Lawrence Hinkley*, Deputy Attorney General, and *Jean S. Breitenstein* for the State of Colorado, and *Acting Solicitor General Stern* for the United States.

No. 108, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF WYOMING TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT

JOSEPH B. MEYER
Attorney General of Wyoming

LARRY DONOVAN
Senior Assistant
Attorney General
Counsel of Record

DONALD M. GERSTEIN
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

DENNIS C. COOK
Special Assistant
Attorney General
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant
Attorneys General
MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

November 25, 1994

RECEIVED
NOV 2 5 1994
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BEST AVAILABLE COPY

TABLE OF CONTENTS

1. EXCEPTIONS OF THE STATE OF WYOMING TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

2. WYOMING BRIEF IN SUPPORT OF EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

3. APPENDIX

No. 108, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

EXCEPTIONS OF THE STATE OF WYOMING TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

1. The State of Wyoming takes exception to the Special Master's recommendation to deny with prejudice Wyoming's First Counterclaim and First Cross-Claim which seek injunctive relief to prevent circumvention of the equitable apportionment of the North Platte River through unlawful and wasteful practices.

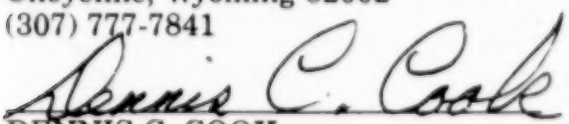
2. The State of Wyoming takes exception to the Special Master's recommendation to entertain Nebraska's claims of injury to non-irrigation season uses and uses downstream of the apportioned reach of the North Platte River, including endangered species and wildlife habitat uses.

3. The State of Wyoming takes exception to the Special Master's recommendation to entertain Nebraska's Horse Creek claim which would expand the scope of the North Platte River apportionment.

4. The State of Wyoming takes exception to the Special Master's recommendation to entertain Nebraska's claims to impose interstate ground water regulation in Wyoming under standards that Nebraska refuses to apply intrastate to its own ground water use.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK
Special Assistant Attorney General
Counsel for Wyoming
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

ATTORNEYS FOR THE STATE OF WYOMING

No. 108, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

WYOMING BRIEF IN SUPPORT OF EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

I. QUESTIONS PRESENTED 1

II. JURISDICTION 1

III. STATEMENT OF THE CASE 2

A. COURSE OF PROCEEDINGS 2

B. NATURE OF THE AMENDED PLEADINGS 7

IV. SUMMARY OF ARGUMENT 9

V. ARGUMENT 13

A. THE PURPOSE OF THIS CASE IS TO DEFINE AND PROTECT THE EXISTING APPORTIONMENT, NOT TO ADJUDICATE A NEW APPORTIONMENT OR ENLARGE THE GEOGRAPHIC LIMIT OF THE APPORTIONMENT 13

B. THE SPECIAL MASTER'S RECOMMENDATION TO DENY WITH PREJUDICE PART OF WYOMING'S FIRST COUNTERCLAIM AND FIRST CROSS-CLAIM WOULD PREMATURELY LIMIT THE CHOICE OF REMEDIES AVAILABLE TO THE COURT UPON PROOF THAT NEBRASKA AND THE UNITED STATES HAVE CIRCUMVENTED THE APPORTIONMENT 18

1. *The Need for Additional Injunctive Relief Sought in Wyoming's First Counterclaim and First Cross-Claim was Contemplated in the Court's 1945 and 1993 Opinions* 18

2. *The Court did not Sanction Waste by Allowing Nebraska to Allocate its Percentage Share Among its Canals in the Pivotal Reach* 22

3. *The Principle Favoring Deference to Intrastate Administration of Water Rights Does not Compel the Dismissal of Wyoming's Claims for Additional Injunctive Relief* 26

4. *The Effect of Adopting the Special Master's Recommendation Would be to Render the Court Powerless to Fashion Affirmative Relief to Control Nebraska's Waste* 27

C. *BY ANNOUNCING THAT HE WILL HEAR EVIDENCE OF INJURY TO USES BELOW TRI-STATE DAM AS PART OF NEBRASKA'S COUNTS I AND III, THE SPECIAL MASTER WOULD TRANSFORM THIS CASE INTO ONE FOR A NEW APPORTIONMENT* 28

1. *The Special Master's Recommendation that the Court Consider Alleged Water Needs for Endangered Species, Wildlife Habitat and Other Uses Downstream of the Apportioned North Platte River Contradicts the Court's Denial of Nebraska's Earlier Motions to Amend* . . . 28

2. *Allegations of Injury to Endangered Species and Wildlife Habitat are Based on Mere Speculation That Various Pending Proceedings Under State or Federal Environmental Laws Will Quantify a Water Requirement for Such Uses and That Quantification Will Lead to Claims of Real Injury* 32

D. *THE COURT SHOULD NOT ACCEPT NEBRASKA'S HORSE CREEK CLAIMS WHICH WOULD SEEK TO EXPAND THE GEOGRAPHIC SCOPE OF THE APPORTIONMENT WITHOUT ALLEGING SUFFICIENT INJURY TO WARRANT REOPENING THE APPORTIONMENT* 34

E. *NEBRASKA IN EQUITY CANNOT DEMAND INJUNCTIONS AGAINST WYOMING GROUND WATER USE AS A MATTER OF INTERSTATE EQUITABLE APPORTIONMENT WHEN NEBRASKA'S OWN LAW DOES NOT RECOGNIZE SUCH A REMEDY INTRASTATE* 37

VI. CONCLUSION 41

APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Arizona v. California,
283 U.S. 423 (1931) 34

Budd v. Bishop,
543 P.2d 368 (Wyo. 1975) 23

Central Platte Natural Resource District v. State of Wyoming, et al.,
245 Neb. 439, 513 N.W.2d 847 (1994) 23, 40

Hinderlider v. La Plata & Cherry Creek Ditch Co.,
304 U.S. 92 (1938) 26

Kansas v. Colorado,
206 U.S. 46 (1907) 36, 38

Mississippi v. Louisiana,
113 S.Ct. 549 (1992) 37

Missouri v. Illinois,
200 U.S. 496 (1906) 36, 38-40

Nebraska v. Wyoming,
325 U.S. 589 (1945) . . . . . *passim*

Nebraska v. Wyoming,
479 U.S. 1051 (1987) 2

Nebraska v. Wyoming,
481 U.S. 1011 (1987) 2

Nebraska v. Wyoming,
485 U.S. 931 (1988) 4, 28, 31

Nebraska v. Wyoming,
113 S.Ct. 1689 (1993). . . . . *passim*

Nebraska v. Wyoming,
113 S.Ct. 1941 (1993) 4, 28, 31

Nebraska v. Wyoming,
114 S.Ct. 1290 (1994) 6

New Jersey v. New York,
283 U.S. 336 (1931). 6

New York v. Illinois,
274 U.S. 488 (1927). 34

Ohio v. Kentucky,
410 U.S. 641 (1973). 38, 39

Ramshorn Ditch Company v. United States,
269 F. 80 (8th Cir. 1920) 36

United States v. Tilley,
124 F.2d 850 (8th Cir. 1942) 36

United States v. West Virginia,
295 U.S. 463 (1935). 34

Wyoming v. Colorado,
259 U.S. 419 (1922). 6

Wyoming v. Colorado,
286 U.S. 494 (1932). 14

CONSTITUTIONS

U.S. Const., Article III, § 2, Clause 2 2

STATUTES AND COURT RULES

Endangered Species Act, 16 U.S.C. §1536(1988) 33

Judiciary Act, 28 U.S.C. §1251(a) (1988) 2

Reclamation Act of 1902, 43 U.S.C. §372 (1988) 23

South Platte Compact, 44 Stat. 195 33

Warren Act, 43 U.S.C. §§523-525 (1988) 20

Neb. Rev. Stat. §46-231 (1988 Reissue) 23

Wyo. Stat. §41-3-101 (1977) 23

Wyo. Stat. §§41-3-901 to 938 (1977) 39

Fed.R.Civ.P. 12(b)(6) 37

Fed.R.Civ.P. 12(c) 37

MISCELLANEOUS

Natural Resources, Energy, and Environmental Law, 1993 The Year in Review, Section of Natural Resources, Energy, and Environmental Law, American Bar Association (1993) 40

Robert L. Stern, Eugene Gressman, et al., *Supreme Court Practice* (7th Ed. 1993) 37

I. QUESTIONS PRESENTED

This matter is before the Court on exceptions to the Special Master's Third Interim Report on Motions to Amend the Pleadings. Wyoming's exceptions raise the following issues:

1. Whether the Court should grant Wyoming leave to file its First Counterclaim and First Cross-Claim which seek injunctive relief to prevent circumvention of the equitable apportionment of the North Platte River through unlawful and wasteful practices.

2. Whether the Court should deny Nebraska leave in Counts I and III to claim injury to non-irrigation season uses and uses downstream of the apportioned reach of the North Platte River, including endangered species and wildlife habitat uses.

3. Whether the Court should deny Nebraska leave in Count I to claim an apportionment of return flows below Tri-State Dam without a threshold showing of serious injury.

4. Whether the Court should dismiss on the pleadings Nebraska's claim to impose interstate ground water regulation in Wyoming under standards that Nebraska refuses to apply intrastate to its own ground water use.

II. JURISDICTION

The Court has previously granted leave to both Nebraska and Wyoming to file claims in the retained jurisdiction of the Court pursuant to Paragraph XIII of

the 1945 Decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945). *Nebraska v. Wyoming*, 479 U.S. 1051 (1987) and 481 U.S. 1011 (1987). The Court's jurisdiction rests on Article III, Section 2, Clause 2 of the U.S. Constitution and the Judiciary Act, 28 U.S.C. §1251(a) (1988). This case is now before the Court on motions for leave to file amended pleadings submitted by Nebraska and by Wyoming.

III. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

The Third Interim Report of the Special Master now before the Court addresses Nebraska's third and Wyoming's first requests to amend their pleadings to assert new claims or to clarify existing claims.

Nebraska's original petition, accepted for filing in 1987, requested "that the Court enter its order requiring the State of Wyoming to comply with the . . . Decree . . . and enjoining the State of Wyoming from increasing its depletion of the natural flows of the North Platte River in violation of the State of Nebraska's apportionment under the Decree." Petition for an Order Enforcing Decree and for Injunctive Relief at 3-4 (Docket No. 1)[1]. Wyoming's counterclaim, also accepted for filing in 1987, alleged that Nebraska has "circumvented and violated the Decree . . . [b]y demanding natural flow water . . . in excess of the present beneficial use requirements of the Nebraska lands entitled to water . . . under the Decree"

1. Docket numbers refer to the docket maintained by the office of the Special Master.

and "[b]y demanding natural flow and storage water . . . and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree." Wyoming Counterclaim at 8-9 (Docket No. 5). Wyoming's counterclaim sought injunctive relief to prevent Nebraska's circumvention of the Decree. *Id.*

Wyoming's counterclaim was based on the Court's holding that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen [in Wyoming] for use below Tri-State." *Nebraska v. Wyoming*, 325 U.S. at 628. Affidavits in the record support the allegations in Wyoming's counterclaim that Nebraska has been diverting excessive amounts of water into canals in the apportioned Guernsey to Tri-State section of the river and wasting that water back to the river for use below Tri-State Dam. Wyoming Reply Brief in Support of Second Motion for Summary Judgment at 42-48; Third Affidavit of Bern S. Hinkley; Affidavit of Earl Michael (Docket No. 352). *See* Map in Appendix. The affidavits show that the excessive diversions by Nebraska canals result from using substantially inflated irrigated acreage figures to calculate allowable diversions, failing to require adequate measuring devices, demanding delivery of storage water below Tri-State Dam and failing to divert and use such deliveries, returning excessive amounts of water unused through wasteways and applying unreasonably large and unsubstantiated transportation losses to storage deliveries. *Id.* Wyoming asserted that Nebraska, through wasteful and inefficient practices, was accomplishing indirectly that which the Court said Nebraska was not entitled to do directly: the bypassing of water to uses downstream of Tri-State Dam in circumvention of the apportionment.

In January, 1988, Nebraska requested leave to file an amended petition that would have sought a new or expanded equitable apportionment of the North Platte River to provide water for instream endangered species and wildlife habitat uses in the central Platte River in Nebraska ("1988 amended petition"). The Court denied leave to file the 1988 amended petition. *Nebraska v. Wyoming*, 485 U.S. 931 (1988). In October, 1991, Nebraska sought leave to file an amended petition while cross-motions for summary judgment on the 1986 petition were pending before the Special Master ("1991 amended petition"). Count I of the 1991 amended petition would have sought an equitable apportionment of non-irrigation season flows of the North Platte River for uses below Tri-State Dam in Nebraska, including the same instream wildlife habitat uses that Nebraska had unsuccessfully sought to bring into the case with its 1988 amended petition. Counts II and III of the 1991 amended petition would have asserted new claims of injury to or violation of the existing apportionment against Wyoming and against the United States. After deciding the summary judgment motions in the 1993 opinion, *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), the Court denied Nebraska leave to file Count I of its 1991 Amended Petition and referred Counts II and III to the Special Master for recommendation. *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993).

The Court's 1993 opinion concluded, *inter alia*, that new water development on the North Platte tributaries in Wyoming did not violate the present Decree. Similarly the Court concluded that the Decree does not "impose a cap" on the diversions by Nebraska canals diverting from the pivotal reach. *Nebraska v. Wyoming*,

113 S.Ct. at 1701.[2] However, obviously referring to both Nebraska's claims and Wyoming's counterclaim, the Court noted that it had retained jurisdiction under Paragraph XIII of the Decree to "modify the decree in light of substantial changes in supply, threatened future development, or circumvention of the decree." *Id.* at 1693-94. Consequently, the Court held that the parties could seek modification of the Decree under the existing pleadings. However, new injunctions that would add restrictions on a state's use would be available only upon a showing of substantial injury by clear and convincing evidence. *Id.* at 1694-96.[3] In so holding that additional injunctive relief might be available in this case, the Court did not open the case to claims for a new Nebraska apportionment or to expand the geographic limits of Nebraska's existing apportionment because such claims were not before the Court in the original pleadings.[4]

---

2. The Court noted that the parties had not "sought summary judgment on Wyoming's counterclaim" and that the other "more limited rulings" that the parties had sought in relation to the counterclaim were "too theoretical and not sufficiently anchored . . . to be susceptible of summary resolution . . ." *Nebraska v. Wyoming*, 113 S.Ct. at 1709.

3. The Court also held that in an action to enforce previously determined rights, the plaintiff need not show injury. *Nebraska v. Wyoming*, 113 S.Ct. at 1695.

4. Nebraska has continually characterized the claims in the 1986 petition as seeking to protect the apportionment determined in the prior proceedings. Most recently Nebraska said:

> Nebraska's original Petition sought to address various violations of the Decree by Wyoming. Nebraska alleged that Wyoming was violating the Decree and threatening to upset Nebraska's equitable apportionment established by the Court . . .

Nebraska's Brief in Support of Motion for Leave to File Amended Petition, February 18, 1994 at 3 (Docket No. 623).

The present motions for leave to amend were filed in early 1994. The Court referred them to the Special Master. *Nebraska v. Wyoming*, 114 S.Ct. 1290 (1994). After receiving briefs the Special Master issued his Fourteenth Memorandum stating his "tentative recommendations" and presenting a number of questions to the parties. (Docket No. 677.) (Copy reproduced in Appendix at A-1.) The Special Master held argument on the motions to amend on July 26 and 27, 1994 (Transcript of hearing found at Docket No. 688) and, after inviting and receiving supplemental authority on equitable apportionment methods,[5] filed his Third Interim Report.

---

5. At argument, the Special Master invited the citation of supplemental authority on the following question:

> Is there, in the history of . . . the equitable apportionment doctrine . . . any circumstance where a downstream state has, in effect, received a mass allocation which had the consequence of allowing the upstream state to only honor the mass allocation but to otherwise deplete the stream?

The question included interstate compacts. Transcript of July 26-27, 1994 hearing at 252 (Docket No. 688). In response Wyoming cited numerous interstate compacts that had precisely that effect. In addition, Wyoming pointed out that the Court has issued only three interstate equitable apportionment decrees. One allocated a fixed quantity to the upstream state, leaving the rest to be used by the downstream state. *Wyoming v. Colorado*, 259 U.S. 419 (1922), decree modified 260 U.S. 1 (1922). Another provided for a fixed delivery obligation to the downstream state, while also placing an upper limit on the upstream state's diversions. *New Jersey v. New York*, 283 U.S. 336 (1931), decree modified, 345 U.S. 369 (1953). The third is the North Platte apportionment at issue in this case. Letter from Dennis Cook to the Honorable Owen Olpin, August 4, 1994 (Docket No. 689); Order of the Special Master, August 5, 1994 (Docket No. 691).

B. NATURE OF THE AMENDED PLEADINGS

The amended petition that Nebraska now tenders would replace the remaining Counts II and III of its 1991 amended petition. Some of the claims that Nebraska tenders would expand the scope of this case from one to protect the existing apportionment by enforcement and modification of the Decree to one for a new apportionment. Count I would attempt to clarify and restate the allegations in Nebraska's 1986 petition, but also would add new allegations that Wyoming is violating Nebraska's apportionment by failing to maintain adequate records under the Decree, by allowing ground water development, by improving the efficiency of existing projects and by interfering with return flows through Horse Creek, a tributary to the North Platte downstream of Tri-State Dam. Count II would assert that the United States is violating Paragraph XVII of the Decree by entering into contracts to provide storage water or storage space in Glendo Reservoir for uses not authorized in the Decree. Count III would recast Nebraska's Laramie River claim as one for a new apportionment for year-around uses and for uses downstream of Tri-State Dam. Count IV of the newly tendered petition is a renewal of Count I of Nebraska's 1991 petition for a non-irrigation season apportionment, which the Court denied leave to file in 1993. Nebraska's Brief in Support of Motion for Leave to File Amended Petition at 3 (Docket No. 623).

The amendments tendered by Wyoming would clarify and amend Wyoming's existing counterclaim and would assert several new claims against Nebraska and the United States. Wyoming's amended First Counterclaim against Nebraska and First Cross-Claim

against the United States allege essentially the same facts as Wyoming's original counterclaim. The amended First Counterclaim is more specific than Wyoming's original counterclaim in describing both the actions by which Nebraska has circumvented the apportionment and the additional injunctive relief sought by Wyoming to give full effect to the existing apportionment. It would ask the Court to modify the Decree to enjoin unlawful and wasteful diversions if the Court finds that Nebraska is circumventing or undermining the apportionment by such diversions. Wyoming's First Cross-Claim would bring similar allegations against the United States. The First Cross-Claim alleges that the United States has contributed to the unlawful and wasteful use of water in the pivotal reach by the manner in which it has operated the federal reclamation projects.

Wyoming's Second Counterclaim would amend the present counterclaim concerning Nebraska's use of Glendo Reservoir storage water by withdrawing the allegation that Nebraska has used that water outside the basin of the North Platte River and by identifying the specific water service contract which Wyoming alleges to violate the Decree. The Second Cross-Claim would bring those same allegations against the United States as a party to that water service contract.

Wyoming's Third Counterclaim and Third Cross-Claim would introduce a claim for relaxation of the Decree's limits on the use of Glendo Reservoir storage water as an alternative to the claim for relief asserted in the Second Counterclaim and Second Cross-Claim. Wyoming's Fourth Counterclaim and Fifth Cross-Claim would seek a modification of the Decree to remove pro-

visions for calculation of carriage loss on the delivery of storage water which Wyoming asserts are no longer correct and, as a result, do not serve their intended purpose.

Finally, Wyoming's Fourth Cross-Claim alleges that the United States has violated various contracts for the delivery of storage water and applicable federal law, thereby undermining the apportionment of natural flow. Wyoming alleges that the Court relied heavily on the presence of storage water in the system and assumed its lawful distribution in accordance with existing contracts when determining the equitable apportionment of natural flow[6] and that the United States has upset the apportionment by the manner in which it has allocated water released from the federal reservoirs.

IV. SUMMARY OF ARGUMENT

This case turns on the equitable apportionment of the North Platte River determined in the Court's 1945 opinion. The Court, through a series of decisions since 1986, has agreed to hear Nebraska's and Wyoming's claims to enforce the existing equitable apportionment of the North Platte and, if necessary, to modify the North Platte Decree to give effect to that apportionment. The Court twice has denied Nebraska's attempts to expand the scope of this case to determine whether North Platte flows are required for uses below the presently apportioned reach, including endangered species and wildlife

6. Nebraska agrees that the equitable apportionment was premised on the recognition that federal reservoirs provide storage water to the same lands for which natural flows are apportioned. Nebraska's tendered Amended Petition at 3, ¶7 (Docket No. 623). *See also Nebraska v. Wyoming*, 325 U.S. at 605.

habitat in central Nebraska and whether such determination would warrant a new apportionment. When read together, the Court's opinion and orders in this case frame the case as one to protect and to give effect to the existing apportionment.

The Court should continue to limit this case to one which would more clearly define the existing apportionment. Upon resolution of this case, if a party can show that the apportionment is no longer equitable or that changed conditions threaten irreparable injury to a state's interest even under the existing apportionment, the Court could consider a future application to adjudicate a new apportionment. However, such a future claim for a new apportionment would have to overcome the important principles of finality and certainty that lie at the root of the Court's reluctance to reopen an equitable apportionment.

The claims related to the Laramie River provide an example of the present dispute over the scope of this case. If this case is about protecting the existing apportionment, then Nebraska must prove that Wyoming's use of waters of the Laramie River so substantially reduces the flows in the apportioned reach as to cause real and substantial injury to uses that form the basis of Nebraska's apportionment - the canals diverting in the apportioned reach from Guernsey to Tri-State Dam. If, on the other hand, the Court directs the Special Master to try the issue of whether Wyoming's use of the Laramie River injures Nebraska's uses below Tri-State Dam, then this case in effect would be transformed into an action for a new North Platte apportionment in the first instance for such downstream uses. In that event the Court would face a greatly expanded, complex, and expensive litigation.

With respect to claims to modify the Decree to give effect to the existing apportionment, the Special Master would have the Court apply different standards to the similar claims of Nebraska and Wyoming. On the one hand, the Special Master recommends denial with prejudice of Wyoming's counterclaims and cross-claims that would seek additional injunctions in the Decree because, in his view, those claims would relitigate the basic apportionment. On the other hand, he recommends that the Court accept Nebraska's similar claims for new injunctions against Wyoming's development of Deer Creek and the Laramie River. He fails to appreciate that the claim for additional injunctions in the Decree that Wyoming would bring is a matter which the Court expressly reserved for consideration at the foot of the Decree. Because the Court expressly retained jurisdiction over the issue of whether limits on Nebraska's diversions may become necessary in order to carry out the apportionment, the Master surely is in error in suggesting that the issue has been foreclosed as a matter of res judicata.

With respect to Nebraska's claim in Count IV for a new apportionment, the Special Master recommends that the Court deny for the third time Nebraska's attempt to transform this case into a "global apportionment" for non-irrigation season uses or uses below Tri-State Dam. The Special Master recognizes again that wildlife habitat needs have not been determined and that, as a result, claims for an apportionment for that purpose are premature. Nonetheless he insists that he inevitably will be called upon to address endangered species and wildlife habitat needs in this case. Therefore rather than wait until Nebraska can articulate a case for a new apportionment he has announced

that he will now hear evidence of the impact of Wyoming's existing and proposed uses on alleged water needs for endangered species and wildlife habitat downstream in the Platte River in central Nebraska. By doing so he would transform this case into one for a new apportionment for such downstream uses. Unless the Court directs the Special Master on this point and reaffirms that this case is limited to claims to carry out the equitable apportionment, the Court's previous denials of Nebraska's motions to amend will be rendered meaningless and the Special Master will admit Nebraska's claims for a new and expanded apportionment through the back door.

Similarly Wyoming believes that the Special Master's recommendation to accept Nebraska's claim to enjoin proposed efficiency measures in the Horse Creek basin would improperly entertain a claim to expand the scope of the apportionment. Nebraska has not alleged sufficient injury to justify the extraordinary step of reopening the apportionment.

Finally Nebraska's claim for restriction of ground water use in Wyoming should be dismissed on the pleadings. The Court should not in equity hear Nebraska's request to impose interstate regulation of wells when Nebraska refuses to impose such regulation as a matter of intrastate law.

V. ARGUMENT

A. THE PURPOSE OF THIS CASE IS TO DEFINE AND PROTECT THE EXISTING APPORTIONMENT, NOT TO ADJUDICATE A NEW APPORTIONMENT OR ENLARGE THE GEOGRAPHIC LIMIT OF THE APPORTIONMENT.

The Court's 1945 opinion fashioned an apportionment to prevent threatened injury to the specific irrigation uses which Nebraska was able to show were in need of protection, i.e., the canals diverting in the pivotal Guernsey to Tri-State section of the North Platte River. *Nebraska v. Wyoming*, 325 U.S. at 628. As to uses below Tri-State Dam, the Court adopted Special Master Doherty's finding that local sources and return flows were sufficient and that "equitable apportionment does not permit Nebraska to demand direct flow water from above Whalen for use below Tri-State." *Id.* at 628, 654-55; Doherty Report at 96. Special Master Olpin acknowledges the "geographic limits of Nebraska's apportionment." Third Interim Report at 43.

After determining the basic apportionment in the 1945 opinion, the Court directed the parties to draft a decree containing the injunctions deemed necessary by the Court to put the apportionment into effect. *Nebraska v. Wyoming*, 325 U.S. at 657, 665. As the Court recognized in its 1993 opinion, the Decree is not synonymous with the apportionment.[7] Rather, the

7. For example, the Court found that Nebraska's apportionment determined in the earlier proceeding included the right to store water in the Inland Lakes despite the Decree's silence on the subject. *Nebraska v. Wyoming*, 113 S.Ct. at 1697. The Court held that

Decree is a means for carrying out the apportionment. *See* Wyoming Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 8-12 (Docket No. 624).

The motions for leave to amend the pleadings frame a fundamental dispute about the scope of this case: whether the Court has accepted or should accept claims for a new or expanded apportionment or whether the Court should continue to limit any claims for modification of the Decree to those for the purpose of carrying out and giving effect to the existing equitable apportionment. The issue flows in part from Wyoming's effort in the opening brief on its motion to amend to reconcile certain statements in the Court's 1993 opinion with the fact that the Court has twice denied Nebraska leave to bring claims for a new or expanded apportionment. The 1993 opinion held that the parties might seek modification of the Decree and that consideration of new injunctions in the Decree "may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment." However, by denying Nebraska's previous motions to amend, the Court has stopped short of opening this case to a complete reweighing of the equities. *Nebraska v. Wyoming*, 113 S.Ct. at 1695. Wyoming reasoned in its opening brief:

> The only interpretation that gives effect to both the April 20, 1993 opinion and the Court's orders denying Nebraska leave to amend is one that dis-

---

"when the decree is silent or unclear, it is appropriate to consider the underlying opinion, the Master's Report, and the record in the prior proceedings to determine whether the Court previously resolved the issue." *Id.* at 1695, *citing Wyoming v. Colorado*, 286 U.S. 494, 506-08 (1932).

> tinguishes between modification of the Decree and modification of the underlying equitable apportionment. While the Court has indicated a willingness to consider the need for modification of the Decree to give effect to the original apportionment, it has not opened the case to an unlimited reconsideration of the apportionment or to a complete reweighing of the equities on which the apportionment was based.

Wyoming Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 4 (Docket No. 624).

The recommendations in the Third Interim Report suggest that the Special Master has not yet drawn a clear line defining the scope of this case. On the one hand he recommends dismissing with prejudice part of Wyoming's counterclaim because, in his view, Wyoming's request for additional injunctive relief would constitute a relitigation of the basic apportionment. Third Interim Report at 55.[8] On the other hand, the Special Master recommends that the Court accept Nebraska's Counts I and III in their entirety, which would go well beyond the existing claims for modification of the Decree to carry out the apportionment and would transform this case into a complicated, time-consuming and expensive trial for a new and expanded apportionment.

The eight-year procedural history of this case undeniably establishes the need for a more complete defini-

---

8. Wyoming excepts to that recommendation and shows in the argument that follows (Part B) that Wyoming's claims for injunctive relief are in fact necessary to define and give effect to the geographic limits of Nebraska's apportionment, not to relitigate that apportionment.

tion of the existing apportionment. The claims and counterclaims which the Court has allowed to be filed present issues of whether new development in Wyoming on the one hand and wasteful practices in Nebraska on the other have injured or undermined the apportionment. The states need an answer to their competing claims that the other state has violated or circumvented the existing apportionment.[9]

The need to better define Nebraska's apportionment flows from the very nature of Nebraska's existing claims. Nebraska has repeatedly and consistently characterized the claims in its 1986 petition as seeking to protect the apportionment determined by the Court in 1945. To sustain its claim for new injunctive relief, Nebraska must show the injury to its apportionment and, therefore, must first define that apportionment.[10] If the apportionment is defined no more specifically than 75% of the nat-

---

9. Wyoming has characterized its first counterclaim as seeking a clearer definition of Nebraska's apportionment in order to afford more certainty. This lawsuit epitomizes the uncertainty that Wyoming faces with each new proposal by one of its citizens to use water from the North Platte. Without a clearer definition of Nebraska's apportionment, Wyoming will continue to face the threat of litigation in the Supreme Court over each such proposal.

10. In his Fourteenth Memorandum, the Special Master raised the question:

> If the court declines to define Nebraska's apportionment, what difficulties does that impose in determining whether proposed projects in Wyoming would cause injury to Nebraska's apportionment?

Fourteenth Memorandum of Special Master at 5 (Docket No. 677) (copy reproduced in Apprendix at A-1). The answer to the Master's question is self-evident. Injury to something cannot be proved without first defining that which is alleged to be injured.

ural flow in the Guernsey Dam to Tri-State Dam section, then Nebraska's proof necessarily will fail. There is not even an allegation that Nebraska has ever failed to receive 75% of the natural flow present in the pivotal reach. Rather, Nebraska's allegation is that Wyoming threatens to deplete the natural flows reaching the apportioned section to the injury of uses dependent on those flows. In order to meet its burden of proving injury, Nebraska itself must define the reasonable requirements of those uses served by the apportionment or rely on the Court's previous determination of such requirements.[11]

11. In the earlier proceeding Nebraska faced the same problem of showing injury and it attempted to do so through its "out-of-priority" studies, which were designed to show that senior Nebraska canals had received lessened supplies because of diversions by upstream junior canals in Wyoming. Special Master Doherty directed Nebraska to redo its out-of-priority studies holding the requirements of the Nebraska canals to those determined on the evidence before Special Master Doherty. Doherty Report at 103. In other words, Special Master Doherty realized that injury could be shown only if there were some reasonable requirement against which to measure the alleged injury. Likewise today, even if the requirements previously determined by Special Master Doherty and the Court are not to be taken as absolute diversion limits, there must be some measureable definition of the Nebraska requirements in order to determine the question of injury.

B. THE SPECIAL MASTER'S RECOMMENDATION TO DENY WITH PREJUDICE PART OF WYOMING'S FIRST COUNTERCLAIM AND FIRST CROSS-CLAIM WOULD PREMATURELY LIMIT THE CHOICE OF REMEDIES AVAILABLE TO THE COURT UPON PROOF THAT NEBRASKA AND THE UNITED STATES HAVE CIRCUMVENTED THE APPORTIONMENT.

The Special Master recommends that the Court consider Nebraska's claims for additional injunctive relief by way of modification of the Decree but deny with prejudice Wyoming's similar claims for new restrictions on Nebraska to prevent waste and unlawful use that injures Wyoming users. There is no basis for the distinction drawn by the Special Master between Nebraska's and Wyoming's tendered claims for injunctive relief.

1. The Need for Additional Injunctive Relief Sought in Wyoming's First Counterclaim and First Cross-Claim was Contemplated in the Court's 1945 and 1993 Opinions.

In the proceedings leading to the 1945 Decree, the United States asked the Court to include specific injunctions in the Decree limiting Nebraska's share of water in the pivotal reach at any time to the amount of water actually being diverted by the Nebraska canals in that reach up to the requirements of the lands under those canals. *Nebraska v. Wyoming*, 325 U.S. at 628. The United States was concerned that Nebraska, through administration of water rights within Nebraska, would draw natural flow from Wyoming for uses downstream

of Tri-State Dam. While the Court agreed that Nebraska's equitable apportionment did not extend to uses below Tri-State Dam, it did not see a need at the time for the injunctions requested by the United States. Instead, the Court left the issue open for further consideration:

> We cannot assume that Nebraska will undertake to circumvent the decree. . . If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree.

Id. at 628-29.

With its original counterclaim and now with its First Counterclaim and First Cross-Claim, Wyoming seeks such relief at the foot of the Decree. Wyoming asks first for the Court to define Nebraska's apportionment. Then if Wyoming proves, as it has alleged, that unlawful and wasteful practices by canals in the pivotal reach undermine or circumvent that apportionment, Wyoming would ask the Court to consider modifying the Decree to include additional injunctive relief.[12] The Court in its

12. When the Nebraska canals in the pivotal reach divert more water than they need, more junior canals make up their deficiency by increasing their demand for storage water. *See Nebraska v. Wyoming*, 325 U.S. at 630-31. The resulting depletion of storage supplies then has further injurious effect because the storage reservoirs must replace that supply by exercising their priority for storage of water before junior Wyoming water rights. On the average natural flow meets only about 50% of the requirements of the canals in the pivotal reach. Third Interim Report at 62; *Nebraska v. Wyoming*, 325 U.S. at 605. The balance of supply is from stor-

1993 opinion acknowledged that Special Master Doherty calculated the requirements of Nebraska's canals in the Guernsey to Tri-State section "for the purpose of determining the appropriate apportionment in the pivotal reach, not to impose a cap on the canals' total diversions . . ." *Nebraska v. Wyoming,* 113 S.Ct. at 1701. Consequently, the Court granted Nebraska's request for partial summary judgment that the Decree does not "impose absolute ceilings on canals taking in the pivotal reach." However, the Court also held that this case should not be narrowly confined to claims to enforce the terms of the existing Decree, but would include claims to modify the Decree pursuant to Paragraph XIII of the Decree.

The 1945 Decree apportions to Nebraska 75% of the natural flow in the Whalen to Tri-State reach of the North Platte. To ensure that an equitable supply of water arrives in that reach for division between the two states, the Decree places a variety of injunctions on Wyoming and Colorado activities upstream. As the Special Master noted in oral argument, this case is "well beyond" argument over strict application of those injunctions. Transcript of July 26, 1994 hearing at 172-73 (Docket No. 688). The Nebraska case before the court is

---

age water controlled by the United States under contracts with the various irrigation districts. Wyoming's First Cross-Claim against the United States recognizes that the United States shares responsibility for the wasteful diversions occurring in both the federal project canals and those receiving storage water under the Warren Act, 43 U.S.C. §§523-25 (1988). Wyoming's Fourth Cross-Claim further alleges that the United States has upset the apportionment by failing to abide by the relevant contracts and federal law in the distribution of storage water. The Special Master has recommended that the Court accept the filing of Wyoming's Fourth Cross-Claim.

based entirely on the need for *additional* injunctions regarding development of North Platte tributaries, i.e. additional definition of the equitable apportionment Nebraska claims under the 1945 Decree.

The relief sought in Wyoming's First Counterclaim and First Cross-Claim parallels that sought by Nebraska respecting water development on the tributaries in Wyoming. For example, although the Court in 1945 declined to limit Wyoming's development of the tributaries between Pathfinder and Guernsey, Nebraska now has an opportunity to seek modification of the Decree under the Court's express retained jurisdiction. *Nebraska v. Wyoming*, 113 S.Ct. at 1699; Decree Paragraph XIII(c). The Court also has given Nebraska an opportunity, under the general retained jurisdiction provisions of Paragraph XIII(f) of the Decree, to seek modification of the Decree to restrict Wyoming's use of the Laramie River despite the exclusion of the Laramie from the 1945 apportionment. 113 S.Ct. at 1695, 1697-98.

Like Nebraska's claims, Wyoming's First Counterclaim and First Cross-Claim would seek modification of the Decree pursuant to the Court's express anticipation of the need for such relief. However, the Special Master recommends that Wyoming's claim for modification of the Decree be denied with prejudice because in his view it seeks to relitigate matters that were decided by the Court in 1945. If the Special Master were to apply the same analysis to Nebraska's claims, he would have to conclude that Nebraska is seeking to relitigate the Court's previous decision not to restrict Wyoming's use of the Laramie and not to impose limits on development of the tributaries like Deer Creek. The Special Master

seems to apply different standards to Wyoming's and Nebraska's claims for modification of the Decree when there is no justification for distinguishing the two. Both seek additional injunctive relief to protect the equitable apportionment by addressing matters over which the Court retained jurisdiction.

2. *The Court did not Sanction Waste by Allowing Nebraska to Allocate its Percentage Share Among its Canals in the Pivotal Reach.*

The Special Master apparently felt constrained by the 1945 and 1993 opinions of the Court to deny Wyoming an opportunity for affirmative relief to address the issue of waste. The Special Master's recommendation rests on two erroneous assumptions:

1. That Nebraska has an absolute and immutable right to allocate its share of natural flow in the pivotal reach among its canals without regard to waste or the injurious effect of such waste on the equitable apportionment; and

2. That beneficial use of water is a concept foreign to the equitable apportionment.

The Special Master suggests that Wyoming's request for affirmative relief would constitute a request to relitigate the basic apportionment. Third Interim Report at 63 n.156. However, the Special Master's analysis does not recognize the distinction between the basic equitable apportionment and the injunctions in the Decree which were fashioned for the purpose of carrying that apportionment into effect. The Court held in its 1993 opinion that, under the present Decree, Nebraska may distrib-

ute its 75% of the natural flow in the pivotal reach in any way it sees fit. *Nebraska v. Wyoming*, 113 S.Ct. at 1701. But the Court was interpreting the existing Decree and addressing Wyoming's claim that Nebraska's waste violated injunctions in the Decree. The 1993 opinion did not foreclose the opportunity of Wyoming to seek modification of the Decree if Wyoming proved that Nebraska's method of allocating water among its users upsets the very basis of the apportionment. Rather than allow exploration of alternative approaches to providing a more administrable definition of Nebraska's apportionment, the Special Master has wrongly interpreted the 1993 opinion as a rejection of any effort to more completely define the apportionment. Such a conclusion is plainly contrary to the Court's 1945 opinion acknowledging that a remedy for such circumvention of the apportionment should be available at the foot of the Decree.

Far from constituting a concept foreign to the doctrine of equitable apportionment, the doctrine of beneficial use lies at the very heart of both state and federal water allocation laws and is an essential predicate of the equitable apportionment effected by the 1945 Decree. Under the laws of both Nebraska and Wyoming, as well as under federal reclamation law, beneficial use constitutes the measure and the limit of a water right. Wyo. Stat. §41-3-101 (1977); Neb. Rev. Stat. §46-231 (1988 Reissue); Reclamation Act of 1902, §8, 43 U.S.C. §372 (1988). A water right is limited to the amount that can be beneficially used regardless of the amount of the "paper water right" fixed by permit. *See Central Platte Natural Resource District v. State of Wyoming, et al.*, 245 Neb. 439, 513 N.W.2d 847 (1994); *Budd v. Bishop*, 543 P.2d 368, 373 (Wyo. 1975).

Both Special Master Doherty and the Court were well aware of the limits of beneficial use in fashioning the 1945 apportionment. Doherty Report at 15; *Nebraska v. Wyoming*, 325 U.S. at 612-614. It is inconceivable that the Court in 1945 would have ignored a water law principle as fundamental as that of beneficial use in formulating the apportionment. Rather, the Court assumed as an essential underpinning of the apportionment that each state and the federal agencies responsible for administration of water rights under the Decree would continue to be guided by the doctrine of beneficial use and would not allow canals to divert substantially more than their requirements.[13]

The Special Master finds "no criteria for nor definitions of waste or beneficial use in either [Special Master Doherty's] Report or the decree." Third Interim Report at 60-61 n.151. He points out that Special Master Doherty devoted "considerable energy to addressing historic diversions." *Id.* Wyoming acknowledges that

---

13. For example, in the earlier proceeding Nebraska argued that Special Master Doherty had allowed an insufficient diversion requirement for the Northport Canal. The issue was whether the Northport Canal could demand a full supply at the river headgate when much of its requirement was met by return flows accruing directly to the canal. The Court said,

> We conclude that Northport should be entitled to use that amount of flow during the season to meet its requirement of 19,100 acre-feet. The 186 second feet will, however, be subject to reduction by the amount of return flow intercepted by . . . Northport *at any given time*.

325 U.S. at 651 (emphasis added).

The Court obviously thought there would be some limits on the canals' diversions, even if the Court would decline at that time to impose limits through specific injunctions in the Decree.

Special Master Doherty considered historic diversions in determining the requirements of the canals in the pivotal reach. However, historic diversion was only one of many factors considered by Special Master Doherty. He painstakingly determined the amounts of irrigated acreage under each canal, the rates of seepage and loss for each canal and, ultimately, the amount of water per irrigated acre that was reasonably required to achieve the successful irrigation of the particular lands. Doherty Report at 196-245. In fact, Special Master Doherty expressly rejected historic diversions as a reliable measure of requirements:

> The exceedingly wide fluctuation in the delivery of water to this [Northport] project (as well as to a great many others) seriously discredits those deliveries as a measure of requirement. This is true whether we look at the maximum or minimum or to an average. A more reliable method, wherever the record supplies the necessary data, is to start with the per acre requirement at the land, ascertain and apply the canal loss percentage, and thus arrive at the necessary rate of headgate diversion.

Doherty Report at 223.

Regardless of the methodology used and the factors considered by Special Master Doherty, the fact is that he determined the irrigation requirements of those specific lands and the Court adopted his findings "for the purpose of determining the appropriate apportionment in the pivotal reach." 113 S.Ct. at 1701.[14] If Wyoming

14. Special Master Doherty defined "irrigation requirement" as "the quantity of water, inclusive of precipitation, (including *unavoidable* wastes) that is required for crop production." Doherty Report

proves that Nebraska users, with the aid or acquiescence of the United States, have circumvented the apportionment by diverting in excess of the requirements of the lands supplied by canals in the apportioned reach and by spilling or returning that excess water to the river for uses not recognized in the Decree, the Court should have power to fashion an appropriate remedy.

3. *The Principle Favoring Deference to Intrastate Administration of Water Rights Does not Compel the Dismissal of Wyoming's Claims for Additional Injunctive Relief.*

The Special Master's fear that the relief sought in Wyoming's First Amended Counterclaim would unduly interfere with intrastate water administration is misplaced. Third Interim Report at 62. While the Court tries to defer to intrastate administration where possible, an interstate equitable apportionment can and does determine and limit individual water uses when such a limit is necessary to effect the equitable apportionment. *See, Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Here the Court has already determined that the equitable apportionment does not entitle Nebraska to demand direct flow from Wyoming for uses below Tri-State. *Nebraska v. Wyoming*, 325 U.S. at 628. If Wyoming proves that Nebraska is accomplishing indirectly, through waste and inefficiency, that which the Court said it could not do directly, the Court has said that it will consider the need for additional injunctive relief. *Id.* at 628-29.

---

at 5 (emphasis added). Wyoming uses the term "beneficial use requirement" synonymously. Reasonably *avoidable* waste is not part of requirements, even under Special Master Doherty's definition.

4. *The Effect of Adopting the Special Master's Recommendation Would be to Render the Court Powerless to Fashion Affirmative Relief to Control Nebraska's Waste.*

The Special Master has acknowledged that evidence of Nebraska's waste and inefficiency will be part of Wyoming's defense to Nebraska's various claims. Third Interim Report at 63-64 and n.158. Thus, denying Wyoming's First Counterclaim and First Cross-Claim with prejudice as recommended by the Special Master would not limit the evidence or scope of trial but would only limit the scope of relief that could be considered or adopted by the Court.

The better approach would be to withhold ruling on the appropriate scope of relief until the facts have been developed. In his recommendation concerning Wyoming's Third Counterclaim dealing with transportation losses, the Special Master adopts such an approach by recommending that the Court "not foreordain the relief to be granted." Third Interim Report at 66. Likewise, there is no reason at this stage to prematurely and prospectively limit the remedies that the Court might adopt if Wyoming proves that the operation of the Nebraska canals in the pivotal reach is fundamentally undermining the equitable apportionment.

C. BY ANNOUNCING THAT HE WILL HEAR EVIDENCE OF INJURY TO USES BELOW TRI-STATE DAM AS PART OF NEBRASKA'S COUNTS I AND III, THE SPECIAL MASTER WOULD TRANSFORM THIS CASE INTO ONE FOR A NEW APPORTIONMENT.

1. *The Special Master's Recommendation that the Court Consider Alleged Water Needs for Endangered Species, Wildlife Habitat and Other Uses Downstream of the Apportioned North Platte River Contradicts the Court's Denial of Nebraska's Earlier Motions to Amend.*

The Court twice has denied Nebraska leave to amend its petition: once to seek a new apportionment for endangered species and wildlife habitat in the Platte River in central Nebraska, *Nebraska v. Wyoming*, 485 U.S. 931 (1988), and once to seek an apportionment of non-irrigation season flows primarily for uses downstream of the presently apportioned reach. *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). Nebraska has again requested leave to amend its petition to seek an apportionment of non-irrigation season flows in large part for alleged endangered species and wildlife habitat uses in the central Platte River downstream of the apportioned North Platte River. Nothing has changed to warrant a different result and therefore, the Special Master again recommends that the Court deny leave to bring such claims. However, he then effectively negates that recommendation by stating that the downstream endangered species and wildlife issues are already in the case as part of Nebraska's Laramie River and Deer Creek claims. *See* Third Interim Report at 14 ("[S]ome evi-

dence of those changes [that affect wildlife uses in downstream Nebraska] and their impact on the critical habitat will be introduced."), 17 ("Because several key federal environmental laws had not been enacted at the time of the original proceedings, those statutes and the wildlife uses they recognize may also come before the Court now as changed conditions."), 26 ("Despite the Court's denial of Nebraska's 1988 petition, wildlife habitat problems continue to present issues that ultimately cannot be ignored in these proceedings.").

The Special Master intends to entertain claims by Nebraska to impose new restrictions on Wyoming for the purpose of supplying water for endangered species and wildlife habitat purposes in the central Platte:

> Nebraska invoked wildlife needs in central Nebraska in both her 1988 and 1991 proposed amendments. Although her motions were denied, Nebraska has persisted in her attempts to have wildlife issues considered in this proceeding in order to protect that equity and to spread the burden of providing water for wildlife habitat.
>
> * * *
>
> While I continue to believe that the time has not yet come for a global non-irrigation season apportionment for wildlife habitat and other uses, I do not doubt that wildlife issues must be considered in, and evidence of the needs of these uses admitted into, this case in the context of the controversies over the waters of the Laramie River and Deer Creek.

Third Interim Report at 18-20.

The Special Master acknowledges that "apportioning the non-irrigation season flows will be an entirely new and extremely complex original jurisdiction case" and that "[t]o add Count IV would surely bring about further delay and complexity." Third Interim Report at 54, 55. On the other hand, he suggests that an inquiry into wildlife uses in the context of Nebraska's Deer Creek and Laramie River claims would be more limited in scope than the "global apportionment" sought in Nebraska's tendered Count IV and that "apparently much of the data evidencing necessary flows for wildlife has already been developed." *Id.* at 53 n.137.

There cannot be a *limited* inquiry into the endangered species and wildlife habitat issues that would apply only to requests for new injunctions against Wyoming. If the Court takes on the issue, a trial would be required to determine initially whether and if so, what amount of, flows are essential to the conservation and recovery of the endangered species and their critical habitat. In that type of cart-before-the-horse approach to equitable apportionment, the Court would then need to assess whether its initial determination could lead to the type of real and substantial injury upon which Nebraska could rely to have the Court reconsider the equitable apportionment of the North Platte. Only after all of that initial effort to establish the ripeness of Nebraska's claims, would the weighing of downstream uses against Wyoming uses be appropriate. Then, rather than the one-sided trial now perceived by the Special Master, any such trial to reweigh equities would also include evidence of Nebraska's own responsibility for depletion of the central Platte River, including evidence of Nebraska's extensive ground water use, expanded irrigation use, etc. *See* Wyoming Response to

Nebraska's Motion for Leave to Amend at 37-43 (Docket No. 664).

To allow Nebraska in the context of its Laramie River and Deer Creek claims to seek restrictions against Wyoming in order to secure a supply of year-round flows for endangered species and wildlife habitat purposes would in fact be to entertain a claim for an apportionment for such wildlife uses. Such a result would plainly contradict the Court's denial of Nebraska's two previous motions to amend.[15] Wyoming acknowledges that the Court in its 1993 opinion declined "to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings." *Nebraska v. Wyoming,* 113 S.Ct. at 1695. There is no indication, however, that the Court intended by that language to reverse its previous denial of Nebraska's claim for an apportionment for endangered species and wildlife habitat uses in the central Platte River. *Nebraska v. Wyoming,* 485 U.S. 931 (1988). In fact, by subsequently denying Nebraska leave to file Count I of its 1991 amended petition, the Court reaffirmed that this case was not to include a claim for apportionment of non-irrigation season flows or for uses below Tri-State Dam such as endangered species and wildlife habitat purposes. *Nebraska v. Wyoming,* 113 S.Ct. 1941 (1993).

15. At the hearing before the Special Master on June 26, 1994, counsel for Nebraska admitted that Nebraska's Count IV would have been unnecessary had Nebraska known that the Special Master would treat Nebraska's existing Laramie River and Deer Creek claims as encompassing the non-irrigation season and endangered species issues. Transcript of June 26, 1994 Hearing at 157-59.

2. *Allegations of Injury to Endangered Species and Wildlife Habitat are Based on Mere Speculation That Various Pending Proceedings Under State or Federal Environmental Laws Will Quantify a Water Requirement for Such Uses and That Quantification Will Lead to Claims of Real Injury.*

The Court's denial of Nebraska's previous amendments evidenced not only a reluctance to expand this case into one for a new apportionment but also a recognition that endangered species issues must be addressed in the first instance under the statutes enacted by Congress for that purpose. Nebraska's allegation that Deer Creek Reservoir or development on the Laramie will harm flows needed for wildlife habitat, like Nebraska's claim for a "global apportionment" for wildlife uses, is based on the anticipation that certain federal environmental laws might impose an unfair and disproportionate burden on Nebraska users to provide water for wildlife habitat. Third Interim Report at 18.

The Federal Energy Regulatory Commission is considering renewal of hydroelectric licenses for Kingsley Dam and related facilities in Nebraska. The central issue there is whether and the extent to which releases may be required from the two million acre-foot Lake McConaughy to avoid jeopardy to endangered species or their habitat. However, Nebraska is not alone in facing the endangered species problem. All three states in the Platte River drainage are involved in negotiations to develop a basin wide recovery program for the Platte River endangered species.[16] The U.S. Bureau of

16. The Recovery Plan process is a cooperative effort among the three states, the United States and environmental and water user representatives to find a way to recover Platte River endangered

Reclamation and the U.S. Fish and Wildlife Service are studying the environmental effects of operation of the federal reservoirs in Wyoming and Colorado. Affidavit of John H. Lawson, United States Response to the Intervention Motions of the Platte River Trust, et al. (Docket No. 398). Deer Creek Reservoir underwent formal consultation under Section 7 of the Endangered Species Act (16 U.S.C. §1536(1988)) to assure non-jeopardy to the endangered species. Virtually any significant water development project in any of the three states will have federal involvement triggering similar review under federal environmental laws.

However, until the various proceedings applying the federal environmental laws to Nebraska's water uses have run their course and specific water requirements for wildlife have been determined, it is premature to speculate on the outcome of such proceedings or to consider reopening the apportionment on the mere antici-

---

species without upsetting existing equitable apportionments. (The South Platte River is apportioned by interstate compact between Colorado and Nebraska. South Platte Compact, 44 Stat. 195.) *See* Transcript of July 26, 1994 hearing at 86-91 (Docket No. 688); Third Interim Report at 26-28 n.72. Wyoming believes that the Court should encourage such an effort to resolve the endangered species concerns within the existing apportionment. However, the Special Master, based on extraneous materials provided by various amici, dismisses the Recovery Plan effort because the Governor of Colorado reportedly expressed the view that the interstate agreement to initiate the process had not committed Colorado "to deliver any more water at the Colorado-Nebraska state line than is provided by interstate compact." Third Interim Report at 27 n.72; July 26, 1994 Transcript at 87-89. Before any evidence has been offered, confronted or admitted, and before the Court has accepted jurisdiction over the issue, the Special Master has improperly relied on "substantial factual information and learning" outside the pleadings, affidavits and sworn discovery responses in the record to presume a water requirement for endangered species. Third Interim Report at 20.

pation of a particular result. The Court will not exercise its original jurisdiction over a claim involving future, speculative injury. *See New York v. Illinois,* 274 U.S. 488, 490 (1927); *Arizona v. California,* 283 U.S. 423, 462 (1931); *United States v. West Virginia,* 295 U.S. 463, 475 (1935).

The Special Master appears to have assumed that, as a matter of fact, there is a shortage of needed water for wildlife habitat and that he will merely weigh that predetermined equity when considering whether to recommend modification of the Decree. *See* Third Interim Report at 11-20, 53 n.137. Such allegations cannot be assumed. They are being disputed and intensively negotiated in the proceedings before the Federal Energy Regulatory Commission on Relicensing of Kingsley Dam, in the environmental review of North and South Platte federal reservoirs, and in the Recovery Plan negotiations. The wildlife issues belong in those forums and there is no reason to presume at this stage that their resolution will require the Court's involvement or a reopening of the equitable apportionment.

D. THE COURT SHOULD NOT ACCEPT NEBRASKA'S HORSE CREEK CLAIMS WHICH WOULD SEEK TO EXPAND THE GEOGRAPHIC SCOPE OF THE APPORTIONMENT WITHOUT ALLEGING SUFFICIENT INJURY TO WARRANT REOPENING THE APPORTIONMENT.

Wyoming and the United States opposed the part of Nebraska's Count I that would seek injunctive relief to prevent contemplated irrigation efficiency measures

under a federal irrigation project in the drainage of Horse Creek, a tributary entering the North Platte below Tri-State Dam. On its face the issue appears to involve the existing apportionment. However, Nebraska's Horse Creek claim actually seeks to protect a certain flow regime below Tri-State Dam that would require expanding the apportionment. The Special Master recognizes that Nebraska's Horse Creek claim involves a request to reopen the apportionment to extend its geographic limits. Third Interim Report at 41-43. But he fails to recognize that Nebraska must overcome the Court's reluctance to reopen an equitable apportionment. *Nebraska v. Wyoming,* 113 S.Ct. at 1696. Even assuming Wyoming's actions would affect return flows below Tri-State Dam, that fact alone is not sufficient to warrant the Court extending the apportionment below Tri-State Dam. The Court should not presume injury.

The Special Master suggests that Horse Creek constitutes a unique situation where such return flows accrue within Wyoming's borders and conceivably could be captured by a Wyoming user. However, the amount of water involved is too small and the likelihood of any substantial development too remote to justify the extraordinary step of reopening the basic apportionment to extend its geographic limits.[17] Moreover, the Court can take notice that it is virtually impossible for Wyoming or

17 The specific improvement in question on Horse Creek is a 680 acre-foot re-regulating reservoir proposed to increase the efficiency of the Ft. Laramie Canal which delivers water to the Goshen Irrigation District in Wyoming and the Gering-Ft. Laramie Irrigation District in Nebraska. The reservoir would periodically impound flows from the canal for later delivery to North Platte Project lands, thereby providing a small reduction in the diversion demand on the North Platte River. By way of comparison, the

its water users to have any substantial impact on return flows and local sources below Tri-State Dam. Water uses that can affect the return flows below Tri-State are almost entirely in Nebraska's control.

Finally, even if Nebraska could show an imminent and substantial threat to uses dependent on return flows, Nebraska's theory faces the legal obstacle that Nebraska's own law recognizes the right of an irrigator to recapture and use return flows within its control. *United States v. Tilley,* 124 F.2d 850, 858 (8th Cir. 1942); *Ramshorn Ditch Company v. United States,* 269 F. 80 (8th Cir. 1920). The same principle was applied by the Court in 1945 when it acknowledged the right of the United States and irrigators under the federal projects to reuse return flows which were captured and controlled within the federal project. *Nebraska v. Wyoming,* 325 U.S. at 634-37. Nebraska cannot in equity argue that a different standard ought to apply as an interstate matter. *Kansas v. Colorado,* 206 U.S. 46 (1907); *Missouri v. Illinois,* 200 U.S. 496 (1906).

---

annual gains to the North Platte between Tri-State Dam and Bridgeport, Nebraska have averaged 736,000 acre-feet. Affidavit of Ann S. Bleed, March 1, 1991, Nebraska's Motion for Partial Summary Judgment at 27, 35 (Table 5) (Docket No. 296). Moreover, this project has been placed in "inactive" status by the Wyoming Water Development Commission. Fourth Affidavit of Michael K. Purcell, ¶ 15, Wyoming Response to Nebraska's Motion for Leave to File Amended Petition (Docket No. 651).

E. NEBRASKA IN EQUITY CANNOT DEMAND INJUNCTIONS AGAINST WYOMING GROUND WATER USE AS A MATTER OF INTERSTATE EQUITABLE APPORTIONMENT WHEN NEBRASKA'S OWN LAW DOES NOT RECOGNIZE SUCH A REMEDY INTRASTATE.

Nebraska claims in Count I that Wyoming violates the apportionment "by the present and future effects of existing ground water development and by potential ground water development for municipal, industrial, and irrigation purposes. . ." Nebraska Amended Petition at 4-5. In addition, Nebraska claims in Count III that Wyoming depletes Laramie River flows guaranteed by the Grayrocks settlement agreement "by the present and future effects of existing and threatened ground water development . . . ."[18] Nebraska Amended Petition at 9. On the other hand, Nebraska law does not allow for restriction of ground water use regardless of the impact such use might have on surface water supplies. Therefore, Wyoming objects to Nebraska's ground water claims and asks that they be dismissed from Counts I and III for failure to state a claim upon which relief can be granted in equity. Wyoming's objection is equivalent to a motion to dismiss under Fed.R.Civ.P. 12(b)(6) or 12(c). Robert L. Stern, Eugene Gressman, et al., *Supreme Court Practice* at 478 (7th Ed. 1993). Wyoming hopes to avoid a costly and time-consuming trial if the

---

18 Although Nebraska's claims to Laramie River flow assume that the Grayrocks settlement should form the basis of an injunction against Wyoming, the Court has specifically declined to rely on that private agreement to reduce Nebraska's burden of proof on the Laramie claims. *Nebraska v. Wyoming*, 113 S.Ct. at 1699; *see also Mississippi v. Louisiana*, 113 S.Ct. 549 (1992).

Court will not as a matter of equity grant the relief Nebraska seeks.[19]

There is a fundamental distinction between Nebraska's ground water claims and the other claims that the Court has already accepted. By refusing to provide for the regulation of wells to protect senior surface water rights under its own state law, Nebraska effectively fails to recognize the connection between ground water and surface water. Thus, a simple principle of equity will control the issue. The Court in equity should not entertain a claim by one state against another for relief that the complaining state's own law fails to recognize intrastate. *Missouri v. Illinois,* 200 U.S. 496 (1906). A similar principle was applied in *Kansas v. Colorado,* 206 U.S. 46, 104-05 (1907) (Since Kansas law required appropriators to honor the reasonable use of a riparian proprietor "she cannot complain if the same rule is administered between herself and a sister state.").

Nebraska's position is like that of Missouri in *Missouri v. Illinois, supra.* There the Court declined to enjoin the dumping of sewage in the Illinois River by Illinois municipalities in part because Missouri, the complaining state, had no way to control similar discharges by its own municipalities:

> Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a

19 Wyoming, of course, disputes Nebraska's estimates of the quantity of ground water depletions but acknowledges that at this stage of the pleadings the Court should take the allegations of the pleadings as true. *Ohio v. Kentucky,* 410 U.S. 641, 645 (1973).

> standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame.

Id. at 522.

Perhaps *Missouri v. Illinois* is distinguishable by the fact that it was decided after trial. However, Wyoming believes that Nebraska's failure to address ground water regulation as an intrastate matter "offers a standard to which the defendant [Wyoming] has the right to appeal" in this case and will ultimately provide a basis for denial of the relief Nebraska seeks. If the Court agrees, then there is no need for a trial. Rather, the Court should deny the claim at this stage in keeping with the Court's desire to dispose of claims at the earliest possible stage. *See Ohio v. Kentucky,* 410 U.S. 641 (1973).

The Special Master rejects Wyoming's position as contrary to "the clear modern trend in water law to take account of the connection between ground waters and surface waters." Third Interim Report at 39. However, Wyoming freely acknowledges the ground water/surface water connection. Wyoming law has endorsed the "modern trend in water law" and provides a remedy to surface water users whose rights are injured by ground water depletion. *See* Wyoming Memorandum Describing the Administration of Water Rights in the North Platte Basin (September 17, 1993) at 57-60 (Docket No. 565); Wyo. Stat. §§41-3-901 to 938 (1977). Only Nebraska law, on the other hand, adheres to the admittedly outdated

view that neither recognizes the ground water/surface water connection nor provides for regulation of wells. *Natural Resources, Energy, and Environmental Law, 1993 The Year in Review,* Section of Natural Resources, Energy, and Environmental Law, American Bar Association (1993) at 329-30; *Central Platte Natural Resources District v. Wyoming,* 245 Neb. 439, 513 N.W.2d 847 (1994); Nebraska's Answers to Wyoming's Third Set of Requests for Admissions at 4-5, Admission No. 5 (Docket No. 186). The issue is not one of fact, but turns on the basic equitable principle that Wyoming should not be subject to interstate restrictions that Nebraska will not impose as a matter of intrastate law.

The Special Master dismisses Wyoming's equitable argument with the following statement:

> Nebraska provides a sufficient answer to Wyoming's equitable argument by noting that Wyoming "forgets that it is the upstream state which is subject to decreed restrictions designated to protect the natural flows of the North Platte River in the reach above the state line."

Third Interim Report at 40. The argument that only Wyoming wells and not Nebraska wells affect the flow to the pivotal reach, even if accepted as true, does not respond to the holding in *Missouri v. Illinois* that a state's intrastate laws and administrative practice should be taken to provide an equitable "standard to which the defendant state has the right to appeal in an interstate dispute." 200 U.S. at 522.

If the Court allows Nebraska to proceed to trial on its ground water claims, then those claims should be limit-

ed to the protection of flows to meet the requirements of canals in the pivotal reach above Tri-State Dam rather than to the protection of flows for uses downstream of Tri-State Dam. Moreover, if Nebraska attempts to limit ground water use in Wyoming, Wyoming must be allowed to demonstrate the self-inflicted injury that results from Nebraska's refusal to regulate ground water use intrastate.[20]

VI. CONCLUSION

For the foregoing reasons, the Court should adopt the Special Master's recommendations with the following exceptions:

1. The Court should grant Wyoming leave to file its First Counterclaim and First Cross-Claim in their entirety;

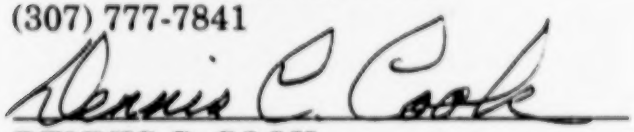
2. The Court should clarify that Nebraska's claims are limited to those brought for the purpose of carrying into effect the existing apportionment for the irrigation of lands served by diversions in the pivotal reach;

3. The Court should deny Nebraska leave to file that part of its Counts I and III involving ground water uses in Wyoming.

---

20 Wyoming disputes the assumption that Nebraska wells cannot affect the supply of water to lands irrigated from the pivotal reach. Nebraska wells can substantially affect the supply available to lands under the canals diverting from the pivotal reach, thereby increasing the demand by those canals on natural flow and storage water from Wyoming. Fourth Affidavit of Bern S. Hinckley, Wyoming Response to the Supplemental Memorandum for the United States (Docket No. 682).

Respectfully submitted,
JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK
Special Assistant Attorney General
Counsel for Wyoming
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320
RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General

MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782
ATTORNEYS FOR THE
STATE OF WYOMING

No. 108, Original

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING, ET AL.,
Defendants.

OFFICE OF THE SPECIAL MASTER

FOURTEENTH MEMORANDUM OF SPECIAL MASTER

PRE-HEARING MEMORANDUM ON MOTIONS TO AMEND THE PLEADINGS

A hearing has been scheduled on July 26 and 27, 1994 to address Nebraska's[1] and Wyoming's[2] motions to amend the pleadings. The purpose of this memorandum

1 Motion for Leave to File Amended Petition, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River Below Wheatland and to Apportion the Unapportioned Natural Flows of the North Platte River, and Brief in Support of Motion For Leave to File Amended Petition ("Nebraska's Motion"), Feb. 18, 1994.

2 Wyoming Motion For Leave To File Amended Counterclaims and Cross-Claims, Amended Counterclaims and CrossClaims, And Brief In Support Of Motion For Leave To File Amended Counterclaims and Cross-Claims ("Wyoming's Motion"), Feb. 18, 1994.

is to assist the focus of that hearing. Where they are formed, I set forth below my *tentative* recommendations to the Supreme Court respecting the disposition of the various counts in Nebraska's and Wyoming's motions. I have posed some questions, but the discussion at the hearing should not be limited by those questions.

Several of the proposed new pleadings are complex in form. At the conclusion of the hearing, during our status conference, I would find it useful to work together to simplify complex elements of the proposed new pleadings.

I propose to recommend that the Supreme Court grant the states' motions to amend the pleadings where they are uncontested and where the Supreme Court's standards for exercising original jurisdiction are met. Uncontested counts of the motions to amend include:

Nebraska's Count II
Wyoming's Second Counterclaim
Wyoming's Second Cross-Claim
Wyoming's Third Counterclaim
Wyoming's Third Cross-Claim

With respect to the remaining proposed claims, my tentative recommendations are as follows:

NEBRASKA'S COUNT I

GRANT, except with respect to the proposed amendments regarding existing and potential groundwater depletions. I am presently undecided on that issue pending receipt of the July 20, 1994 responses to the July 1, 1994 Supplemental Memorandum of the United

States on Proposed Amended Claims of Wyoming and Nebraska. I am also presently undecided concerning the inclusion of the Horse Creek issue.

Questions:

1. Where, oh where, is Horse Creek?
2. What was the status of Horse Creek in the original proceedings?

NEBRASKA'S COUNT III

GRANT.

NEBRASKA'S COUNT IV

DENY WITHOUT PREJUDICE on ripeness grounds the proposal for a global non-irrigation season apportionment, but address effects on non-irrigation season flows of all proposed projects or issues currently in the case and added to the case by amended pleadings.

Questions:

1. Are there imminent and substantial threats of additional non-irrigation season depletions in Wyoming that will not be addressed through claims already in the case? If so, what actions or proposed actions of Wyoming give rise to those threats, and what is the magnitude of their anticipated depletions? If there are in fact such imminent and substantial threatened depletions, could they be addressed on a case-by-case basis instead of by a global non-irrigation season apportionment?

2. Were there to be a present global apportionment of non-irrigation season flows among Colorado, Wyoming and Nebraska, how would the Court go about quantifying the flows Nebraska seeks for each of the equities she asserts — irrigation, hydroelectric power production, water-cooled electric power production, municipalities, recreation and fish and wildlife? For example, how should the Court go about quantifying Nebraska's fish and wildlife equities? Would doing so require the Court to be informed of the ongoing habitat and recovery initiatives of responsible state and federal wildlife agencies and the flows that will ultimately be required to implement regulatory measures yet in the process of being formulated?

3. Were the Court to apportion non-irrigation flows for equities asserted by Nebraska, would the Court have to craft decree provisions to assure that those equities are actually served? Again using fish and wildlife equities as an example, would the Court be obliged to write the decree so as to assure that the fish and wildlife share would arrive where it is needed and would not be depleted by other Nebraska uses?

4. What is the status of recent work on the Central Platte River Recovery Implementation Program and by the Bureau of Reclamation? What, if any, agreements have been made among the states concerning contributions to be made to the program of river recovery?

5. Short of a global off-irrigation season appropriation, what could be achieved in the context of this

case to preserve flexibility to meet downstream wildlife equities as determined, for example, by ongoing studies of state and federal agencies. Cf. Second Interim Report on Motions For Summary Judgment and Reviewed [sic] Motions For Intervention (April 9, 1992) at 107 n.116.

WYOMING'S FIRST COUNTERCLAIM
WYOMING'S FIRST CROSS-CLAIM

DENY, except GRANT the amendment for the final paragraph (". . . to modify the Decree as necessary to confirm that, when the water storage rights of the federal reservoirs have not been fully satisfied, those reservoirs may not bypass water to the Nebraska State Line Canals in excess of the diversion limitations or annual volumetric limitations fixed in Paragraph IV of the Decree.").

Questions:

1. What remains of Wyoming's original counterclaims following the Supreme Court's 1993 opinion?

2. If the Court were to venture to "define" Nebraska's apportionment as Wyoming requests, how would it go about that task? More specifically, how would that definition take account of the non-irrigation uses that are ultimately served by Nebraska's apportionment? For example, how would the Court accommodate fish and wildlife within such a definition?

3. If the Court declines to define Nebraska's apportionment, what difficulties does that impose in determining whether proposed projects in Wyoming would cause injury to Nebraska's apportionment?

WYOMING'S FOURTH COUNTERCLAIM
WYOMING'S FIFTH CROSS-CLAIM

GRANT.

Questions:

1. What is the current status of negotiations respecting a revision of the transportation loss formula?

2. Could I be of assistance in reaching a consensus on a revised transportation loss formula?

WYOMING'S FOURTH CROSS-CLAIM

GRANT.

Questions:

1. What is the current status of *Goshen Irrigation District v. United States,* No. C89-0161-J?

/s/_____
Owen Olpin, Special Master

DATED: July 12, 1994

63 pp

SUPREME COURT, U.S.
FILED
NOV 25 1994

No. 108, Original

In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

43pp

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES

The United States excepts to the Special Master's recommendation that Wyoming be granted leave to file its Fourth Cross-Claim against the United States, which seeks relief under the North Platte Decree based on allegations that the United States has failed to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by water service contracts governing use of water from those reservoirs.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

TABLE OF CONTENTS

	Page
Statement	1
A. The original proceedings	2
B. The current proceedings	5
1. The First and Second Interim Reports	6
2. The Third Interim Report	9
Introduction and summary of argument	13
Argument:	
Wyoming's proposed Fourth Cross-Claim does not present an appropriate claim for relief in this original action	16
A. The North Platte Decree explicity provides that the Decree shall not affect water storage rights or in any way interfere with the operation of federal water storage facilities	18
B. Wyoming is not an appropriate party to seek enforcement of legal and contractual rights with respect to the Bureau of Reclamation's administration of storage water	24
C. The federal district courts provide alternative fora for resolving challenges to the Bureau of Reclamation's administration of storage water	26
Conclusion	30
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Arizona v. *New Mexico*, 425 U.S. 794 (1976)	17, 26
California v. *Nevada*, 447 U.S. 125 (1980)	16, 17, 26, 30
California v. *Texas*, 457 U.S. 164 (1982)	17, 26
California v. *United States*, 438 U.S. 645 (1978)	27
California v. *West Virginia*, 454 U.S. 1027 (1981)	17
ETSI Pipeline Project v. *Missouri*, 484 U.S. 495 (1988)	27

Cases—Continued:

	Page
Hinderlider v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)	28
Ickes v. *Fox*, 300 U.S. 82 (1937)	27
Ide v. *United States*, 263 U.S. 497 (1924)	27
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275 (1958)	27
Maryland v. *Louisiana*, 451 U.S. 725 (1981)	17, 24
Minnesota v. *United States*, 305 U.S. 382 (1939)	29
Mississippi v. *Louisiana*, 113 S. Ct. 549 (1992)	17
Nebraska v. *Wyoming*:	
345 U.S. 589 (1945), modified, 345 U.S. 981 (1953)	*passim*
345 U.S. 981 (1953)	5
479 U.S. 1051 (1987)	1
483 U.S. 1002 (1987)	1
492 U.S. 903 (1989)	1
112 S. Ct. 1930 (1992)	1
113 S. Ct. 1689 (1993)	1, 6, 7, 8, 9, 29
114 S. Ct. 1290 (1994)	1-2, 9
115 S. Ct. 308 (1994)	2
Nevada v. *United States*, 463 U.S. 110 (1983)	27
Ohio v. *Wyandotte Chems. Corp.*, 401 U.S. 493 (1971)	17, 26
Oklahoma ex rel. Johnson v. *Cook*, 304 U.S. 387 (1938)	25
Texas v. *New Mexico*, 462 U.S. 554 (1983)	17, 25, 26
United States v. *Minnesota*, 270 U.S. 181 (1926)	24
United States v. *Nevada*, 412 U.S. 534 (1973)	16, 17, 26
United States v. *Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977)	27
Washington v. *General Motors Corp.*, 406 U.S. 109 (1972)	17, 26
Westlands Water Dist. v. *Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993)	30
Wyoming v. *Colorado*, 259 U.S. 419 (1922)	3
Wyoming v. *Oklahoma*, 112 S. Ct. 789 (1992)	17, 25, 26

Constitution and statutes:

	Page
U.S. Const. Art. III, § 2, Cl. 2	16
28 U.S.C. 1251(a)	16, 17
28 U.S.C. 1251(b)(2)	16
28 U.S.C. 1251(b)(3)	17
43 U.S.C. 390uu	29

Miscellaneous:

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th ed. 1993)	16

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

STATEMENT

On October 6, 1986, the State of Nebraska petitioned this Court to adjudicate its claims under the North Platte Decree entered in *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953). The Court granted Nebraska leave to file its petition, 479 U.S. 1051 (1987), and referred the matter to Special Master Owen Olpin, 483 U.S. 1002 (1987). The Special Master filed his First and Second Interim Reports, 492 U.S. 903 (1989); 112 S. Ct. 1930 (1992), which addressed various pretrial issues. This Court overruled the affected States' exceptions to those reports. 113 S. Ct. 1689 (1993). The Court has since referred to the Special Master motions by those States to amend their pleadings. 114 S. Ct. 1290

(1994). On September 9, 1994, the Special Master submitted his Third Interim Report addressing those motions. The Court has invited the parties to file exceptions to the Special Master's Third Interim Report. 115 S. Ct. 308 (1994).

A. The Original Proceedings

In 1934, the State of Nebraska brought an original action in this Court against the State of Wyoming, seeking an equitable apportionment of the North Platte River. See *Nebraska* v. *Wyoming*, 325 U.S. at 591. In the course of the next 11 years, the State of Colorado was impleaded as a defendant, the United States intervened, Special Master Michael Doherty was appointed to take evidence, and (after a lengthy investigation) he issued a report. This Court reviewed the 274-page Doherty Report and largely followed its recommendations. See *id.* at 616-617.

The Court's 1945 decision focused on the immediate problem at hand: the North Platte's flow was overappropriated, and water users in Wyoming and Colorado were depleting the water supply before it reached downstream users in Nebraska. The Court perceived a clear need for an interstate apportionment of available water based on principles compatible with state water law systems. 325 U.S. at 616-617. As the Court explained, under the state law doctrine of prior appropriation, "priority of appropriation gives superiority of right." *Id.* at 617. The Court concluded that this "priority rule" should be the "guiding principle" in ensuring that available water is fairly allocated among the States. *Id.* at 618. The Court also noted, however, that a "just and equitable" apportionment might require departures from that principle. *Ibid.*

The Court was well aware that the apportionment controversy was "a delicate one and extremely complex." 325 U.S. at 617. It attempted to provide a workable solution to the practical problem by formulating a decree to "deal with conditions as they obtain today." *Id.* at 620. The Court observed that if conditions "substantially change, the decree can be adjusted to meet the new conditions." *Ibid.* Mindful that the North Platte Basin was experiencing a drought, the Court also concluded that its apportionment should be based on the "dependable flow." *Ibid.* "Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years." *Ibid.*, quoting *Wyoming* v. *Colorado*, 259 U.S. 419, 476 (1922).

Having stated those principles, the Court applied them to sequential sections of the North Platte River, from its source in Colorado to the Nebraska-Wyoming border. 325 U.S. at 621-655; see *id.* at 593-607 (describing the "natural sections" of the river). For each section, the Court examined Special Master Doherty's detailed inventory of the water supply, existing and proposed uses, their water requirements, their priorities compared to other rights, and the downstream effect of upstream limitations. The Court basically concluded that established priorities should be protected from any material increase in diversions that pose a concrete threat to the water supply. But the Court declined to prohibit alleged harms that were speculative, concluding that appropriate relief would be available if the threat materializes and "promises to disturb the delicate balance of the river." *Id.* at 625. See also *id.* at 622-623, 626-627, 628-629, 632-633, 637, 654, 655, 657.

Broadly viewed, the Court's decision had three prominent features. First, it allowed Colorado and

Wyoming water users on the upper reaches of the North Platte River (from its source to Pathfinder Reservoir) to continue existing diversions, while prohibiting certain new diversions that would diminish downstream water supplies. See 325 U.S. at 621-625. Second, the decision established priorities among federal storage reservoirs and certain canals that supply water for irrigation during the growing season. *Id.* at 625-637.[1] Third, the decision provided a proportional allocation of the North Platte River's natural flow from Whalen Dam near the confluence of the North Platte and Laramie Rivers in Wyoming to the Tri-State Dam, just across the border in Nebraska. *Id.* at 637-654.[2]

The Court directed the parties to formulate a decree "to carry this opinion into effect." 325 U.S. at 657. The resulting North Platte Decree contains a series of injunctions that, in accordance with the Court's decision, impose specific prohibitions on water diversions that pose an actual or impending threat to established uses. See Decree ¶¶ I-V (325 U.S. at 665-669).[3] The Decree also contains other definitional and

---

[1] Generally speaking, certain Nebraska canals that predated the Bureau of Reclamation's North Platte and Kendrick Projects have the most senior rights. 325 U.S. at 625-626, 630-631. The North Platte Project's Pathfinder and Guernsey Reservoirs, which store water primarily for Nebraska irrigation districts, have seniority over the subsequently constructed Kendrick Project's Seminoe and Alcova Reservoirs, which store water primarily for Wyoming irrigation districts. *Id.* at 626, 632-633.

[2] The Court apportioned 75% of the irrigation season natural flow to Nebraska and 25% to Wyoming, based on a rough proportion of the respective States' irrigation requirements and relative priorities in that reach. See 325 U.S. at 640-646.

[3] The Decree generally follows the structure of the Court's opinion, imposing prohibitions beginning at the headwaters of the North Platte River and extending to the Wyoming-Nebraska

administrative provisions. See Decree ¶¶ VI-XV (325 U.S. at 669-672). Paragraph XIII, the so-called "re-opener" provision, is particularly important. In keeping with the Court's decision to postpone resolution of abstract conflicts until they pose a concrete problem, paragraph XIII provides that "[a]ny of the parties may apply at the foot of this decree for its amendment or for further relief." *Id.* at 671-672.[4]

B. The Current Proceedings

In 1986, Nebraska invoked paragraph XIII of the Decree for an order enforcing the decree and for injunctive relief. See First Interim Rep. 2 & n.1; Second Interim Rep. 4. Nebraska contended that Wyoming has violated Nebraska's rights under the Decree through actions or proposed actions that would deprive Nebraska of water. Wyoming admitted the actions alleged in

---

border. Thus, paragraph I of the Decree enjoins Colorado from diverting or storing water in excess of prescribed amounts from the source of the North Platte River to the Colorado-Wyoming border. 325 U.S. at 665. Paragraph II enjoins Wyoming from diverting or storing water in excess of prescribed amounts from the Colorado-Wyoming border to Guernsey Reservoir. *Id.* at 665-666. Paragraphs III and IV establish priorities among the Nebraska canals, the North Platte Project reservoirs, and the Kendrick Project reservoirs, which divert water at various points for the most part in Wyoming. *Id.* at 666-667. Paragraph V apportions the natural flow from the Guernsey Reservoir to the Tri-State Dam, located in Nebraska near the Wyoming border. *Id.* at 667-669.

[4] In 1953, this Court approved a stipulation by the parties to amend the Decree to take into account the Bureau of Reclamation's construction and operation of the Glendo Unit of the Pick-Sloan Missouri Basin Program. See 345 U.S. 981. The Decree, as modified, appears in the appendix to Special Master Olpin's Third Interim Report at C1-C11.

Nebraska's petition, but denied that those actions violated the Decree, and it also filed a counterclaim against Nebraska. This Court referred the matter to Special Master Olpin, together with several requests for intervention by private parties. See Second Interim Rep. 5-7.

1. *The First and Second Interim Reports*

The Special Master has supervised pretrial proceedings and discovery aimed at narrowing and defining the issues. His First Interim Report recommended denial of Wyoming's comprehensive motion for summary judgment, but left open "the possibility of summary adjudication on any issue later in the proceedings." First Interim Rep. 16, 17-18; see *id.* at 18-37.[5] His Second Interim Report contained his recommendations on the parties' subsequent motions for summary judgment on four central issues in the case: (1) the Inland Lakes dispute; (2) the Laramie River dispute; (3) the Deer Creek dispute; and (4) the "below Tri-State" issues. See Second Interim Rep. 16-19; see also *id.* at 109-110 (proposed order). This Court largely accepted those recommendations and overruled exceptions by the affected States. 113 S. Ct. 1689 (1993).[6]

a. The Inland Lakes dispute. The Court first ruled that Nebraska and the United States were entitled to summary judgment on the Inland Lakes issue. The

[5] The Special Master also denied the pending motions by private parties for intervention, but gave those parties liberal opportunity to participate as amici curiae. See First Interim Rep. 6-14.

[6] The Special Master also recommended against granting the private parties' renewed motions for intervention. Second Interim Rep. 101-109. Those parties did not file exceptions to that recommendation. See 113 S. Ct. at 1694.

Inland Lakes are Bureau of Reclamation reservoirs located in Nebraska. They are part of the Bureau's North Platte Project and serve Nebraska irrigators. During the non-irrigation season, the Bureau diverts North Platte water at the Whalen Dam, located in Wyoming, to the Inland Lakes by way of the Interstate Canal. Nebraska argued that Wyoming was interfering with the Bureau's water deliveries to the Inland Lakes. The Court agreed with the Special Master that the Court's 1945 decision in this litigation had recognized the Inland Lakes storage rights and that the Lakes are entitled to continue receiving water deliveries with the same priority date as other components of the North Platte Project. See 113 S. Ct. at 1696-1697.

b. The Laramie River dispute. The Court next denied Nebraska's and Wyoming's competing motions for summary judgment on the Laramie River issues. The Laramie River is a North Platte tributary that originates in Colorado and flows into the Whalen-to-Tri-State section of the North Platte River. Nebraska argued that Wyoming had authorized storage and diversion facilities on the Laramie River that would deplete that stream's contributions to the North Platte and would diminish flows that Nebraska was entitled to receive under the Court's apportionment. The Court agreed with the Special Master that the 1945 decree "did not decide the fate of the excess Laramie waters," and it concluded that Nebraska could obtain injunctive relief only if it produced evidence that Wyoming's actions pose "a threat of injury serious enough to warrant modification of the decree." 113 S. Ct. at 1697-1699.

c. The Deer Creek dispute. The Court also denied Wyoming's motion for summary judgment on the Deer Creek dispute. Deer Creek is a North Platte tributary that originates in central Wyoming and flows into the

Pathfinder-to-Guernsey section of the North Platte River. Wyoming's proposed Deer Creek Project would result in the construction of a reservoir on Deer Creek to store and divert water for various uses. Nebraska argued that the project would deplete the Deer Creek contributions to the North Platte and would diminish flows that Nebraska was entitled to receive under the Court's apportionment. The Court ruled that the dispute raised issues of material fact concerning the project's character and administration that precluded entry of summary judgment. 113 S. Ct. at 1699-1700.

d. The "below Tri-State" issues. The Court granted Nebraska partial summary judgment on the "below Tri-State" issues. The Tri-State Dam, located about one mile east of the Wyoming-Nebraska border, marks the end of the Whalen-to-Tri-State section of the North Platte River. As we have explained (see page 4 & note 2, *supra*), this Court apportioned the natural flow in that section during the irrigation season, granting 75% to Nebraska and 25% to Wyoming. The Court did not impose an apportionment of the North Platte River downstream of the Tri-State Dam, because it appeared that other sources, including return flows from North Platte irrigation diversions, would provide sufficient water to meet the needs in the downstream section. See 325 U.S. at 654-655. Nebraska contended in the proceedings below that it has a legal entitlement to use of those return flows, because the Decree was premised on their availability. Colorado and Wyoming responded that the Decree protects only Nebraska's right to divert specific amounts of water upstream of the Tri-State Dam. The Special Master concluded that full resolution of the "below Tri-State" issues required further factual development. He recommended, however, that the Court grant partial summary judgment to Nebraska to clarify

that Nebraska is entitled to 75% of the natural flow in the Whalen-to-Tri-State section without regard to the beneficial use requirements of the individual canals. The Court agreed with that recommendation. See 113 S. Ct. at 1700-1701.

2. *The Third Interim Report*

Following this Court's 1993 decision, Nebraska and Wyoming requested leave from the Court to amend their pleadings, and the Court referred those requests to the Special Master. See 114 S. Ct. 1290 (1994). The Special Master's Third Interim Report contains his recommendations. The Special Master recommended that the Court allow Nebraska and Wyoming each to proceed with three of their general claims pertaining to the enforcement and modification of the North Platte Decree. The Special Master recommended against allowance of two claims—one proposed by Nebraska and one proposed by Wyoming. See Third Interim Rep. 33-36. See generally Third Interim Rep. App. D1-D16 (reprinting Nebraska's proposed amended petition); *id.* at E1-E13 (reprinting Wyoming's proposed amended counterclaims and cross-claims).

a. The Nebraska Claims. The Special Master recommended that the Court allow Nebraska to replace its current petition with Counts I through III of its proposed amended petition. See Third Interim Rep. 36-47. Those counts encompass the disputes that were left unresolved by this Court's 1993 decision, as well as additional issues involving other North Platte tributaries, groundwater depletion, water measurement, and the operation of federal reservoirs.

Count I of Nebraska's proposed amended petition seeks to enjoin "the State of Wyoming from increasing its depletion of the natural flows of the North Platte River

in violation of the State of Nebraska's apportionment under the Decree." Third Interim Rep. App. D7. That Count reasserts and expands upon Nebraska's allegations in its original petition. Nebraska not only asserts that Wyoming has violated the existing Decree through proposed development of North Platte tributaries (such as Deer Creek), but also asserts violations based on groundwater development and failure to maintain proper records. See *id.* at D4-D5. Count I specifically asserts that Wyoming has violated Nebraska's rights "by such projects as the proposed Deer Creek Project, reregulating reservoirs and canal linings in the Goshen Irrigation District and the Horse Creek Conservancy District, and by permitting unlimited depletion of groundwater that is hydrologically connected to the North Platte River and its tributaries." *Id.* at D5. See Third Interim Rep. 36-43.

Count II of Nebraska's proposed amended petition seeks to enjoin "the United States from violating the State of Nebraska's apportionment under the Decree." Third Interim Rep. App. D8. That Count has no corollary in Nebraska's original petition. It arises under Paragraph XVII of the North Platte Decree, which the parties added by stipulation in 1953 specifically to address the operation of the proposed Glendo Reservoir. See note 4, *supra*. Nebraska alleges that the United States has violated Paragraph XVII "by contracting for the use of Glendo Reservoir water for other than authorized purposes in the basin of the North Platte River in southeastern Wyoming below Guernsey Reservoir." *Id.* at D7. Although the United States denies that its Glendo contracting practices violate the Decree, the United States has not objected to including

that issue (which may be resolved by stipulation) in this proceeding. See Third Interim Rep. 43-44.[7]

Count III of Nebraska's proposed amended petition asks this Court to modify the existing Decree by specifying "that the inflows of the Laramie River below Wheatland are a component of the equitable apportionment of the natural flows in the Guernsey Dam to Tri-State Dam reach." Third Interim Rep. App. D11. That Count also seeks to enjoin "the State of Wyoming from depleting Nebraska's equitable share of the Laramie River's contribution to the North Platte River and from impeding or interfering with releases of water from Grayrocks Dam and Reservoir pursuant to the Grayrocks Settlement Agreement." *Id.* at D11-D12. Count III is an expanded version of Nebraska's original Laramie River claim. See Third Interim Rep. 44-47.

The Special Master recommended that the Court exclude without prejudice Count IV of Nebraska's proposed amended petition, which asks this Court to "equitably apportion the unapportioned non-irrigation season flows of the North Platte River between Nebraska and Wyoming." Third Interim Rep. App. D15. The Master noted that "the examination during trial of concrete non-irrigation season injury claims asserted by Nebraska with respect to both the Laramie River, Deer Creek, and other issues in the case will inform any subsequent case there may be on the non-irrigation season." Third Interim Rep. 49. He suggested that an apportionment of non-irrigation season flows may ultimately be necessary, but he concluded that such an apportionment, which would be an extremely complex

---

[7] Wyoming also has raised a challenge under Paragraph XVII of the North Platte Decree to the United States' operation of the Glendo Reservoir. See p. 13, *infra*.

undertaking, should not be undertaken until the other claims are resolved. See *id.* at 47-55.

b. The Wyoming Claims. The Special Master recommended that the Court deny Wyoming's request to amend its current counterclaim by adding the proposed First Counterclaim against Nebraska and the proposed First Cross-Claim against the United States. Third Interim Rep. 55-64. Those proposed amendments seek to modify the existing Decree to confirm "that equitable apportionment does not allow Nebraska to demand direct flow water from Wyoming for use below Tri-State Dam" and to limit certain water diversions to Nebraska "in excess of the diversion limits or annual volumetric limitations fixed in Paragraph IV of the Decree." Third Interim Rep. App. E6, E10. The Special Master explained that Wyoming's proposal, which seeks to transform the 1945 equitable apportionment "from a proportionate sharing of the natural flows into a defined and quantified apportionment," would "require relitigating matters that were litigated and determined in the original case in 1945 and largely reaffirmed in the Court's 1993 opinion." Third Interim Rep. 55.[8]

The Special Master recommended, however, that Wyoming be allowed to replace its current counterclaim with the Second through Fourth Counterclaims and the Second through Fifth Cross-Claims contained in its proposed amended filing. See Third Interim Rep. 64-71. The counterclaims (which seek relief against Nebraska) and the cross-claims (which seek relief against the

[8] The Special Master noted, however, that "denial should not foreclose Wyoming from litigating certain discrete issues contained within those pleading amendments," provided that Wyoming does not attempt to "relitigate the basic apportionment formula that was settled in 1945." Third Interim Rep. 63, 64.

United States and in some instances Colorado) address three subjects. Wyoming's Second and Third Counterclaims and Second and Third Cross-Claims seek enforcement or modification of Paragraph XVII of the North Platte Decree, which the parties added in 1953 to address the Bureau of Reclamation's operations at Glendo Reservoir. See *id.* at 64-65.[9] Wyoming's Fourth Counterclaim and Fifth Cross-Claim seek to revise the procedure set forth in Paragraph V of the North Platte Decree for determining "carriage" losses. *Id.* at 65-67. Finally, Wyoming's Fourth Cross-Claim "states a claim solely against the United States for alleged failure to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by the contracts governing water use from those reservoirs." *Id.* at 67-71.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Special Master's Third Interim Report proposes that this Court allow Nebraska and Wyoming to revise their pleadings to allow litigation of specific disputes and emerging concerns within the North Platte Basin, including issues of tributary development, groundwater depletion, reservoir operation, water measurement, and carriage losses. The Special Master concluded that "the alleged problems caused by changed conditions on the North Platte, and especially by increasing demands from a greater array of interests, have greatly magnified the complexities of the controversies" and require an expansion of the scope of issues considered beyond "those considered between 1934 and 1945 and even those specifically spelled out in the 1986 and 1987 pleadings." Third Interim Rep. 8.

---

[9] Paragraph XVII of the North Platte Decree is also the subject of Nebraska's proposed Count II. See p. 10, *supra*.

The Special Master's recommended pleading amendments provide an acceptable framework for resolving the current disputes, save in one important respect. The United States excepts to the Special Master's recommendation that Wyoming be granted leave to file its Fourth Cross-Claim against the United States, which seeks relief under the North Platte Decree based on allegations that the United States has failed to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by water service contracts governing water use from those reservoirs. Wyoming's challenge to the Bureau of Reclamation's administration of storage water is an inappropriate matter in this proceeding for three related reasons.

First, the North Platte Decree grants Wyoming no right to challenge the federal government's administration of storage water. To the contrary, the Decree expressly states that "[s]torage water shall not be affected by this decree," Decree ¶ VI, "nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities," Decree ¶ XII(b). See Third Interim Rep. App. C6, C7. Wyoming's challenge to the Bureau's administration of storage water in this proceeding would manifestly "affect" storage water and "interfere" with the operation of federal water storage facilities. That result is inconsistent with the express terms and intent of the Decree, which leaves in place the established institutions and mechanisms for resolving disputes over administration of federal storage water.

Second, Wyoming is not an appropriate party to challenge the federal government's administration of storage water. The Bureau of Reclamation stores water in federal reclamation reservoirs for release in accord-

ance with its contractual commitments to reclamation project participants and other water users. Wyoming is not a party to those contracts and has no rights under the Decree or otherwise to water stored in federal reservoirs for private water users. The project participants and other contracting parties, who possess legally enforceable contractual rights to the water, are the real parties in interest with respect to the administration of North Platte Project storage water contracts, and they are not parties to this proceeding.

Third, Congress has expressly provided other judicial mechanisms to adjudicate claims by appropriate parties that the federal government has, as Wyoming alleges, "failed to operate the federal reservoirs in accordance with applicable federal and state laws and has failed to abide by the contracts governing use of water from the federal reservoirs." Third Interim Rep. App. E11. Indeed, a North Platte Project irrigation district has brought a challenge to the Bureau's practices in administering storage water; that case has been briefed and submitted, and it is awaiting decision. See *Goshen Irrigation District* v. *United States*, No. C89-0161-J (D. Wyo.). See App., *infra*, 1a-8a (reproducing Complaint). This Court should not exercise its original jurisdiction to displace fully adequate mechanisms for resolving conflicts among the Bureau, the reclamation project participants, and other water contractors.

ARGUMENT

WYOMING'S PROPOSED FOURTH CROSS-CLAIM DOES NOT PRESENT AN APPROPRIATE CLAIM FOR RELIEF IN THIS ORIGINAL ACTION

The Constitution grants this Court original jurisdiction over cases in which "a State shall be Party." Art. III, § 2, Cl. 2. Congress has conferred on this Court "original but not exclusive jurisdiction" over controversies between a State and the United States. 28 U.S.C. 1251(b)(2). The Court has exercised its non-exclusive original jurisdiction "sparingly," because claims within that grant of jurisdiction may frequently be pursued through an alternative federal judicial forum. See *United States* v. *Nevada*, 412 U.S. 534, 538 (1973) (per curiam); *California* v. *Nevada*, 447 U.S. 125 (1980). See generally R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 469-471, 475 n.17 (7th ed. 1993).

For example, in *United States* v. *Nevada*, *supra*, the Court declined to exercise its original jurisdiction to resolve the respective water rights of California, Nevada, and an Indian tribe, noting that a Nevada district court currently had jurisdiction over water uses in Nevada, 412 U.S. at 537-538, and that "[a]ny possible dispute with California with respect to United States water uses in that State can be settled in the lower federal courts in California," *id.* at 539-540. Similarly, in *California* v. *Nevada*, *supra*, the Court declined to expand its reference to a Special Master in an interstate boundary dispute to resolve borderland title and ownership issues that "typically will involve only one or the other State and the United States, or perhaps

various citizens of those States." 447 U.S. at 133. Instead, the Court explained, "litigation in other forums seems an entirely appropriate means of resolving whatever questions remain." *Ibid.*[10]

The principles that this Court applied in *United States* v. *Nevada*, *supra*, and *California* v. *Nevada*, *supra*, are fully applicable to Wyoming's Fourth Cross-Claim, which seeks relief under the North Platte Decree solely against the United States. Wyoming's claim—which alleges that the federal government has administered water stored in federal reservoirs in violation of federal and state laws and contractual agreements—founders on three basic points. First, the North Platte Decree expressly provides Wyoming no right to "affect" storage

[10] The Court has applied a similar approach to its other exercises of original jurisdiction. For example, Congress has conferred on this Court "original and exclusive" jurisdiction over controversies between two or more States. 28 U.S.C. 1251(a). The Court has construed the grant of exclusive jurisdiction under Section 1251(a) as "obligatory only in appropriate cases," explaining that the question whether a case is "appropriate" requires consideration of "the nature of the interest of the complaining State" and "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi* v. *Louisiana*, 113 S. Ct. 549, 552-553 (1992). See, *e.g.*, *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 798 (1992); *Texas* v. *New Mexico*, 462 U.S. 554, 570-571 (1983); *California* v. *Texas*, 457 U.S. 164, 168 (1982) (per curiam); *California* v. *West Virginia*, 454 U.S. 1027 (1981); *Maryland* v. *Louisiana*, 451 U.S. 725, 739-740 (1981); *Arizona* v. *New Mexico*, 425 U.S. 794, 797-798 (1976) (per curiam). See also *Wyoming* v. *Oklahoma*, 112 S. Ct. at 810-812 (Thomas, J., dissenting). The Court is likewise reluctant to exercise its non-exclusive original jurisdiction over suits brought by a State against citizens of another State (28 U.S.C. 1251(b)(3)) if an alternative federal or state forum is available. See *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972); *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493 (1971).

water or "in any way interfere with" the operation of federal water storage facilities. Decree ¶¶ VI, XII(b). See Third Interim Rep. App. C6, C7. Second, Wyoming has no contractual or other legal right to the storage water at issue, which is governed by water storage contracts between the Bureau of Reclamation and the water users. And third, any objections that those water users may have to the Bureau's water allocation practices may be litigated in federal district court. See, *e.g.*, *Goshen Irrigation District* v. *United States*, No. C89-0161-J (D. Wyo.).

A. The North Platte Decree Explicitly Provides That The Decree Shall Not Affect Water Storage Rights Or In Any Way Interfere With The Operation of Federal Water Storage Facilities

Wyoming's Fourth Cross-Claim rests on a fundamental misunderstanding of the North Platte Decree. Wyoming argues that the equitable apportionment contained in that Decree "was premised in part on the assumption that the United States would operate the federal reservoirs and deliver storage water in accordance with applicable federal and state law and in accordance with the contracts governing use of water from the federal reservoirs." Third Interim Rep. App. E11. Wyoming contends that the United States has not adhered to those laws and contracts and that Wyoming may therefore obtain relief under the Decree. See *id.* at E11-E12. Wyoming specifically requests the Court to (1) "declare that the United States' allocation procedure is contrary to the equitable apportionment"; (2) "enjoin the United States' continuing violations of federal and state law"; and (3) "direct the United States to comply with the terms of its contracts." *Id.* at E12. The North

Platte Decree does not provide a basis for granting that relief in this forum.

The North Platte Decree was carefully crafted to preserve the established system for allocation of storage water, including the existing mechanisms for resolution of disputes between the Bureau of Reclamation, project participants, and water contractors. That intention is clear from the terms of the Decree. Paragraph VI states:

> This Decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

Nebraska v. *Wyoming*, 325 U.S. 589, 669 (1945), modified, 345 U.S. 981 (1953); see Third Interim Rep. App. C6. Moreover, paragraph XII(b) states that the Decree shall not affect

> [s]uch claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

325 U.S. at 671; see Third Interim Rep. App. C7. Those provisions indicate that Wyoming cannot invoke the Decree to challenge how the Bureau administers storage water. The Decree expressly leaves the administration of federal storage water, including the resolution of particular contractual disputes, to established institutions and mechanisms that existed prior to the North

Platte Decree and that are independently available to the affected parties.[11]

The Court's 1945 decision, which provided the basis for the North Platte Decree, leaves no doubt that the Court intended that disputes over storage water administration would be resolved through those institutions and mechanisms. The Court specifically recognized that water stored in federal reservoirs is subject to distribution under the federal reclamation laws. 325 U.S. at 611-616, 628-629. The Court placed restrictions on storage of water in the Pathfinder, Guernsey, Seminoe, and Alcova Reservoirs to protect senior canals, *id.* at 630, but the Court made clear that "storage water should be left for distribution in accordance with the contracts which govern it," *id.* at 631.[12]

This Court considered the availability of storage water in deciding upon a formula for equitable apportionment of the North Platte River in the pivotal Whalen-to-Tri-State reach of the river, but it did so in a far more limited sense than Wyoming suggests. See 325 U.S. at 638-646. The Court rejected at the outset Wyoming's

---

[11] The parties amended the Decree by stipulation in 1953 to make one limited exception to that principle. The parties added Paragraph XVII to address the Bureau's operation of the proposed Glendo Reservoir. Both Nebraska and Wyoming have raised specific challenges in this proceeding to Bureau practices under Paragraph XVII. See pp. 10, 13, *supra*. Those Glendo claims are not part of Wyoming's Fourth Cross-Claim.

[12] Indeed, the Court formulated a definition of "storage water" in the Decree specifically to preserve the rights provided by outstanding water contracts. See 325 U.S. at 631; *id.* at 670 (Decree ¶ XI(b)); Third Interim Rep. App. C7. It also declined to include provisions in the Decree that were inconsistent with—or were made unnecessary by—existing Bureau contracts. See 325 U.S. at 632-633. The Court additionally recognized that future contracts might alter the Bureau's obligations. See 325 U.S. at 632.

contention that the Court should apportion storage water. *Id.* at 638-640. The Court explained:

> Certainly an apportionment of storage water would disrupt the system of water administration which has become established pursuant to mandate of Congress in § 8 of the Reclamation Act [43 U.S.C. 372] that the Secretary of the Interior in the construction of these federal projects should proceed in conformity with state law. In pursuance thereto all of the storage water is disposed of under contracts with project users and Warren Act [43 U.S.C. 523-525] canals. It appears that under that system of administration of storage water no State and no water users within a State are entitled to the use of storage facilities or storage water unless they contract for the use.

Id. at 639-640. The Court sought to preserve the established storage water administration system to ensure that water contractors are not "deprived of the use of a part of the storage supply for which they pay." *Id.* at 640. The Court accordingly elected to apportion only the natural flow of the river, see *id.* at 640, 642, explaining that it would take into account "the effects of storage" only as a factor bearing on its choice of an appropriate basis for apportionment, *id.* at 640.

The Court applied that principle in selecting among the proposed apportionment formulas. 325 U.S. at 640-646. The Special Master recommended apportionment through a flat percentage of daily natural flow—75% to Nebraska and 25% to Wyoming—that was based on a rough proportion of the respective States' irrigation requirements and relative priorities in the Whalen-to-Tri-State reach of the river. *Id.* at 640-642. By contrast, Wyoming proposed that Nebraska receive a "mass

allocation" (705,000 acre feet) based on Nebraska's estimated beneficial use, *id.* at 642, while the United States and Nebraska urged an apportionment based either on "strict priority" or through a "block allocation" system that combined both priority and percentage allocation features, *id.* at 643-644.

After comparing those alternatives, the Court decided to adopt the Special Master's flat percentage system. The Court took "account" of storage water, but only in a very limited respect. 325 U.S. at 645. The Court explained the relevance of storage water as follows:

> As we have said, storage water, though not apportioned, may be taken into account in determining each State's equitable share of the natural flow. *Wyoming* v. *Colorado*, *supra* [259 U.S. 419 (1922)]. Our problem is not to determine what allocation would be equitable among the canals in Nebraska or among those in Wyoming. That is a problem of internal administration for each of the States. Our problem involves only an appraisal of the equities between the claimants whom Wyoming represents on the one hand and those represented by Nebraska on the other. We conclude that the early Wyoming uses, the return flows, and the greater storage water rights which Nebraska appropriators have in this section as compared with those of Wyoming appropriators tip the scales in favor of the flat percentage system recommended by the Special Master.

Ibid. Thus, the Court considered the availability of storage water only as one of several general factors bearing on the relative equities among the States, and it refused to delve into questions of how water would be allocated among particular users, which were questions of "internal administration." *Ibid.* The Court should

adhere to that approach here and decline to provide a forum in this proceeding for litigating claims concerning specific allocations and deliveries of storage water.[13]

Special Master Olpin recommended allowance of Wyoming's Fourth Cross-Claim on the rationale that "Wyoming's position is not unlike Nebraska's position in attempting to prevent depletions of Horse Creek flows into the mainstem below Tri-State Dam." Third Interim Rep. 70 n.170. The two claims, however, present a fundamentally different situation with respect to the exercise of original jurisdiction. Nebraska's Horse Creek claim presents a bona fide dispute with Wyoming over whether the North Platte Decree gives Nebraska an entitlement to the allegedly depleted flows. The dispute between those two States over the interpretation and application of the Decree cannot be resolved in any other forum. See *id.* at 41-43. By contrast, Wyoming's Fourth Cross-Claim against the United States does not seek to interpret, apply, or modify any provision of the North Platte Decree. Instead, Wyoming seeks to enforce legal and contractual rights that exist entirely apart from the Court's Decree in this case. Indeed, as we explain below, Wyoming is not a real party in interest

---

[13] Indeed, the allegations contained in Wyoming's Fourth Cross-Claim are strikingly similar to the arguments that Wyoming made—and the Court rejected—in the earlier proceedings (including Wyoming's request for an apportionment of storage water). See Exceptions of Defendant, The State of Wy ing, to the Report of Michael J. Doherty, Special Master, No. 6 Orig. (O.T. 1944) at 16, 17-18; Brief of Defendant, State of Wyoming, No. 6 Orig. (O.T. 1944) at 47-57. Wyoming argued then, as now, that Nebraska water users were receiving excessive quantities of storage water in violation of the reclamation laws. The Court declined to resolve those claims. See 325 U.S. at 640 (denying Wyoming's request for an apportionment of storage water).

with respect to those legal and contractual rights, and the real parties in interest may obtain adjudication of their rights in other federal judicial fora.

B. Wyoming Is Not An Appropriate Party To Seek Enforcement Of Legal And Contractual Rights With Respect To The Bureau Of Reclamation's Administration Of Storage Water

Wyoming's Fourth Cross-Claim should be disallowed for the additional reason that Wyoming is not the appropriate party to challenge the federal government's allocation of storage water. As this Court recognized in its 1945 decision, the Bureau of Reclamation is obligated to distribute project storage water in accordance with specific contracts between the Bureau, project participants, and other water users. See, *e.g.*, 325 U.S. at 631, 632-633, 639-640. Those entities have a direct interest in ensuring that the Bureau adheres to the water contracts and the relevant provisions of federal and state law. They—and not Wyoming—are the real parties in interest in any dispute over the allocation of storage water. See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 737 (1981) ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens."). See also *United States* v. *Minnesota*, 270 U.S. 181, 193-195 (1926).

Wyoming has contended that it is acting in its sovereign capacity to protect its equitable apportionment. That sovereign interest, however, is minimal insofar as Wyoming has no direct interest in the storage water apart from the interests of a particular class of Wyoming water users who have water contracts. By its terms, Wyoming's Fourth Cross-Claim is concerned solely with the Bureau of Reclamation's method of

"allocat[ing] storage water" among Nebraska and Wyoming water users. Third Interim Rep. App. E11. Any change in that allocation would enure to the direct benefit of only those Wyoming water users who have contracted for water. As the Court has explained, a State may assert "'*quasi-sovereign*' interests" in an original action, but "th[at] principle does not go so far as to permit resort to [the Court's] original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy." *Oklahoma ex rel. Johnson* v. *Cook*, 304 U.S. 387, 393-394 (1938).[14]

This Court properly takes into account "practical" considerations in determining whether to entertain an original action. See *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983). Wyoming's doubtful status as an appropriate party to challenge the Bureau's administration of storage water would, as a practical matter, adversely affect the progress of future proceedings before the Special Master, which have already consumed nearly eight years in pretrial litigation. Wyoming's standing to assert the Fourth Cross-Claim would likely become a matter of litigation. Compare *Wyoming* v. *Oklahoma*,

[14] To the extent that Wyoming claims indirect benefits from the use of that water within its borders, its claim would appear even more tenuous than the claim of derivative injury, based on lost tax revenues from decreased private coal sales, that was put forward in *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 798-799 (1992). Three Members of the Court questioned whether that claim of injury provided an appropriate basis for the exercise of original jurisdiction. See *id.* at 812 ("In my view, an entirely derivative injury of the type alleged here—even if it met minimal standing requirements—would not justify the exercise of discretionary original jurisdiction.") (Thomas, J., dissenting).

112 S. Ct. 789, 804-810 (1992) (Scalia, J., dissenting). In addition, the Court would face the question of whether to allow intervention by the numerous water users who are parties to the water contracts at issue, or whether to construe their contractual and legal rights in their absence. It is entirely unnecessary to complicate this proceeding with those questions, because another judicial forum exists to resolve any questions over the Bureau's practices.

C. The Federal District Courts Provide Alternative Fora For Resolving Challenges To The Bureau Of Reclamation's Administration Of Storage Water

This Court exercises its original jurisdiction "with an eye to promoting the most effective functioning of this Court within the overall federal system." *Texas* v. *New Mexico*, 462 U.S. at 570. It is "incline[d] to a sparing use of [its] original jurisdiction so that [its] increasing duties with the appellate docket will not suffer." *California* v. *Texas*, 457 U.S. 164, 168 (1982) (per curiam). Accordingly, the Court generally will not entertain an original action if another suitable forum is available. See, *e.g.*, *California* v. *Nevada*, 447 U.S. at 133; *Arizona* v. *New Mexico*, 425 U.S. 794, 797 (1976) (per curiam); *United States* v. *Nevada*, 412 U.S. at 538; *Washington* v. *General Motors Corp.*, 406 U.S. 109 (1972); *Ohio* v. *Wyandotte Chems. Corp.*, 401 U.S. 493 (1971).

The federal district courts are appropriate alternative tribunals for litigating claims respecting the Bureau of Reclamation's practices, including its administration of storage water. Those courts possess clear practical advantages as fora for resolution of such claims. The federal district courts in the arid western States are

proximate to the real parties in interest, they typically are well versed in local conditions and the pertinent law, and they are well equipped to undertake the factual inquiries that those suits may entail with minimal expense to the parties. In addition, their decisions are subject to judicial review by the regional courts of appeals and ultimately by this Court.

When this Court crafted the North Platte Decree, it fully understood that the lower federal courts were capable of resolving disputes over specific water allocations under the reclamation laws. See *Nebraska* v. *Wyoming*, 325 U.S. at 612-615 (citing and quoting *Ickes* v. *Fox*, 300 U.S. 82 (1937); *Ide* v. *United States*, 263 U.S. 497 (1924), and other reclamation cases that were initiated in lower courts). Since that time, this Court has routinely considered a broad variety of reclamation issues through judicial actions that were first brought in district court. See, *e.g.*, *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495 (1988); *Nevada* v. *United States*, 463 U.S. 110 (1983); *California* v. *United States*, 438 U.S. 645 (1978); *United States* v. *Tulare Lake Canal Co.*, 535 F.2d 1093 (9th Cir. 1976), cert. denied, 429 U.S. 1121 (1977). See also *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958) (on appeal from state court).

There is no reason to exempt the North Platte Basin from the operation of familiar institutions or from recourse to traditional mechanisms for relief. We accordingly submit that challenges to the Bureau's allocation of storage water should be presented to a federal district court. Indeed, the Goshen Irrigation District, a Wyoming water user, has filed a complaint against the United States and the Bureau of Reclamation seeking to enforce its contractual right to storage water under the North Platte Project, raising

arguments that are essentially identical to those that Wyoming presses here. See *Goshen Irrigation District* v. *United States*, No. C89-0161-J (D. Wyo., complaint filed June 23, 1989). That case is currently under submission, and the parties are awaiting a decision from the district court.

Special Master Olpin's rationale for supplanting the district court is unpersuasive. He suggested that because neither Wyoming nor Nebraska is a party to the *Goshen* litigation, the federal district court "does not have jurisdiction to consider whether any violations that may be proven on the part of the United States will have the effect of undermining the 1945 apportionment." Third Interim Rep. 71. But the fundamental question posed—wherever the claim may be presented—is whether the Bureau has violated any water users' rights. If the court concludes that the Bureau has violated those rights, then it can order the Bureau to provide appropriate relief to cure the violation. And if that court concludes that the Bureau has not violated those rights, then there is no threat to Wyoming's apportionment. In either event, the court must act in a manner consistent with this Court's North Platte Decree, and Wyoming's apportionment will therefore be secure. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (an interstate apportionment "is binding upon the citizens of each State and all water claimants").

Special Master Olpin also suggested that "[t]he situation is comparable to the Court's previous taking of jurisdiction over the Inland Lakes issue even though at the time of Nebraska's initial petition in 1986 a case was pending in Wyoming federal district court in which the Wyoming State Engineer was attempting to litigate the same question against the Bureau of Reclamation."

Third Interim Rep. 71. The Inland Lakes dispute, however, is plainly distinguishable, because that dispute centered on a disagreement between Wyoming and Nebraska over the interpretation of the North Platte Decree itself.[15] By contrast, the storage water dispute does not involve any interpretation, application, or modification of the Decree, which unequivocally states that storage water "shall not be affected." Decree ¶ VI (325 U.S. at 669). Wyoming's allegations rest instead on independent sources of legal rights and duties—"the contracts governing use of water from the federal reservoirs" and "applicable federal and state law." Third Interim Rep. App. E11.[16]

[15] As this Court explained, the fundamental issue was whether "the decree entitles the Bureau to continue its longstanding diversion and storage practices." 113 S. Ct. at 1696. This Court ruled that "[t]he decree did not explicitly establish the Inland Lakes' priority," but "the evidence from the prior litigation supports the conclusion that the Inland Lakes' priority was settled there." *Id.* at 1697.

[16] The Special Master also appeared to suggest that this Court should displace the district court because the United States had raised a sovereign immunity defense in the *Goshen* litigation. Third Interim Rep. 71 n.173. As this Court has recognized, Congress alone may consent to a suit against the United States, and the Executive Branch therefore has an obligation to raise sovereign immunity where there is a legitimate question whether Congress has authorized suit. See *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939). The fact that the United States raised that defense provides no justification for the Court to exercise jurisdiction here. Indeed, a meritorious sovereign immunity defense would bar suit in this Court as well as in district court. *Id.* at 386-387. The sovereign immunity argument raised in the *Goshen* litigation rested on a literal interpretation of the sovereign immunity waiver contained in the reclamation laws, 43 U.S.C. 390uu, which allows joinder of the United States under certain conditions. The United States' interpretation of that provision has

In sum, this Court's North Platte Decree should not disable the federal district courts from resolving issues concerning the federal government's administration of storage water. The contractual disputes at issue here—like the "ownership and title questions" at issue in *California* v. *Nevada*, *supra*—should be resolved in the lower courts, which would normally resolve such claims. See 447 U.S. at 133. Those courts provide a superior forum for resolving complex questions of contract administration with the full participation of the water users, who are the real parties in interest with respect to those claims.

CONCLUSION

The Court should reject the Special Master's recommendation that Wyoming be granted leave to assert its Fourth Cross-Claim.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

NOVEMBER 1994

---

not been followed in subsequent judicial decisions. See, *e.g.*, *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 673-674 (9th Cir. 1993). Those decisions have been brought to the district court's attention in the *Goshen* litigation.

APPENDIX

Donald E. Jones
JONES AND GRAHAM LAW OFFICES
Attorneys for Plaintiff
P.O. Box 848
Torrington, Wyoming 82240
(307) 532-5523

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Case No. C89-0161-J

GOSHEN IRRIGATION DISTRICT, a
Wyoming Irrigation District,
Plaintiff

vs.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF INTERIOR; U.S. BUREAU OF RECLAMATION; MANUEL LUJAN, Secretary of the Interior; C. DALE DUVALL, Commissioner of Reclamation, and KENNETH C. RANDOLPH, JR., Acting Project Manager, North Platte River Projects Office, U.S. Bureau of Reclamation,
Defendants

[Filed June 23, 1989]

COMPLAINT

The plaintiff complains against the defendants as follows:

PART I. *GENERAL ALLEGATIONS*

JURISDICTION AND WAIVER OF IMMUNITY

1. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1346. This suit is brought against the governmental defendants pursuant to waiver of immunity as provided in 43 U.S.C. § 390uu.

PARTIES

2. The plaintiff, Goshen Irrigation District (district), is an irrigation district organized and operating under the laws of the State of Wyoming, with offices in Torrington, Goshen County, Wyoming. The district operates and maintains a diversion dam, canal and laterals for delivery of irrigation water to and in behalf of its landowners. The district is a part of the North Platte project.

3. The defendant United States of America and its agencies, the Department of Interior and Bureau of Reclamation (bureau), administer the North Platte project under the Reclamation Act of 1902, as amended (the "Act"), 43 U.S.C. § 371, et seq. The bureau's offices are in Mills, Wyoming.

4. The defendant Manuel Lujan is Secretary of the Interior charged with the duty to carry out the provisions of the Act pursuant to 43 U.S.C. § 373.

5. The defendant C. Dale Duvall is Commissioner of Reclamation charged with the duty to administer the reclamation under the Act pursuant to 43 U.S.C. § 373(a).

6. The defendant Kenneth C. Randolph, Jr., is Acting Project Manager of the bureau. He directly

administers the collection and release of storage waters within the North Platte project.

PART II. *CAUSE OF ACTION*

7. This is an action by the district against the United States, its agencies and officers to enforce the district's contractual rights to storage water under the North Platte project.

PART III. *ALLEGATIONS COMMON TO CLAIMS*

8. Under the Act the United States constructed storage dams, diversion dams and distribution facilities in the North Platte River and project area, commonly known as the "North Platte project" (project), for reclamation and irrigation of public and private lands, known as "project lands."

9. In 1926, irrigation districts (including this district) were formed to contract with the United States in behalf of landowners' rights and obligations under the project. The United States and this district entered into a written contract in 1926, with subsequent amendments thereto. Copies of the contract provisions controlling this litigation are found in portions of the 1926 contract between the parties, annexed hereto as Exhibit 1, and the 1952 amendatory contract, annexed hereto as Exhibit 2.

10. Under the 1926 contract, this district (as well as the remaining project districts by separate contracts) assumed collection from project landowners to pay the United States for construction costs of the project reservoirs and dams (Pathfinder and Guernsey) and other facilities. The district also agreed to operate and maintain certain project works at its own costs. This district's landowners have fully paid the United States its share of the project construction costs.

11. Under the contracts, the bureau releases and delivers from the reservoirs each district's contractual share of storage water for diversion into its distribution systems to project farms. Delivery is by three main canals (divisions) operated by the district and three similar Nebraska quasi-public districts with approved contractual irrigable acreages, as follows:

North Platte Project Districts & Irrigable Lands

Fort Laramie Division
- Goshen Irrigation District..... 52,483.78 acres
- Gering & Fort Laramie Irrigation District..... 54,845.00 acres

Interstate Division
- Wyoming Lands..... 1,875.00 acres
- Nebraska Nondistrict Lands..... 392.60 acres
- Pathfinder Irrigation District.. 100,556.43 acres

Northport Division
- Northport Irrigation District..... 13,615.00 acres

Total Acres..... 223,767.81

These are the project lands and acreages. See Exhibit 2, Article 1. This district's project lands are supported by adjudicated priority water rights in the project reservoirs with priority date of December 6, 1904.

12. Under its contract, the district is entitled to its pro rata share (project acreage share) of the outlet capacity of the reservoirs (Exhibit 2, Article 13) delivered at Station 12 near the district's diversion point at Whalen Dam in Goshen County (Exhibit 1,

Article 50). This share is limited by the capacity of the district's canal (Exhibit 1, Article 50), or 1500 c.f.s. From this canal the district is entitled to 49% of the canal capacity, or 735 c.f.s, and the Gering & Fort Laramie Irrigation District (canal extension) is entitled to 51% of the capacity, or 765 c.f.s.

13. As of May 2, 1989, the storage available for the project lands was 632,680 acre-feet, of which the district's pro rata share was 148,000 acre-feet. From this storage, the bureau arbitrarily allocated to the district only 93,354 acre-feet, contrary to the contracts.

14. Runoff into storage has augmented the storage water available for delivery to increase the district's storage share, but to date the increase allocated by the bureau to the district is of little consequence to meet its seasonal crop consumption needs.

15. As of June 15, 1989, runoff had increased the district's net contractual storage right by an additional 37,210 acre-feet; however, its canal capacity now limits its storage entitlement to 142,000 acre-feet to meet the remaining 1989 crop needs of its landowners and farmers.

16. Defendants continue, and threaten to continue, to breach the district's contractual rights to project irrigation storage water and refuse to deliver the district's contractual share, as demanded.

17. The bureau's refusal to comply with district contracts has forced the district to unnecessarily conserve and cease use of irrigation water, resulting in continuing harm to crop growth.

18. The district has duly performed all of the conditions on its part to be performed under these contracts with the United States and as required by law.

PART IV. *CLAIMS*

19. Each claim adopts by this reference all allegations contained in this complaint necessary for support of such claim.

Claim 1

[Breach of Contract]

20. The defendants have breached and threaten to continue to breach the district's contractual and legal rights to project storage waters appropriated to its landowners.

Claim 2

[Specific Performance]

21. The district has demanded the defendants comply with existing agreements between the United States and the district and to specifically perform their duties and responsibilities thereunder and deliver to the district its project share of storage waters, which defendants refuse to do.

Claim 3

[Authority of Bureau Officials]

22. The release of the district's storage waters in such reduced amounts in violation of the contract by bureau officials exceeds their statutory and regulatory authority and is null and void.

Claim 4

[Injunction]

23. The landowners of the district have suffered and will continue to suffer substantial crop loss because the district has not received and will not receive its contractual and legal share of project storage water.

24. Defendants threaten to continue to withhold from the district and its farmer-landowners the storage water to which they are entitled, requiring the district and its landowners to suffer extreme hardship and irreparable damage from crop loss.

25. The district has no adequate or speedy remedy at law for the defendants' conduct, above described, and this action for injunction is the district's only means for securing relief before further permanent, irreparable harm occurs.

PART V. *PRAYER FOR RELIEF*

The plaintiff (district) requests this Court to —

1. Issue a temporary restraining order and a preliminary injunction pursuant to Fed. R. Civ. P. 65, ordering the defendant United States of America, and its agencies, officers, employees, successors, and attorneys, and all those in active concert or participation with it or them, to refrain immediately and pending the final hearing and determination of this action from denying plaintiff the contractual share of project storage waters to which it is entitled under the 1926 contract and amendatory contracts thereto, specifically including the 1952 amendatory contract, and with priority as provided by law;
2. Issue a permanent injunction perpetually enjoining and restraining defendant United States of America, and its agencies, officers, employees, successors and attorneys, and all those in active concert or participation with it or them, from the conduct complained of herein;
3. Enforce compliance by the defendants of their contractual obligations owed to the plaintiff,

herein described, and plaintiff's priority rights to storage waters provided as a matter of law;

4. Award to plaintiff its costs and attorney fees; and
5. Award plaintiff such other and further relief as this Court may deem proper.

JONES AND GRAHAM LAW OFFICES
Attorneys for Plaintiff

By /s/ Donald E. Jones
Donald E. Jones
P.O. Box 848
Torrington, Wyoming 82240
(307) 532-5523

Supreme Court, U.S.
FILED
DEC 23 1994
OFFICE OF THE CLERK

No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
vs.
STATE OF WYOMING,
Defendant.

COLORADO'S REPLY BRIEF

GALE A. NORTON
Attorney General

STEPHEN K. ERKENBRACK
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General

WENDY C. WEISS*
First Assistant Attorney General
Natural Resources Section

Attorneys for State of Colorado

1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5110
FAX: (303) 866-3558
*Counsel of Record

No. 108, Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
vs.
STATE OF WYOMING,
Defendant.

COLORADO'S REPLY BRIEF

The State of Colorado submits this reply to the Exceptions of the State of Wyoming to the Third Interim Report of the Special Master and Brief in Support. For the reasons set forth below, Colorado supports argument V.C of Wyoming's brief and urges the Court to clarify that Nebraska's claims to modify the decree are limited to giving effect to the existing apportionment for the irrigation of lands served by diversions above Tri-State Dam.

I. INTRODUCTION

Colorado did not file any exceptions to the Special Master's Third Interim Report because none of the proposed amendments to the pleadings that the Master recommended be allowed directly affects Colorado's apportionment. However, Colorado has consistently and vigorously opposed efforts by Nebraska to seek a new apportionment for uses in the Platte River in central Nebraska downstream of the presently apportioned reach, and this Court has twice denied

Nebraska's motions for leave to amend its petition to add such claims.

II. ARGUMENT

Colorado shares Wyoming's skepticism that there can be "a *limited* inquiry into the endangered species and wildlife habitat issues that would apply only to requests for new injunctions against Wyoming." Wyoming Brief at 30. Rather, consideration of these uses would, as Wyoming cautions, entail "greatly expanded, complex, and expensive litigation." Wyoming Brief at 10. There is simply no reason for this Court to exercise its original jurisdiction to determine such complex technical issues when, as Wyoming correctly points out, they are presently being considered in other, more appropriate, fora. *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 503 (1971) ("granting Ohio's motion for leave to file would, in effect, commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and conciliatory bodies are actively grappling with on a more practical basis."). Colorado is a party to the ongoing negotiations to develop a basin-wide recovery plan for the Platte River endangered species, as well as to the Federal Energy Regulatory Commission relicensing proceedings for Kingsley Dam, both of which are considering habitat needs and how to meet them. Not only would it be a waste of this Court's resources to determine the same issues, but it would subject Colorado and the other parties to those proceedings to additional expense and possibly inconsistent decisions.

III. CONCLUSION

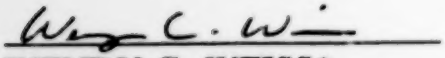
The State of Colorado joins Wyoming in requesting the Court to clarify that Nebraska's claims to modify the decree are limited to protecting the existing apportionment for the irrigation of lands served by diversions above Tri-State Dam.

Respectfully submitted,

GALE A. NORTON
Attorney General

STEPHEN K. ERKENBRACK
Chief Deputy Attorney General

TIMOTHY M. TYMKOVICH
Solicitor General



WENDY C. WEISS*
First Assistant Attorney General
Natural Resources Section

Attorneys for State of Colorado

1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5110
FAX: (303) 866-3558
*Counsel of Record

AG Alpha No. lw wc iadga
AG File No. P:\NR\NRWEISWC\NEBVWYO.BRF

No. 108, Original

Supreme Court, U.S.
FILED
DEC 29 1994
THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES OPPOSING EXCEPTIONS OF THE STATE OF WYOMING

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether this Court should adjudicate Wyoming's request, contained in its proposed First Counterclaim and First Cross-Claim, to impose "beneficial use" limitations on Nebraska's existing apportionment of the North Platte River.

2. Whether this Court should allow the Special Master to consider Nebraska's allegations of downstream injury to endangered species and wildlife habitat in examining Nebraska's challenges, contained in Counts I and III of its proposed amended petition, to Wyoming's tributary developments.

3. Whether this Court should adjudicate Nebraska's claim, contained in Count I of its proposed amended petition, challenging Wyoming's utilization of Horse Creek, a North Platte tributary originating in Wyoming.

4. Whether this Court should adjudicate Nebraska's claim, contained in Count I of Nebraska's proposed amended petition, requesting limitations on groundwater use within Wyoming.

TABLE OF CONTENTS

	Page
Statement	1
Summary of argument	5
Argument:	
A. Wyoming is mistaken in contending that the "purpose of this case" is solely "to define and protect the existing apportionment"	8
B. Wyoming's First Counterclaim and first Cross-Claim should be denied insofar as they seek to replace this Court's percentage-based apportionment formula with a mass allocation scheme	10
C. The Special Master is entitled to consider evidence of injury to uses below Tri-State Dam in resolving Nebraska's claims	18
D. Nebraska's challenge to Wyoming's utilization of Horse Creek is an appropriate matter for resolution in this proceeding	20
E. Nebraska's challenge to Wyoming's groundwater use is an appropriate matter for resolution in this proceeding	21
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 460 U.S. 605 (1983)	15, 17
Colorado v. *Kansas*, 320 U.S. 383 (1943)	21, 23
Missouri v. *Illinois*, 200 U.S. 496 (1906)	22
Nebraska v. *Wyoming*:	
325 U.S. 589 (1945)	2-3, 8, 9, 15, 16, 20
345 U.S. 981 (1953)	3, 8
479 U.S. 1051 (1987)	3, 11
481 U.S. 1011 (1987)	3, 11
483 U.S. 1002 (1987)	3
492 U.S. 903 (1989)	3

Cases—Continued: Page

112 S. Ct. 1930 (1992) 3
113 S. Ct. 1689 (1993) ..... *passim*
114 S. Ct. 1290 (1994) 3

Miscellaneous:

D. Dobbs, *Dobbs Law of Remedies* (2d ed. 1993) .. 21, 23

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 108, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF WYOMING, ET AL.

ON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES OPPOSING EXCEPTIONS OF THE STATE OF WYOMING

STATEMENT

This Court has invited the parties to file exceptions to the Special Master's Third Interim Report, which addresses motions by the States of Nebraska and Wyoming to amend their pleadings. See 115 S. Ct. 308 (1994). The United States and Nebraska have excepted to the Special Master's recommendation that the Court allow Wyoming's Fourth Cross-Claim. Wyoming has excepted to the Special Master's recommendations that the Court disallow portions of Wyoming's First Counterclaim and First Cross-Claim and allow various portions of Nebraska's claims. The United States submits this brief in response to Wyoming's exceptions.

1. The origins of this suit are described in this Court's decision on the Special Master's First and

Second Interim Reports and in our brief supporting the United States' exception to the Special Master's Third Interim Report. See *Nebraska* v. *Wyoming*, 113 S. Ct. 1689, 1693-1694 (1993); U.S. Except. Br. 1-13. As explained therein, Nebraska brought an original action against Wyoming in 1934 seeking an interstate apportionment of the North Platte River. The Court issued a decision in 1945, relying on Special Master Doherty's extensive analysis of the water supply, existing and proposed uses, their water requirements, their priorities compared to other rights, and the downstream effect of upstream limitations. *Nebraska* v. *Wyoming*, 325 U.S. 589. See *Nebraska* v. *Wyoming*, 113 S. Ct. at 1693; U.S. Except. Br. 2-3.

The Court's 1945 decision has three prominent features. First, the Court allowed the continuation of existing diversions in the upper reaches of the North Platte River in Colorado and in Wyoming above Pathfinder Reservoir; second, it fixed priorities among the federal reservoirs in Wyoming and certain irrigation canals that divert water in Wyoming for Nebraska's use during the irrigation season; and third, it established a percentage apportionment of the natural flow of the North Platte River in the 40-mile reach between the Whalen Diversion Dam in Wyoming and the Tri-State Diversion Dam in Nebraska. The decision granted 75% of the natural flow in that "pivotal" reach to Nebraska and 25% of the natural flow to Wyoming. *Nebraska* v. *Wyoming*, 325 U.S. at 621-654. See *Nebraska* v. *Wyoming*, 113 S. Ct. at 1693; U.S. Except. Br. 3-4 & n.2.

The Court entered the North Platte Decree to implement its decision. See *Nebraska* v. *Wyoming*, 325

U.S. at 665-672. Reflecting the Court's understanding that the decision was designed to "deal with conditions as they obtain today," 325 U.S. at 620, the Decree included a "reopener" provision, Paragraph XIII, which allows the parties to seek modification of the Decree in response to substantial changes in conditions, including changes in water supply and water needs. Decree ¶ XIII, 325 U.S. at 671-672. The parties have since invoked Paragraph XIII to modify the Decree by stipulation to account for the Bureau of Reclamation's construction of the Glendo Unit of the Pick-Sloan Missouri Basin Program. *Nebraska* v. *Wyoming*, 345 U.S. 981 (1953). See *Nebraska* v. *Wyoming*, 113 S. Ct. at 1693-1694; U.S. Except. Br. 4-5 & n.4.

In 1986, Nebraska invoked Paragraph XIII to initiate this proceeding against Wyoming to enforce rights and obtain injunctive relief under the North Platte Decree. Wyoming later filed a counterclaim against Nebraska. This Court granted the parties leave to file their claims and referred the matter to Special Master Olpin. See *Nebraska* v. *Wyoming*, 479 U.S. 1051 (1987); 481 U.S. 1011 (1987); 483 U.S. 1002 (1987). After extensive briefing, Special Master Olpin submitted his First and Second Interim Reports, which contained his recommendations on the parties' competing claims for summary judgment. See 492 U.S. 903 (1989); 112 S. Ct. 1930 (1992). This Court considered exceptions to those Reports and adopted the Special Master's recommendations that the motions for summary judgment be granted in part and denied in part. See 113 S. Ct. at 1694-1701. Thereafter, the parties requested an opportunity to amend their pleadings. See 114 S. Ct. 1290 (1994). The Special Master's Third Interim Report contains his recommendations concerning the pro-

posed amendments. The United States' brief supporting an exception to that Report summarizes the proposed amendments and the Special Master's recommendations. See U.S. Except. Br. 9-13.

2. The United States and Nebraska have excepted to the Special Master's recommendation that the Court allow Wyoming's proposed Fourth Cross-Claim, which alleges that the United States has failed to operate federal reservoirs in Wyoming in accordance with federal and state laws and to abide by water service contracts governing use of water from those reservoirs. See Third Interim Rep. 67-71. The United States and Nebraska are in substantial agreement that Wyoming's proposed claim is not an appropriate matter for resolution through this original action. See U.S. Except. Br. 16-30; Neb. Except. Br. 9-21.

Wyoming presents four exceptions to the Special Master's Third Interim Report. See Wyo. Except. 1-2. First, Wyoming objects to the Special Master's recommendation that this Court deny in significant part Wyoming's proposed First Counterclaim and First Cross-Claim, which seek to impose "beneficial use" limitations on Nebraska's existing apportionment of the North Platte River. See Third Interim Rep. 55-64. Second, Wyoming objects to the Special Master's stated intention to consider Nebraska's allegations of downstream injury to endangered species and wildlife habitat when examining Nebraska's challenges, contained in Counts I and III of its proposed amended petition, to future tributary developments in Wyoming. See *id.* at 14, 19-20, 49-51. Third, Wyoming objects to the Special Master's recommendation that this Court allow Nebraska's claim, contained in Count I of its proposed amended peti-

tion, challenging Wyoming's utilization of Horse Creek, a North Platte tributary originating in Wyoming. See *id.* at 41-43. Finally, Wyoming challenges the Special Master's recommendation that this Court allow Nebraska's claim, contained in Count I of Nebraska's proposed amended petition, requesting limitations on groundwater use within Wyoming. See *id.* at 38-41.

SUMMARY OF ARGUMENT

Wyoming's exceptions to the Special Master's Third Interim Report should be rejected. Wyoming's threshold argument that "the purpose of this case is to define and protect the existing apportionment" reflects a fundamental misunderstanding of the current proceedings. Wyo. Except. Br. 13. This Court has previously declined "to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings." *Nebraska* v. *Wyoming*, 113 S. Ct. 1689, 1695 (1993). The Court has made clear that any party to the North Platte Decree may invoke Paragraph XIII—the Decree's "reopener" provision —to obtain modification of the existing apportionment, provided that the party can satisfy the Court that the facts and circumstances warrant a "reweighing of equities and an injunction declaring new rights and responsibilities." *Id.* at 1696.

Wyoming's first exception, which asks this Court to reject the Special Master's recommendation against allowance of Wyoming's First Counterclaim and First Cross-Claim, actually seeks the sort of relief that Wyoming's threshold argument condemns. The Special Master recommended that this Court disallow Wyoming's First Counterclaim and First Cross-Claim insofar as those claims seek to modify the basic ap-

portionment by replacing the percentage-based apportionment formula that this Court adopted in 1945 with a mass allocation scheme. See Third Interim Rep. 36, 55-64. As the Special Master explained, the Court considered and rejected Wyoming's mass allocation approach in 1945, and Wyoming has not provided a sufficient justification for altering the percentage-based formula, which has now been utilized for nearly half a century. See *ibid.*

Wyoming's second exception, which challenges the Special Master's stated intention to consider evidence of detriments to endangered species and wildlife habitat, is without merit. Nebraska seeks equitable relief in Counts I and III of its proposed amended petition on the ground that Wyoming's future water resource developments on North Platte tributaries, such as Deer Creek and the Laramie River, would harm Nebraska's downstream interests. The Special Master properly concluded that he has discretion to consider a broad range of alleged harm—irrespective of whether that harm occurs to agricultural or environmental interests, during or outside of the irrigation season, and above or below the Tri-State Diversion Dam—when he examines Nebraska's claims for equitable relief.

Wyoming's third exception, which objects to the Special Master's recommendation that Nebraska be allowed to challenge Wyoming's utilization of Horse Creek, also lacks merit. The United States initially objected to inclusion of the Horse Creek dispute in this litigation on the ground that the matter was one of relatively minor consequence. The Special Master reasoned, however, that this Court had taken into account Horse Creek's contributions to the North Platte River in determining the 1945 apportionment

and that Nebraska was therefore entitled to show that Wyoming's actions would significantly diminish Horse Creek's historic contributions. Wyoming's contention that the Special Master's decision would "expand the geographic scope of the apportionment" (Wyo. Except. Br. 34) does not provide an adequate justification for overruling the Special Master's decision to examine the matter.

Finally, Wyoming's fourth exception, which objects to the Special Master's recommendation that this Court entertain Nebraska's request to impose limitations on Wyoming's groundwater use, is unpersuasive. Wyoming contends that Nebraska is precluded as a matter of equity from seeking to impose those limitations on Wyoming, because Nebraska does not regulate groundwater within its own borders. The Special Master properly concluded that Nebraska's failure thus far to adopt intrastate groundwater regulations does not necessarily pose an equitable bar to its request for interstate relief. As the Special Master noted, Wyoming has not demonstrated that Nebraska's conduct has had the adverse consequence—namely, depletion of a downstream State's decreed apportionment of surface flow—that Nebraska ascribes to Wyoming's conduct.

ARGUMENT

A. WYOMING IS MISTAKEN IN CONTENDING THAT THE "PURPOSE OF THIS CASE" IS SOLELY "TO DEFINE AND PROTECT THE EXISTING APPORTIONMENT"

Wyoming argues at the outset that the Special Master's recommendations regarding the States' proposed pleading amendments reflect an incorrect understanding of the objective of these proceedings. Wyo. Except. Br. 13-17. Wyoming contends that "[t]he purpose of this case is to define and protect the existing apportionment, not to adjudicate a new apportionment or enlarge the geographic limit of the apportionment." *Id.* at 13. According to Wyoming, this Court should "limit any claims for modification of the Decree to those for the purpose of carrying out and giving effect to the existing equitable apportionment." *Id.* at 14. Wyoming's theory finds no support in the North Platte Decree or in the prior decisions of this Court.

Paragraph XIII of the North Platte Decree expressly authorizes a party to seek modifications of the Decree that go beyond merely "carrying out" or "giving effect to" the existing apportionment. Paragraph XIII states at the outset:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief * * *.

325 U.S. at 671, as modified by 345 U.S. at 981 (reprinted at Third Interim Rep. App. C8). Paragraph XIII additionally states:

> The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree,

> that may at any time be deemed proper in relation to the subject matter in controversy.

325 U.S. at 671 (reprinted at Third Interim Rep. App. C8). Paragraph XIII also contains a non-exclusive list of matters "with reference to which further relief may hereafter be sought," including:

> (f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

325 U.S. at 672 (reprinted at Third Interim Rep. App. C9). Thus, Paragraph XIII's express language attests that parties may seek relief that goes beyond merely effectuating the "existing equitable apportionment." The Paragraph contains no hint of Wyoming's suggested limitation on the relief available in this proceeding.

The Court's 1993 decision in this case also indicates that the parties in this proceeding are not limited to claims for relief that "define and protect the existing apportionment" (Wyo. Except. Br. 13). The Court recognized that a party may invoke Paragraph XIII of the North Platte Decree to obtain "*enforcement* of rights already recognized in the decree" or to seek "*modification* of the decree." See *Nebraska* v. *Wyoming*, 113 S. Ct. at 1694 (emphasis in original). The Court concluded that Nebraska's petition requested both forms of relief and rejected Wyoming's attempt "to restrict the scope of the litigation solely to enforcement of rights determined in the prior proceedings." *Id.* at 1695. The Court made clear that Nebraska may invoke Paragraph XIII to seek modification of the existing apportionment, provided it can satisfy this Court that the facts and circumstances warrant a "reweighing of equities and

an injunction declaring new rights and responsibilities." *Id.* at 1696.

In the face of the Court's 1993 decision, Wyoming now acknowledges that Nebraska is entitled to seek modification of the Decree. But Wyoming seeks to limit the scope of the litigation to only those claims for modification that "carry out the apportionment," and to exclude claims that would create a "new or expanded apportionment." Wyo. Except. Br. 14. This Court's decision allows no such distinction. The Court explained that it retained jurisdiction to:

> modify the decree to answer unresolved questions *and to accommodate "change[s] in conditions"—a phrase sufficiently broad to encompass not only changes in water supply * * * but also new development that threatens a party's interests.*

113 S. Ct. at 1695 (emphasis added). Hence, this Court's 1993 decision does not bar Nebraska from seeking relief beyond that provided in the existing apportionment. Wyoming's contrary argument, which provides the foundation for the State's four specific exceptions that follow, is without support.

B. WYOMING'S FIRST COUNTERCLAIM AND FIRST CROSS-CLAIM SHOULD BE DENIED INSOFAR AS THEY SEEK TO REPLACE THIS COURT'S PERCENTAGE-BASED APPORTIONMENT FORMULA WITH A MASS ALLOCATION SCHEME

Wyoming's first exception asks this Court to reject the Special Master's recommendation against allowance of Wyoming's First Counterclaim and First Cross-Claim. Wyo. Except. Br. 18-27. Wyoming contends that the Special Master's recommendation "would prematurely limit the choice of remedies available to the Court upon proof that Nebraska and

the United States have circumvented the apportionment." *Id.* at 18. The Special Master properly recommended that this Court disallow those claims insofar as they seek to modify the basic apportionment contained in the North Platte Decree by replacing the percentage-based apportionment formula that this Court adopted in 1945 with a mass allocation scheme. See Third Interim Rep. 36, 55-64. As the Special Master explained, the Court considered and rejected Wyoming's mass allocation approach in 1945, and Wyoming has not advanced a sufficient justification for discontinuing the percentage-based formula, which has now been utilized for nearly half a century. See *ibid.*

1. Wyoming's First Counterclaim and First Cross-Claim are most easily understood by reference to their evolution. In 1987, this Court granted Nebraska leave to file its original Petition for an Order Enforcing Decree and for Injunctive Relief, 479 U.S. 1051, and shortly thereafter Wyoming sought and received leave to file a counterclaim, 481 U.S. 1011. Wyoming's counterclaim alleged as follows:

> Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:
>
> (a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;
>
> (b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses

> below Tri-State Dam that are not recognized or authorized by the Decree; and
>
> (c) By using Glendo Reservoir water outside of the basin of the North Platte River in Western Nebraska, for uses other than irrigation and as a substitute for storage water previously available under permanent arrangements.

Wyo. Answer to Petition, Motion for Leave to File Counterclaim, and Counterclaim at 8-9 (Mar. 18, 1987). As subparagraph (a) indicates, Wyoming assumed that the North Platte Decree prohibited irrigation canals from diverting natural flow "in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree." *Id.* at 8.

Nebraska contested Wyoming's assumption through a motion for summary judgment, and this Court resolved the matter in its 1993 decision. The Court concluded that "the decree does not impose absolute ceilings on diversions by canals taking in the pivotal reach." *Nebraska* v. *Wyoming*, 113 S. Ct. at 1700. The Court explained that

> Paragraph V of the decree, which sets forth the apportionment, makes no mention of diversion ceilings and expressly states that Nebraska is free to allocate its share among its canals as it sees fit.

113 S. Ct. at 1701. The Court additionally noted that

> although Paragraph IV "limits the extent to which the Nebraska canals may stop federal reservoirs from storing water, [it] does not place any 'absolute ceilings' or other restrictions

> on the quantities of water those canals may actually divert."

Ibid. (citation omitted). Hence, the Court's 1993 decision eliminated an essential premise of Wyoming's original counterclaim.

Wyoming has attempted to resuscitate the claim contained in subparagraph (a) through its proposed First Counterclaim and First Cross-Claim. Wyoming has replaced the language of the original counterclaim alleging that Nebraska has "circumvented and violated the Decree" with new language alleging that Nebraska has "circumvented and violated the equitable apportionment." Third Interim Rep. App. E4 (para. 11), E8 (para. 26). Wyoming now contends that it is not seeking to enforce the Decree, but rather "to define Nebraska's apportionment." Wyo. Except. Br. 19. In essence, Wyoming suggests that when the Court equitably apportioned the North Platte River, it must have implicitly imposed "beneficial use" limitations on Nebraska that went unstated in the Decree. Consequently, Wyoming contends, the "wasteful practices by canals in the pivotal reach undermine or circumvent that apportionment." *Ibid.*

2. As the Special Master explained, the Court's 1993 decision "addressed the nature of Nebraska's apportionment," and its "holding and its rationale substantially undercut Wyoming's proposed First Counterclaim and First Cross-Claim." Third Interim Rep. 60. The 1993 decision granted partial summary judgment against Wyoming on the question of diversion ceilings, explaining that Paragraph V of the Decree: "sets forth the apportionment" in the pivotal reach of the North Platte River; "makes no

mention of diversion ceilings"; and "expressly states that Nebraska is free to allocate its share among its canals as it sees fit." 113 S. Ct. at 1701. The Court properly viewed Paragraph V of the Decree as resolving the question of diversion ceilings. Wyoming cannot circumvent that ruling by recasting its claim as an action "to more completely define the apportionment." See Wyo. Except. Br. 23.

The Special Master correctly recognized that what Wyoming actually requests is a modification of this Court's apportionment formula. Wyoming "essentially seeks to transform the 1945 equitable apportionment in the pivotal reach from a proportionate sharing of the natural flows into a defined and quantified apportionment that would limit Nebraska's share by a beneficial use standard." Third Interim Rep. 55. Indeed, Wyoming seeks precisely the sort of relief—modification of the apportionment—that Wyoming's threshold argument condemns. See pp. 8-10, *supra*. As we have explained, the North Platte Decree does not bar a State from seeking modification of the apportionment based upon changed circumstances. Wyoming, however, has failed to allege a sufficient basis for obtaining the relief it seeks.

This Court stated in its 1993 decision that "the interests of certainty and stability counsel strongly against reopening an apportionment of interstate water rights absent considerable justification." *Nebraska* v. *Wyoming*, 113 S. Ct. at 1696. The Court explained that "when the plaintiff essentially seeks a reweighing of equities and an injunction declaring new rights and responsibilities, * * * the plaintiff still must make a showing of substantial injury to be entitled to relief." *Ibid.* The plaintiff's burden is

particularly heavy if the relief sought would require relitigating basic elements of the prior apportionment or would upset settled expectations among the parties respecting their water entitlements. See *Arizona* v. *California*, 460 U.S. 605, 615-628 (1983).

In this case, as the Special Master explained, adjudication of Wyoming's new claims "would require relitigating matters that were litigated and determined in the original case in 1945 and largely reaffirmed in the Court's 1993 opinion." Third Interim Rep. 55. The Court's 1945 decision evaluated various proposed formulas for apportionment of the North Platte River within the pivotal Whalen-to-Tri-State reach and eventually settled on a proportional allocation granting 75% of the natural flow to Nebraska and 25% of the natural flow to Wyoming. See *Nebraska* v. *Wyoming*, 325 U.S. at 637-646. The Court expressly rejected Wyoming's proposal that Nebraska receive a fixed apportionment based on current irrigation needs, explaining that variations in the North Platte's annual flow made a mass allocation infeasible. *Id.* at 642; see Third Interim Rep. 56-57. Wyoming's request for diversion ceilings based on beneficial use principles would result in the same type of mass allocation scheme that this Court rejected nearly 50 years ago.

Wyoming has failed to demonstrate why this Court should entertain Wyoming's invitation to displace one of the most fundamental elements of the Court's 1945 apportionment—a percentage-based allocation of the available flow—and replace it with a mass allocation approach that the Court had previously considered and rejected as unworkable. Wyoming argued before Special Master Olpin that its proposed allocation

scheme was needed to provide greater "certainty" to Wyoming users. See Third Interim Rep. 56. This Court, however, considered and rejected similar arguments in 1945. For example, Wyoming argued at that time:

> If the water supply of the North Platte River is to be beneficially utilized, w[i]thout needless waste of this valuable resource, uses must be limited to actual requirements, and the same limitations must be imposed upon Nebraska as are suggested for either Colorado or Wyoming.

Br. of Wyo. in *Nebraska* v. *Wyoming*, No. 6 Orig. (O.T. 1948), at 38 (filed Jan. 24, 1945). Wyoming objected to Special Master Doherty's percentage-based allocation, complaining that

> the Master's approach to the problem is the imposition of partial injunctive measures based upon temporary conditions of water supply.

Id. at 80-81. Instead, Wyoming argued, the Court should "make a complete equitable apportionment between the three states." *Id.* at 82. The Court considered those arguments, but nevertheless adopted the Special Master's percentage-based formula, concluding that Wyoming's approach was not feasible. 325 U.S. at 642, 655. Wyoming points to no changed circumstances warranting revision of the Court's percentage-based apportionment.

Furthermore, Wyoming's proposed "beneficial use" allocation scheme is fraught with practical problems. As the Special Master noted, diversion limits based on beneficial use would be exceedingly difficult to calculate and administer; they would "require far-reaching Court policing of water rights administration

within Nebraska"; and they could prevent Nebraska from applying its apportionment to important non-irrigation uses. See Third Interim Rep. 62-63. The Court properly declined Wyoming's invitation "to open what may become a Pandora's Box, upsetting the certainty of all aspects of the decree." See *Arizona* v. *California*, 460 U.S. at 625.

3. Although the Special Master has recommended against allowance of Wyoming's First Counterclaim and First Cross-Claim insofar as they seek a "fixed and defined apportionment" based on principles of beneficial use, Third Interim Rep. 36, he indicated that that denial "should not foreclose Wyoming from litigating certain discrete issues contained within those pleading amendments." *Id.* at 63. The Special Master's analysis on that point answers Wyoming's objection that his recommendation prevents Wyoming from adjudicating claims that Nebraska has taken action "to circumvent the decree" (Wyo. Except. Br. 18-22) and has inequitably engaged in "waste" of water resources (*id.* at 22-27).

The Special Master's recommendation specifically allows Wyoming to assert those claims to the extent that they were not decided in prior litigation. For example, the Special Master stated that Wyoming is entitled to litigate its claim that "Nebraska has circumvented the decree by unlawfully calling for upstream flows for the use of irrigators diverting below Tri-State contrary to the geographic limitation in the 1945 apportionment." Third Interim Rep. 63. He also stated that "Wyoming should be allowed to defend against relevant Nebraska claims seeking to constrain Wyoming's upstream uses by introducing evidence of Nebraska's waste of water supplies which, if they were not wasted, might obviate the

need for Nebraska's upstream calls." *Id.* at 63-64. But the Special Master properly refused to allow claims that "amount to an attempt to relitigate the basic apportionment formula that was settled in 1945." *Id.* at 64. The Special Master drew an appropriate distinction between claims that arise from new or changed conditions and claims that were settled by prior decision.

C. THE SPECIAL MASTER IS ENTITLED TO CONSIDER EVIDENCE OF INJURY TO USES BELOW TRI-STATE DAM IN RESOLVING NEBRASKA'S CLAIMS

Wyoming's second exception challenges the Special Master's stated intention to consider evidence of "below-Tri-State" injury, including alleged harm to endangered species and wildlife habitat, when evaluating the claims that Nebraska asserts in Counts I and III of its proposed amended petition. Wyo. Except. Br. 28-34. Nebraska's Counts I and III seek equitable relief on the theory that Wyoming's proposed water resource developments on North Platte tributaries, such as Deer Creek and the Laramie River, would harm Nebraska's downstream interests. The Special Master properly concluded that he has discretion to consider evidence relating to a broad spectrum of alleged downstream harm—irrespective of whether that harm would occur to agricultural or environmental interests, during or outside of the irrigation season, and above or below the Tri-State Diversion Dam—when he examines Nebraska's claims for equitable relief. Third Interim Rep. 14, 19-20, 49-51.

Wyoming objects to the Special Master's intended course of action on the theory that an unrestricted examination of the evidence would transform this

case into "one for a new apportionment." Wyo. Except. Br. 28-31. Wyoming's concerns, however, are not well founded. The Special Master has properly concluded that a broad range of evidence—including evidence of harm to Nebraska's wildlife interests—may be relevant for the limited purpose of evaluating Nebraska's challenges to Wyoming's proposed upstream developments. At the same time, the Special Master has specifically disclaimed any intention to apportion non-irrigation season flows for wildlife uses at this juncture of the litigation. See Third Interim Rep. 47-55. The Special Master has simply recognized that he should consider a complete record on downstream effects—including Wyoming's claims that Nebraska has committed "waste" of its water resources, pp. 17-18, *supra*—so that he, and ultimately this Court, will have the facts necessary to determine whether and what relief is appropriate. See Third Interim Rep. 18-20.

Wyoming also contends that the Special Master should not consider evidence concerning downstream wildlife effects because those matters may depend on the outcome of "various pending proceedings under State or federal environmental laws." Wyo. Except. Br. 32-34. Wyoming's objection on that score, however, is premature. The Special Master has noted only that wildlife evidence should not be categorically excluded from this proceeding. He has not barred consideration of other proceedings, *cf. Nebraska v. Wyoming*, 113 S. Ct. at 1698-1699, or foreclosed Wyoming from challenging the relevance or admissibility of particular evidence at some later date based on appropriate evidentiary objections.

D. NEBRASKA'S CHALLENGE TO WYOMING'S UTILIZATION OF HORSE CREEK IS AN APPROPRIATE MATTER FOR RESOLUTION IN THIS PROCEEDING

Wyoming's third exception objects to the Special Master's recommendation that Nebraska be allowed to challenge Wyoming's utilization of Horse Creek, a tributary that rises in Wyoming and joins the North Platte River in Nebraska east of the Tri-State Diversion Dam. The United States initially objected to inclusion of the Horse Creek dispute in this litigation on the ground that the matter was one of relatively minor consequence. Special Master Olpin determined, however, that this Court had relied on Special Master Doherty's calculation of Horse Creek inflows to the "below Tri-State" reach in ruling that the "below Tri-State" water supplies were adequate to satisfy "below Tri-State" needs. Third Interim Rep. 43; see *Nebraska* v. *Wyoming*, 325 U.S. at 654-655. Special Master Olpin accordingly concluded that Nebraska should be allowed to proceed with its claim that Wyoming is improperly depleting Horse Creek's historic contributions to the North Platte River. Third Interim Rep. 43.

Wyoming objects to the Special Master's Horse Creek recommendation primarily on the ground that including the Horse Creek claim would expand the "geographic scope" of this proceeding. Wyo. Except. Br. 34-36. The Special Master correctly considered and rejected that argument. He recognized that Horse Creek inflows were not apportioned in the original proceeding, but he reasonably concluded that Nebraska's claim should be allowed to proceed because the continuation of those inflows was a "predicate" for the 1945 decision. Third Interim Rep. 43; cf.

Nebraska v. *Wyoming*, 113 S. Ct. at 1698 ("the Court apparently expected that some Laramie water would contribute to the natural flows available for apportionment in the pivotal reach"). Wyoming also contends that the Horse Creek inflows are "too small" to justify including them within this proceeding. Wyo. Except. Br. 35. The Special Master properly rejected that contention based upon Nebraska's evidence that those inflows amount to more than 21,000 acre feet per year. Third Interim Rep. 42.

Wyoming additionally contends that any injunction against Wyoming respecting Horse Creek would be inequitable because the Wyoming activities that Nebraska challenges—recapture and conservation of return flows—are permissible under Nebraska's own laws. Wyo. Except. Br. 36. Wyoming's assertion does not provide a basis for this Court to refuse to entertain Nebraska's claim. Wyoming's argument, which amounts to an equitable objection to injunctive relief, should be resolved on the merits in light of all of the equitable factors that bear on the subject. See *Colorado* v. *Kansas*, 320 U.S. 383, 393-394 (1943) ("in determining whether one State is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one State or the other must be weighed as of the date when the controversy is mooted"); see generally D. Dobbs, *Dobbs Law of Remedies* § 2.4 (2d ed. 1993).

E. NEBRASKA'S CHALLENGE TO WYOMING'S GROUNDWATER USE IS AN APPROPRIATE MATTER FOR RESOLUTION IN THIS PROCEEDING

Wyoming's fourth exception objects to the Special Master's recommendation that this Court entertain Nebraska's request to impose limitations on Wyo-

ming's groundwater use. Nebraska alleges, in Counts I and III of its proposed amended petition, that groundwater pumping within Wyoming has depleted the natural flow of the North Platte River and diminished Nebraska's apportioned share. Wyoming concedes that North Platte surface flows are hydrologically linked to groundwater in the North Platte Basin, and it further acknowledges that groundwater pumping in Wyoming depletes the surface flow of the North Platte River, including the flow in the apportioned pivotal reach. Third Interim Rep. 38; Wyo. Except. Br. 39. Wyoming nevertheless contends that Nebraska is precluded as a matter of equity from requesting this Court to impose limitations on groundwater pumping in Wyoming, because Nebraska does not currently regulate groundwater within its own borders. Wyo. Except. Br. 37-41.

The Special Master properly concluded that Nebraska's failure to regulate groundwater intrastate does not necessarily pose an equitable bar to its request for interstate relief. As the Special Master noted, Wyoming has not demonstrated that Nebraska's conduct has had the alleged inequitable consequence that Nebraska ascribes to Wyoming's conduct, viz., depletion of a downstream State's decreed apportionment of surface flow. Third Interim Rep. 40-41. Wyoming additionally asserts that Nebraska's water law "should be taken to provide an equitable 'standard to which the defendant state has the right to appeal in an interstate dispute.'" Wyo. Except. Br. 40 (quoting *Missouri* v. *Illinois*, 200 U.S. 496, 522 (1906)). It is far from clear, however, that Nebraska's laws provide the appropriate equitable standard. Here, as in the case of the Horse Creek dispute, Wyoming's equitable objections should be

resolved on the merits in light of all the relevant factors bearing on the matter. See *Colorado* v. *Kansas*, 320 U.S. at 393-394; D. Dobbs, *Dobbs Law of Remedies* § 2.4 (2d ed. 1993).

We accordingly agree with the Special Master that "Nebraska should have the opportunity to present her injury case at trial respecting present and threatened Wyoming groundwater pumping." Third Interim Rep. 41. By the same token, Wyoming should not be precluded from developing relevant evidence respecting the effects of Nebraska's own groundwater pumping on the available water supply. See Wyo. Except. Br. 40-41. A full development of the record will ensure that the Special Master and this Court have an adequate factual basis upon which to decide what relief (if any) is appropriate.

CONCLUSION

The State of Wyoming's exceptions to the Third Interim Report of the Special Master should be overruled.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ANDREW F. WALCH
PATRICIA L. WEISS
Attorneys

DECEMBER 1994

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 387147 20027

(50)

No. 108, Original

Supreme Court, U.S.
FILED
DEC 29 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S RESPONSE TO WYOMING'S EXCEPTIONS TO THE SPECIAL MASTER'S THIRD INTERIM REPORT

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN
SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

December 29, 1994

Bowne of Phoenix, Inc., Law Printers (602) 223-4455

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S RESPONSE TO WYOMING'S EXCEPTIONS TO THE SPECIAL MASTER'S THIRD INTERIM REPORT

QUESTIONS PRESENTED

Pursuant to Supreme Court Rules 24.1(a) and 14, the questions presented should include all questions raised, be short and concise, avoid argument and repetition, and be expressed in the terms and circumstances of the case. Rule 24.2 provides that an additional listing of the questions presented need not be provided unless the respondent is dissatisfied with the questions presented by the other side.

In regard to each of its exceptions, Wyoming's statement of the question presented is not framed by the circumstances of the case, *i.e.*, by the reasoning underlying Master Olpin's recommendations. Properly framed, they are:

1. Whether the Court should relitigate Wyoming's attempt in the original proceedings to replace the percentage apportionment in ¶ V of the Decree with a mass allocation of natural flow and storage water based on quantitative limitations on water uses in Nebraska.

2. In balancing the equities that would derive from new development in Wyoming whether Nebraska should be precluded from assessing the countervailing equities that would be adversely impacted in Nebraska.

3. Whether return flows and the inflows from Horse Creek, which enters the North Platte River below Tri-State Dam, formed an intrinsic part of limiting the 75% / 25% apportionment to canals diverting above Tri-State.

4. Whether Wyoming can deplete surface waters apportioned to Nebraska in ¶ V of the Decree by pumping the same water out of the ground.

In deciding whether to accept, reject, or modify Special Master Olpin's Third Interim Report, the Court should address the questions actually presented by his recommendations as opposed to the argumentatively idealized questions presented by Wyoming.

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		v
STATEMENT OF THE CASE		1
SUMMARY OF ARGUMENT		4
ARGUMENT		8
POINT I.	ACCEPTANCE OF WYOMING'S FIRST COUNTERCLAIM, FIRST CROSS-CLAIM, AND FOURTH CROSS-CLAIM WOULD AUTHORIZE THE RELITIGATION OF THE BASIC ISSUE DECIDED IN 1945 AND COMMISSION THE DEMISE OF THE EXISTING APPORTIONMENT	9
	A. Wyoming's Original Counterclaim.	10
	B. Wyoming's Proposed First Counterclaim, First Cross-Claim, and Fourth Cross-Claim.	13
	C. The Apportionment made by Special Master Doherty and the Court in 1945 did not Rely on Evidence of Beneficial Use.	15
	D. The Nature of the Evidence Required to Make Beneficial Use Determinations is Categorically Different than the Evidence Received in the Original Proceedings.	16
	E. Wyoming is Seeking a Categorically Different Apportionment.	18
POINT II.	THE DECREE CAN BE MODIFIED TO ADDRESS MATTERS THAT HAVE TO BE RESOLVED IN THE FIRST INSTANCE BASED ON A BALANCING OF CURRENT EQUITIES	22

Page

A. The Court has Decided that Certain Matters May Have to be Resolved in the First Instance in these Proceedings and that Doing so Requires a Balancing of Current Equities. 24

B. In the Original Litigation, the Court did not Limit the Scope of Evidence to Needs and Impacts above Tri-State Dam. 29

POINT III. THE CONTRIBUTIONS OF HORSE CREEK TO THE NEEDS OF NEBRASKA USERS BELOW TRI-STATE ARE AN INTRINSIC PART OF THE APPORTIONMENT OF NATURAL FLOWS FOR DIRECT DIVERSIONS ABOVE TRI-STATE .. 30

POINT IV. WYOMING CANNOT DEPLETE SURFACE WATERS APPORTIONED TO NEBRASKA BY PUMPING THE WATER OUT OF THE GROUND ... 35

A. The Impacts of Wyoming's Groundwater Pumping on Nebraska's Apportioned Surface Flows are Significant. 37

B. Groundwater Pumping That Takes Nebraska's Apportioned Water Presents a Legal As Opposed to an Equitable Issue. 39

CONCLUSION 40

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Arizona v. California, 373 U.S. 546 (1963) 25
Arizona v. California, 376 U.S. 340 (1964) 37
Colorado v. New Mexico, 459 U.S. 176 (1982) 32
Kansas v. Colorado, 206 U.S. 46 (1907) 39, 40
Kansas v. Colorado, 475 U.S. 1079 (1986) 38
Missouri v. Illinois, 200 U.S. 496 (1906) 39, 40
Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) 2, 3, 4, 22, 32, 34
Nebraska v. Wyoming, 479 U.S. 1051 (1987) 10
Nebraska v. Wyoming, 485 U.S. 931 (1988) 27
Nebraska v. Wyoming, 507 U.S.___, 113 S. Ct. 1689 (1993) 11, 23, 24, 25, 30, 40
Nebraska v. Wyoming, 507 U.S.___, 113 S. Ct. 1941 (1993) 27
Texas v. New Mexico, 446 U.S. 540 (1980) 37
Texas v. New Mexico, 462 U.S. 554 (1983) 37

STATUTES AND COURT RULES

Arkansas River Compact, 63 Stat. 145 (1949) 38
Pecos River Compact, 63 Stat. 159 (1949) 37
Reclamation Act of 1902, 43 U.S.C. § 372 (1988) ... 14
S. Ct. R. 24.1(g) 1
S. Ct. R. 24.2 1

MISCELLANEOUS

2 W.A. Hutchins, Water Rights Laws in the Nineteen Western States (1974) 32
First Amended Complaint at ¶ 8, *Kansas v. Colorado*, No. 105, Original 38

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S RESPONSE TO WYOMING'S EXCEPTIONS TO THE SPECIAL MASTER'S THIRD INTERIM REPORT

STATEMENT OF THE CASE

The Supreme Court Rules require a "concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to . . . the record."[1] The rules also provide that "no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side."[2]

While Wyoming argues that the scope of the case should be defined geographically, Wyoming has neglected to set forth the historical facts material to the Court's consideration of the matter.

The original proceedings involved the entire North Platte River and the Platte River to Grand Island,

[1] S. Ct. R. 24.1(g).

[2] S. Ct. R. 24.2.

Nebraska.[3] Equities were considered in Colorado, Wyoming, and Nebraska by river sections. Evidence regarding water uses extended down to Kearney, Nebraska, some 300 miles below Tri-State Dam.[4] After the close of the evidence, however, Nebraska agreed that it would not demand natural flow from the North Platte River in Wyoming to satisfy irrigation demands east of Bridgeport.[5] Accordingly, Special Master Doherty removed the lands east of Bridgeport from any "direct involvement in the case."[6] There remained a dispute, however, whether the lands between Tri-State Dam and Bridgeport should receive natural flow directly from Wyoming.[7]

In evaluating how to accomplish an equitable apportionment, the parties focused on the section between Whalen, Wyoming, and Bridgeport, Nebraska, where most of the irrigated acreage is located. Extensive evidence was introduced relating to the total water supply in this reach.[8] The

---

[3] Report of Michael J. Doherty, Special Master, *Nebraska v. Wyoming*, No. 8, Original at 20, 92 ("Doherty Report"); *see also Nebraska v. Wyoming*, 325 U.S. 589, 593 (1945), *modified*, 345 U.S. 981 (1953).

[4] Doherty Report at 96-99.

[5] *Id.* at 92. The commencement of operations at Kingsley Dam in central Nebraska in 1941 enhanced the available water supply east of Kingsley, thereby diminishing the need for upstream natural flow during the irrigation season. *Id.* at n.2. Largely because of Kingsley Dam, Nebraska was persuaded that the lands east of Bridgeport could safely be removed from consideration in the apportionment of direct natural flow by the Special Master.

[6] *Id.*

[7] *Id.*

[8] The Special Master divided this reach into two sections, Guernsey Reservoir or Whalen Dam to Tri-State Dam and Tri-State to Bridgeport. In the former reach, referred to as the "pivotal section of the entire river" or the "critical section," he

(cont'd)

available supply consisted of upstream flows passing Whalen Dam, accretions to the system from tributaries, return flows, and groundwater accretions. Primary sources included North Platte River flows from above Guernsey Reservoir, inflows from the Laramie River and Horse Creek, storage water from Pathfinder Reservoir, and return flows above and below the state line. Special Master Doherty expressly examined water supplies and demands below Tri-State Dam, as well as in other reaches of the river.

The evidence adduced at trial established a direct relationship between diversions above Tri-State Dam and a resulting supply for downstream uses in the form of return flows. Approximately 60 percent of the diversions at or above Tri-State Dam was not consumed and instead was returned to the river as return flow for reuse downstream. Only because Nebraska's equitable interests below Tri-State were being satisfied by return flows and other local sources was Master Doherty able to conclude that Nebraska lands below that point had no equitable claim for direct flow originating in Wyoming or Colorado.[9]

In exchange for eliminating the demand for water diverted above Tri-State Dam for use on Nebraska lands

---

analyzed long-term means of water supplies and the mean for the drought period of 1931-1940. *Id.* at 53, 146; *see also* 325 U.S. at 604. The long-term means for the Whalen Dam to Tri-State Dam reach advocated by the parties were 1,352,000 acre feet according to Nebraska, 1,321,700 acre feet according to Wyoming, and 1,308,700 according to Colorado. Doherty Report at 64. The Special Master determined, however, that the drought period was most indicative of a dependable supply, concluding that the seasonal average supply between 1931-1940, was 1,058,645 acre feet. *Id.* at 67 (Table III). In concept, it was this fluctuating supply that was apportioned 75%/25% in ¶ V of the Decree.

[9] *Id.* at 9; *see also id.* at 92-96. While concluding that the Nebraska flows above Tri-State had no "direct" claim for natural flows above Tri-State, Doherty also concluded that the Nebraska lands had an indirect claim, *i.e.*, they relied on return flows which provide most of the local supplies.

between Tri-State and Bridgeport, Master Doherty took the evidence necessary to establish that these lands would be satisfied by return flows and local supplies. Special Master Doherty specifically relied on Wyoming Exhibit Nos. W-177 and W-178 to insure that the Nebraska lands below Tri-State would continue receiving sufficient North Platte waters:

> Wyoming's Exhibit 177 shows in detail the location of all channel and tributary accretions to the river in the [Tri-State Dam to Kingsley Reservoir] section, and Wyoming's Exhibit 178 sets up the accretions for the 1931-1940 period against the diversion requirements of the canals in the section. Together these exhibits furnish an apparent demonstration that the local supplies, even during the drouth period, were adequate to supply the needs of the canals without calling upon up-river water. Neither the supply data nor the mathematics of these exhibits is questioned by Nebraska.[10]

Wyoming Exhibit Nos. W-98, W-177, and W-178 were designed to show that sufficient return flows and local supplies were available to Nebraska so that there would be no need for Nebraska to call for water from Wyoming. Wyoming's premise in the original litigation was that the Nebraska canals diverting downstream of Tri-State Dam could rely on these local sources as their sole source of natural flow. Special Master Doherty and the Court accepted Wyoming's premise.[11]

SUMMARY OF ARGUMENT

Point I

Special Master Olpin recommended against the exercise of jurisdiction over Wyoming's First Counterclaim and First

---

[10] *Id.* at 94-95 (footnote omitted).

[11] *Id.* at 94-96; 325 U.S. at 596, 607, 655.

Cross-Claim because they do not seek to further define the existing apportionment, but to replace it with a quantification of Nebraska's entitlement based on a beneficial use standard.[12] Recognizing the differences between Wyoming's initial counterclaim in 1987 and its proposed amended counterclaim, Master Olpin concluded that the Court disposed of the former in deciding in 1993 that the diversion and acreage limitations in ¶ IV of the Decree were not beneficial use limitations on Nebraska canals, either individually or cumulatively.

Wyoming's proposed First Counterclaim, First Cross-Claim, and Fourth Cross-Claim seek to impose beneficial use limitations based on the actual requirements of the Nebraska canals as opposed to the "limitations" set forth in ¶ IV of the Decree. None of the evidence requisite to a determination of actual beneficial use requirements was adduced in 1945. Accordingly, Wyoming's proposed amendments would lead not only to a conceptually different apportionment, but to one that would have to be based on altogether new evidence.

Point II

Wyoming claims that the pleading amendments to its affirmative case would simply "define" the existing apportionment. There are two reasons why Wyoming has not been forthright in attempting to change the existing apportionment. First, Wyoming does not want to reveal that it is seeking a quantified apportionment because doing so would fall prey to principles of finality and repose resulting from the Court's rejection of a quantified apportionment in 1945. Second, Wyoming is trying to avoid a balancing of all of the equities that would be brought to bear on a new apportionment in the ordinary course.

---

[12] *See generally* Owen Olpin, Special Master, Third Interim Report on Motions to Amend the Pleadings at 55-57 (Sept. 9, 1994) (Docket No. 699) ("Third Interim Report").

Similarly, Wyoming insists that the case be viewed as one to protect the existing apportionment in order to limit the evidence of potential injury available to Nebraska in Nebraska's affirmative case. With respect to the proposed developments in Wyoming which would deplete the continuing contributions of the Laramie River, for example, it is Wyoming's object to limit Nebraska's proof of injury to the uses that formed the basis of the apportionment in 1945 as opposed to the actual uses which would form the basis of additional equitable relief.

In resolving the cross motions for summary judgment in 1993, the Court declined to restrict the scope of this case to the enforcement of rights determined in 1945. The Court stated that where there is no pre-existing right to interpret or enforce, the evidentiary inquiry will entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment. The Court determined that rights would have to be resolved in the first instance and that the Decree would have to be modified.

While the Court's resolution of the scope of the case in 1993 is clear, Wyoming tries to show that it is inconsistent with the court's denial in 1988 and 1991 of two motions to amend that were filed by Nebraska. The first motion bears no relation to the pending pleading amendment. The second was denied for lack of ripeness. That decision does not conflict with the Court's explanation of the scope of the case in any respect.

The Master has recommended against accepting Nebraska's second attempt to apportion the nonirrigation season flows of the North Platte, partly on the understanding that the resolution of the issues already in the case will inform an apportionment of the nonirrigation season flows, which the Master believes will ultimately be necessary. If the impact of new development in Wyoming will adversely affect nonirrigation season interests in Nebraska, such evidence should not be precluded in advance of trial.

Point III

In 1945 the Court predicated the apportionment of natural flow above Tri-State Dam on Wyoming's assurance of continuing return flows below Tri-State, including the flows of Horse Creek, in amounts sufficient to satisfy downstream needs. The *quid pro quo* for relieving Wyoming of the need to contribute directly to the satisfaction of downstream uses was Wyoming's guarantee that the downstream uses would be satisfied indirectly through continued return flows. With respect to the return flow contribution of Horse Creek, which enters the North Platte River below Tri-State, Wyoming now seeks to renege on its assurances in 1945 by depleting the flows. Wyoming's argument that Nebraska is seeking a new apportionment of unapportioned Horse Creek flows is beside the point. The maintenance of Horse Creek return flows is an essential predicate of the existing apportionment.

Point IV

With respect to existing and proposed groundwater development in Wyoming, Wyoming maintains that the existing Decree does not limit the use of groundwater. While acknowledging that pumping the water out of the ground is tantamount to diverting it out of the river, Wyoming urges that groundwater escapes the apportionment. Wyoming's argument, however, would vitiate the apportionment.

Wyoming also attempts to hide from its depletions of apportioned surface flows by urging that the Court should not force the conjunctive management of surface and groundwater on Wyoming when Nebraska's laws do not facilitate such management.[18] The issue, according to Wyoming, is an equitable one. Pursuant to the Decree, however, the issue is a legal one. Wyoming is the upstream

---

[18] Conjunctive management is a term which describes the joint administration of hydrologically related surface and groundwater to prevent the impairment of rights dependant on either source.

state admittedly depleting apportioned surface flows through groundwater pumping. Nebraska is not the one obligated to avoid the depletion of surface flows apportioned to a downstream state.

ARGUMENT

At the heart of the dispute presently before the Court is whether the Decree can be modified, as Nebraska requests, or relitigated, as Wyoming requests. The resolution of the dispute will determine the scope of relevant evidence that will be available to the parties. In this regard, Wyoming's strategy has been to urge that this case is "one to protect and to give effect to the existing apportionment." Exceptions of the State of Wyoming to the Third Interim Report of the Special Master and Brief in Support at 12 (Nov. 25, 1994) ("Wyoming's Exceptions" or "Wyoming's Brief in Support of Exceptions"). Wyoming's object is twofold.

Initially, as discussed in Point I, Wyoming is fully aware that the changed conditions since the entry of the Decree in 1945, including changes in the competing demands, would have to be brought to bear on any new apportionment of North Platte waters. Wyoming is also aware that the changes in conditions since 1945 weigh heavily in Nebraska's favor. For these reasons, Wyoming has characterized its affirmative case, *i.e.*, its counterclaim and cross-claims, as seeking to do nothing but "give effect" to the existing apportionment. Accordingly, Wyoming is seeking to avoid the presentation of evidence which would explicate the full array of changed conditions since 1945 with respect to the restructuring of the apportionment formula that Wyoming actually seeks. By characterizing its affirmative case as an attempt to "further define" the existing apportionment, Wyoming also hides from the fact that the quantification it is requesting was presented to the Court in 1942 and again in 1945 and rejected.

Similarly, as described in Point II, Wyoming insists that the case be viewed as one to protect the existing apportionment in order to limit the evidence of potential injury available to Nebraska in Nebraska's affirmative case. With respect to the proposed developments in Wyoming which would deplete the continuing contributions of the Laramie River, for example, it is Wyoming's object to limit Nebraska's proof of injury to the uses that formed the basis of the apportionment in 1945 as opposed to the actual uses which would form the basis of additional equitable relief.

The question before the Court which cuts through the discrete issues framed by the proposed pleading amendments is whether evidence of changed conditions over the past fifty years will be relevant in those areas where Wyoming and Nebraska are now seeking to modify the Decree. Wyoming would like to modify the Decree on the basis of changed conditions, but limit Nebraska to the equities balanced in 1945. In the limited areas in which Nebraska is seeking a modification of the Decree, Nebraska would like to do so on the basis of an evaluation of changed conditions from the perspective of both states.

POINT I

ACCEPTANCE OF WYOMING'S FIRST COUNTERCLAIM, FIRST CROSS-CLAIM, AND FOURTH CROSS-CLAIM WOULD AUTHORIZE THE RELITIGATION OF THE BASIC ISSUE DECIDED IN 1945 AND COMMISSION THE DEMISE OF THE EXISTING APPORTIONMENT

Special Master Olpin recommended that the Court deny Wyoming's motion to add its First Counterclaim and First Cross-Claim because Wyoming "seeks to transform the 1945 equitable apportionment . . . from a proportionate sharing of the natural flows into a defined and quantified apportionment that would limit Nebraska's share by a beneficial use standard." Third Interim Report at 55 (footnote omitted). Master Olpin's recommendation resulted from

1) his understanding of Wyoming's position in the 1945 proceedings, 2) the fact that Special Master Doherty declined to calculate canal requirements on the basis of crop demands and irrigation efficiencies, and 3) the necessary conclusion that doing so could only produce a categorically different apportionment predicated on evidence bearing no resemblance to the evidence adduced during the original trial.

A. Wyoming's Original Counterclaim.

Pursuant to the Court's order of January 20, 1987, granting Nebraska leave to file its petition, Wyoming filed its answer, certain affirmative defenses, and a singular counterclaim. *See Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). The counterclaim was asserted only against Nebraska. With respect to the 75%/25% apportionment of natural flows in ¶ V of the Decree, Wyoming's original counterclaim had two parts:

> Nebraska has intentionally circumvented and violated the Decree, and continues to do so, by the following actions:
>
> > (a) By demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam (including the Ramshorn Canal) in excess of the present beneficial use requirements of the Nebraska lands entitled to water from those canals under the Decree;
> >
> > (b) By demanding natural flow and storage water from sources above Tri-State Dam and by-passing it or diverting it for uses below Tri-State Dam that are not recognized or authorized by the Decree . . . .

Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 8 (Mar. 18, 1987) (Docket No. 5) ("Wyoming's Counterclaim").

The first part of the original counterclaim referred to alleged demands for natural flow "in excess of the *present* beneficial use requirements" of the Nebraska canals diverting in the Whalen to Tri-State reach, *i.e.*, the canals specified in ¶ IV of the Decree. *Id.* (Emphasis added). The counterclaim made no independent assertion that Nebraska was being wasteful or inefficient. Wyoming's position was that "the water requirements of the Nebraska canals diverting between Whalen and Tri-State [had been] specifically litigated and determined" in 1945. Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at 37 (Apr. 26, 1991) (Docket No. 334) ("Wyoming's Response Brief on Summary Judgment"). The "limitations" appearing in ¶ IV of the Decree, in Wyoming's view, were "the *present* beneficial use requirements." *See* Wyoming's Counterclaim at 8.

Nebraska addressed the issue directly in its Motion for Partial Summary Judgment of March 1, 1991. Nebraska asked the Court "to enter judgment . . . declaring as a matter of law that . . . the Decree does not contain restrictions or limitations on diversions or acres irrigated by Nebraska appropriators." Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at 1-2 (Mar. 1, 1991) (Docket No. 296). Wyoming responded to the motion by noting that "[t]he summary judgment that Nebraska seeks in this regard goes directly to Wyoming's counterclaim that diversions in excess of the requirements determined by the Court in 1945 constitute a violation of the Decree." Wyoming's Response Brief on Summary Judgment at 37. In its decision on the motions for summary judgment of April 20, 1993, the Court agreed with Nebraska and the United States that the diversion and acreage "limitations" in ¶ IV of the Decree did not constitute "restrictions on the quantities of water" the Nebraska canals could divert, "either individually or cumulatively." *Nebraska v. Wyoming*, 507 U.S. ___, 113 S. Ct. 1689, 1701 (1993).

In Master Olpin's Third Interim Report he quotes the United States, noting that there is "'little, if anything, left' of Wyoming's 1987 counterclaim" as a result of the Court's 1993 decision. Third Interim Report at 23-24. Based on Wyoming's own characterization of its counterclaim and Nebraska's related motion for summary judgment, there is *nothing* left of the "beneficial use" aspect of Wyoming's original counterclaim insofar as Nebraska's apportionment is concerned.[14]

In its brief in support of its pending exceptions, Wyoming attempts to imply that beneficial use in general was a part of its original counterclaim. Alluding to affidavits appended to its Second Motion for Summary Judgment in 1991, as opposed to anything filed in 1987, Wyoming now asserts that it was complaining of "wasteful and inefficient practices" instead of alleged diversions in excess of the "limitations" in ¶ IV of the Decree. Wyoming's Brief in Support of Exceptions at 3. Wyoming equates the beneficial use allegation in subparagraph (a) of its original counterclaim with subparagraph (b), *i.e.*, the allegation that Nebraska has intentionally by-passed water diverted above Tri-State for use below Tri-State, in order to try to resurrect the beneficial use or water use limitations component of the original

---

[14] The Master correctly concludes that subparagraph (b) of the original counterclaim remains intact, *i.e.*, whether Nebraska has demanded natural flow and storage water from sources above Tri-State and intentionally by-passed for "the benefit of irrigation diversions" below Tri-State. Third Interim Report at 24. In Wyoming's letter to the Honorable Francis J. Lorson, dated September 20, 1994, Wyoming stated that Master Olpin's recommendation to the Court "in effect, recommends the dismissal *with prejudice* of Wyoming counterclaims for injunctive relief accepted by the Court in 1987." *Ibid.* at 1. With respect to the beneficial use part of the counterclaim, however, in its 1993 decision the Court decided, contrary to Wyoming's position, to adopt Master Olpin's recommendation on the subject in his Second Interim Report. Master Olpin now is doing no more than giving effect to the Court's prior decision.

counterclaim. The phrase "in excess of . . . beneficial use requirements," however, does not appear in subparagraph (b) of Wyoming's initial pleading. The beneficial use allegation which Wyoming equates to limitations was contained only in subparagraph (a). Therefore, the concept of beneficial use as distinct from the limitations in ¶ IV was never part of Wyoming's original counterclaim.

B. Wyoming's Proposed First Counterclaim, First Cross-Claim, and Fourth Cross-Claim.

Wyoming's pending motion for leave to file amended counterclaims and cross-claims is conceptually different from its original counterclaim.[15] The fundamental predicate of the proposed First Counterclaim is contained in a section entitled "General Allegations." Paragraph 5 reads:

> The equitable apportionment implemented by the Decree was intended to protect the supply of irrigation water to meet the reasonable beneficial use requirements of the Nebraska lands under canals that divert from the North Platte River at and upstream of Tri-State Dam.

Wyoming's Amended Counterclaims and Cross-Claims at 3 (¶5). The specific beneficial use allegation now appears in ¶ 11 of the proposed First Counterclaim:

> Nebraska has circumvented and violated the equitable apportionment by demanding natural flow water for diversion by irrigation canals at and above Tri-State Dam in excess of the beneficial use requirements of the Nebraska lands entitled to

---

[15] *See generally* Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims (Feb. 18, 1994) (Docket No. 624) ("Wyoming's Amended Counterclaims and Cross-Claims" or "Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims").

> water from those canals under the Decree and by demanding that the federal reservoirs in Wyoming, which are described in Paragraph IV of the Decree, bypass water to the Nebraska State Line Canals in excess of the diversion limitations and seasonal volumetric limitations fixed in Paragraph IV of the Decree.

Id. at 4 (¶ 11). It is important to note that Wyoming's underlying allegation pools natural flow and storage water into "the supply of irrigation water" and the "beneficial use requirements" in the counterclaim are no longer the "*present*" requirements in ¶ IV, but are now the alleged *actual* requirements of the Nebraska lands.

Wyoming's First Cross-Claim mirrors its First Counterclaim and asserts the same cause of action against the United States as the operator of the upstream storage reservoirs and as an entity having control over the delivery of natural flows. All of the allegations in Wyoming's First Counterclaim are incorporated in the First Cross-Claim.

The Fourth Cross-Claim accuses the United States of failing to operate the federal reservoirs in accordance with the beneficial use provisions of the Reclamation Act of 1902, 43 U.S.C. § 372 (1988), and the beneficial use provisions in various water delivery contracts. According to Wyoming, the Fourth Cross-Claim "is an extension of the first counterclaim ...." Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims at 26. Through its Fourth Cross-Claim, Wyoming seeks the same relief as to storage water that the First Counterclaim and First Cross-Claim now seek with regard to natural flow, *i.e.*, the imposition of beneficial use limitations on Nebraska lands and canals.

C. The Apportionment made by Special Master Doherty and the Court in 1945 did not Rely on Evidence of Beneficial Use.

In order to maintain the appearance that it is seeking only to clarify the existing apportionment, Wyoming suggests that the apportionment in 1945 was based on evidence of beneficial use:

> Both Special Master Doherty and the Court were well aware of the limits of beneficial use in fashioning the 1945 apportionment. Doherty Report at 15; *Nebraska v. Wyoming*, 325 U.S. at 612-614. It is inconceivable that the Court in 1945 would have ignored a water law principle as fundamental as that of beneficial use in formulating the apportionment. Rather, the Court assumed as an essential underpinning of the apportionment that each state and the federal agencies responsible for administration of water rights under the Decree would continue to be guided by the doctrine of beneficial use and would not allow canals to divert substantially more than their requirements.

Wyoming's Brief in Support of Exceptions at 24. The fact of the matter is that Special Master Doherty and the Court relied on evidence of actual historical diversions to determine the canal requirements — not on proof of beneficial use.[16]

A review of the record shows that Wyoming's present attempt to force a quantification of beneficial use on Nebraska's canals is precisely what Wyoming tried to do unsuc-

---

[16] Wyoming states that it "acknowledges that Special Master Doherty considered historic diversions in determining the requirements of the canals in the pivotal reach." Wyoming's Brief in Support of Exceptions at 24-25. Wyoming urges, however, that "historic diversion was only one of many factors considered by Special Master Doherty." *Id.* Wyoming's statement is patently incorrect.

cessfully in 1942 and again in 1945. The basic tenet of Wyoming's present argument is that Special Master Doherty based his "requirements" column in Tables VII through XIV of his report on evidence of ideal crop requirements, including a scientific evaluation of the amount of irrigation water, adjusted for effective precipitation, irrigation efficiencies, and canal losses, needed to be applied on the lands under the canals. With the sole exception, however, of admittedly inconclusive testimony with respect to lands under the Ft. Laramie Canal by Wyoming's witness, Mr. Nelson, there is no evidence of ideal crop requirements in the record. In arriving at the requirement columns in Tables VII through XIV, Master Doherty relied almost entirely on historical diversions. Generally, Master Doherty based his determinations of "canal requirements" on historical diversions over an appropriate period — sometimes 7 years and sometimes 11 years. The requirements were not based on an independent evidentiary evaluation of crop requirements.

After reviewing the record of the proceedings through 1945, Special Master Doherty's Report, and the original opinion, Special Master Olpin found that "[t]here are no criteria for nor definitions of waste or beneficial use in either the Report or the decree." Third Interim Report at 60 n.151. Accordingly, Wyoming can point to no evidence in the record in the original proceedings upon which Master Doherty or the Court could have made comprehensive canal-by-canal beneficial use determinations.

D. The Nature of the Evidence Required to Make Beneficial Use Determinations is Categorically Different than the Evidence Received in the Original Proceedings.

In order to establish beneficial use requirements, the Court must evaluate evidence of the location and extent of irrigated lands, the kinds and extent of individual crops being grown, the points of surface and groundwater diver-

sion, the nature and extent of water conveyance facilities, effective precipitation, and soil efficiencies.

The object is to determine the irrigation requirement for lands under a given canal. To do so, consumptive use must first be determined. Consumptive use is the unit amount of water used within a given area by plant transpiration, plant synthesis, and evaporation from the plant and adjacent soil. Effective precipitation is that part of the total precipitation that is available to the plant for consumptive use. The consumptive irrigation requirement is consumptive use less effective precipitation.

Various analytical methods are used to determine consumptive use and the consumptive irrigation requirement. Typically, the methods take into account the types of crops grown, the average monthly temperatures, the monthly percentages of yearly daytime hours, and the effective precipitation during the irrigation season.

The irrigation season for each crop is that period when irrigation water is needed for application to beneficial use. For some crops, it would be all or part of the frost-free period, and for other crops it would be all of the frost-free period, plus a pre-frost and post-frost-free period. Analytical guidelines are used to determine the pre-frost and post-frost-free periods for each crop.

Once the consumptive use and the consumptive irrigation requirements are determined, the farm delivery requirement must be determined. It is the amount of water delivered at the farm headgate or at an irrigation well which is necessary to satisfy the consumptive irrigation requirement. It is determined by dividing the consumptive irrigation requirement by the farm irrigation efficiency. The types of soils, the crops, the method of irrigation, and the slope of the fields are major factors affecting farm irrigation efficiency.

Once the farm delivery requirements are determined, the diversion demand must be calculated or empirically evaluated. The principal factors for doing so include the size and

length of canals and laterals, canal lining, soil types, slope, evaporation, and phreatophyte consumption.

Beneficial use requirements cannot be determined without the submission of proof covering the areas outlined above. No evidence of this nature was presented to the Court in the original proceedings.

E. Wyoming is Seeking a Categorically Different Apportionment.

In the proceedings before Special Master Olpin, Wyoming maintained that it was not seeking to reopen the existing equitable apportionment. Conversely, Nebraska and the United States maintained that the relief Wyoming is seeking "would not effectuate the [existing] apportionment, but would fundamentally change it."[17] Master Olpin agreed with Nebraska and the United States that Wyoming's assertion that it is seeking nothing more than clarity is "in actuality, a plea for restructuring the decree in ways that were considered and expressly rejected in the original proceedings." Third Interim Report at 56. In short, Master Olpin concluded that Wyoming's argument is not credible.

The transcript of the argument before Master Olpin on the motions for leave to file the amended pleadings demonstrates that he was correct. Wyoming began its argument by stating that it sought nothing more than a "further definition of Nebraska's apportionment." Transcript of Hearing, July 26 and 27, 1994, at 163-64 ("Tr."). Without explaining the specific nature of the relief sought, Wyoming argued that "restrictions or definition of Nebraska's apportionment are important . . .." *Id.*

---

[17] Nebraska's Response to Wyoming Motion for Leave to File Amended Counterclaims and Cross-Claims, Amended Counterclaims and Cross-Claims, and Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 13 (May 2, 1994) (Docket No. 650).

In response, Master Olpin sought a more specific explanation:

> Mr. Cook, doesn't that go back to a debate that was very much a part of the fashioning of the 1945 decree. What you're saying has mass allocation sort of written on it, as I listen to you. The question there was dividing up the river. Wyoming wanted to deliver a block of water to Nebraska. You're saying almost the same thing as I hear. You're saying what we need in order to be able to say Nebraska is not entitled to ask for more water is we need a definition that the 1945 decree clearly didn't provide so that we say when Nebraska gets X quantity, then Nebraska cannot be heard to complain. Is X quantity another name for mass allocation?

Id. at 165-66.

Wyoming responded by stating that it wouldn't "preclude the possibility that the end result would be a suggestion for a mass allocation . . ., [but] Wyoming has not arrived at that conclusion yet at this point." *Id.* at 166. Refusing to answer the question specifically, Wyoming continued to maintain that it simply wanted to "better define" the existing apportionment. *Id.* at 168.

Continuing the colloquy, Master Olpin stated:

> . . . [L]et me press you just a little bit more . . .. The Court in '45 made the 25-75 split and with only one exception, the Court chose not to go beyond the [proportional] division of the river. . . . Now, the burden of your proposed amendments would say, okay, now we need to do the step that the Court did not do in 1945. We need to define, to quantify, to figure out exactly how much water Nebraska is entitled to call for the uses that are served by that water so that we will be readily able to say no when Nebraska asks for too much. Now, first, will you agree with me thus far that

> that's not something the Court did in 1945? That it's something you want done for the first time?"

Id. at 170-71. Wyoming responded by stating: "I think — let me — well, I won't agree." *Id.* at 171.

Oral argument on the pending motions for leave to amend continued for two days before Master Olpin, during which he renewed his inquiry of Wyoming numerous times, articulating the question in different ways. The critical issue, to Master Olpin was whether Wyoming is attempting to limit or quantify Nebraska's apportionment. "The thing I find quite difficult," he continued, "is to derive a number" beyond which Nebraska could no longer demand its 75%. *Id.* at 174-76. Again, Wyoming's response was that the existing apportionment should be further defined. *Id.* at 181-82.

The dialogue continued during the second day of argument with Wyoming pursuing a different approach, *i.e.*, that the Court has already accepted jurisdiction over Wyoming's original counterclaim, which still included its beneficial use assertions. According to Wyoming: "Beneficial use is seldom a precise quantity — and yesterday, we — we bogged ourselves down in talking about well, are you asking for a mass allocation, a quantity of water to be mass allocated." *Id.* at 247. Responding to Wyoming's assertion that a quantification of beneficial use was in the case as a result of the Court's acceptance of Wyoming's original counterclaim — and thus should not present an issue on the pending motion to amend — Master Olpin stated:

> Well, but I think that really doesn't quite do it, Mr. Cook. The added elements of seeking a definition and invoking beneficial use as the [criterion] for that definition takes us well beyond what the original counterclaim is talking about and as I thought you almost conceded yesterday, points us back into the direction of mass allocation which you suggested Wyoming may want to revisit in the way of a modification of the decree.

Id. at 251.

By mid-morning, the colloquy had intensified. Wyoming kept stating that it should be able to further clarify the apportionment through some definition of beneficial use. *Id.* at 250-58. While urging that beneficial use was "not a trick concept," however, the relief that Wyoming seeks became clear:

> Mr. Cook: . . . I admit Wyoming seeks to modify the decree. We seek some injunction and some clarification.
>
> Master Olpin: And definition.
>
> Mr. Cook: And definition.
>
> Master Olpin: Precise definition so that by a process of subtraction, Wyoming can decide we can use everything except that which has been defined as the Nebraska apportion[ment].
>
> Now, is that the heart of it?
>
> Mr. Cook: That's the very heart of it.

Id. at 258. After two days of broaching the issue, Wyoming finally admitted that it seeks the same quantification of beneficial use in Nebraska that it urged should be adopted after trial in 1942 and which Master Doherty and the Court specifically rejected.

Unlike Wyoming's present reluctance to admit its position, Wyoming's position in the original litigation was clear. Recognizing then that the only evidence of "requirements" had been derived from actual historical diversions, Wyoming argued in its post-trial brief that "[f]or many reasons we do not believe diversions heretofore made in the Whalen/Tri-State Dam section reflect the requirements of beneficial use, or what such requirements will be in the future." Brief of State of Wyoming, Defendant at 156 (Sept. 5, 1942). According to Wyoming then, "[t]he time has arrived in the North Platte basin, although its coming has not been recognized, when diversions must be limited to

the requirements of beneficial use . . .." *Id.* at 165. While both Master Doherty and the Court rejected Wyoming's position in the original proceedings, that position forms "the very heart" of its position today.[18]

POINT II

THE DECREE CAN BE MODIFIED TO ADDRESS MATTERS THAT HAVE TO BE RESOLVED IN THE FIRST INSTANCE BASED ON A BALANCING OF CURRENT EQUITIES

The stated thesis of Wyoming's exceptions is that "[t]he purpose of this case is to define and protect the existing apportionment, not to adjudicate a new apportionment or enlarge the geographic limit of the apportionment." Wyoming's Brief in Support of Exceptions at 13. As applied to

---

[18] Wyoming also argues that "[i]f the apportionment is defined no more specifically that 75% of the natural flow in the Guernsey Dam to Tri-State Dam section, then Nebraska's proof will necessarily fail." Wyoming's Brief in Support of Exceptions at 16-17. What Wyoming is saying is that the existing apportionment is not enforceable. Wyoming takes the view that a categorically different apportionment, *i.e.*, a quantification of beneficial uses, is needed before Nebraska can begin to prove injury to its equities from proposed upstream depletions. Wyoming's argument is not that the existing apportionment must be further defined, but that it must be changed to quantitatively define it in the first place.

Wyoming also forgets that the injunctions upstream of the Guernsey Dam to Tri-State reach were imposed to prevent further development and reduction of the flows which are apportioned 75%/25%. Where there were no threats of development, no injunctions were put in place. The Court held that if such threats were to appear, "application may be made at the foot of the decree for an appropriate restriction." 325 U.S. at 625. This is precisely what Nebraska is now seeking, *i.e.*, restrictions on threatened development which would deplete the natural flows available in the Guernsey to Tri-State reach.

Nebraska's proposed amendments, Wyoming's argument is animated by an ulterior motive.[19] What Wyoming is actually seeking to do, despite the Court's holding in 1993, is to preclude *in limine* the introduction of a significant part of the evidence that will necessarily bear upon proposed development in Wyoming.

When this case was reopened in 1987, it was conceptualized as an action to protect rights decreed in 1945 and for injunctive relief. In 1993, the Court found that certain matters contained in the initial pleadings had not been previously adjudicated, but the Court nevertheless declined "to restrict the scope of the litigation solely to the enforcement of rights determined in the prior proceedings." 113 S. Ct. at 1695. The Court also described the evidence that may be appropriate in considering a modification of the Decree: "[T]he inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment." *Id.* Accordingly, the contentions raised in Wyoming's exceptions regarding the scope of the case and the related question of what evidence is appropriate to consider in modifying the Decree have already been ruled on by the Court.[20] Both matters are law of the case and *res judicata*.

---

[19] To review Nebraska's proposed amendments, *see* Nebraska's Motion for Leave to File Amended Petition, Amended Petition for an Order Enforcing Decree, for Injunctive Relief, and for Modification of the Decree to Specify an Apportionment of the Natural Flows of the Laramie River below Wheatland and to Apportion the Unapportioned Natural Flows of the North Platte River, and Brief in Support of Motion for Leave to File Amended Petition (Feb. 18, 1994) (Docket No. 623) ("Nebraska's Amended Petition" or "Nebraska's Brief in Support of Amended Petition").

[20] The evidentiary standard for a modification of the Decree was also set forth. When what is sought is essentially "a reweighing of equities and an injunction declaring new rights and responsibilities," the Court stated that a showing of "substantial injury" is required for a party to be entitled to new equitable relief. 113 S. Ct. at 1696.

A. The Court has Decided that Certain Matters May Have to be Resolved in the First Instance in these Proceedings and that Doing so Requires a Balancing of Current Equities.

The scope of the case was first raised on the cross-motions for summary judgment in 1993. *Id.* at 1689. Wyoming argued then that, as framed by Nebraska's initial pleadings, the case was limited to enforcement of existing rights and that Nebraska could not modify the Decree in any respect. *Id.* at 1694-95. The Court did not agree:

> Nebraska also expressly invoked Paragraph XIII, and particularly subparagraphs (c) and (f). As we have said, the Court in those sections retained jurisdiction to modify the decree to answer unresolved questions and to accommodate 'change[s] in conditions' — a phrase sufficiently broad to encompass not only changes in water supply, but also new development that threatens a party's interests. Furthermore, nothing would prevent Nebraska from submitting a new petition if we deemed the original one deficient. *We therefore decline the invitation, at this late date, to restrict the scope of the litigation solely to the enforcement of rights determined in the prior proceedings.*

Id. at 1695 (citations omitted, emphasis added). The Court went on to explain the appropriate scope of evidence:

> In a modification proceeding, . . . there is by definition no pre-existing right to interpret or enforce. At least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment.

Id. (citations omitted).

In resolving the parties' cross-motions for summary judgment, the Court enforced those rights asserted in Ne-

braska's Petition which were related to issues determined to have been resolved in 1945, recognizing that the rights deriving from the apportionment "need not be stated explicitly in the decree." *Id.* at 1695. The Court also determined that the resolution of Nebraska's allegations relating to the proposed Deer Creek Project would involve "further relief" pursuant to ¶ XIII(c) and that there was "no preexisting right to interpret or enforce" with respect to the Laramie River. *Id.* at 1695, 1697-1700. The Court did not determine, however, that these issues were outside the scope of its jurisdiction. Declining to restrict the breadth of the litigation, the Court held that Nebraska's Petition "expressly invoked Paragraph XIII, . . . particularly subparagraphs (c) and (f)," and that the Laramie River and Deer Creek issues were within the Court's exercise of jurisdiction, albeit that the parties' rights would have to be resolved in the first instance and that the Decree would have to be modified. *Id.* at 1695. Under these circumstances, the Court said, the presentation of evidence "may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment."[21] *Id.*

The rationale behind the Special Master's recommendation to allow the introduction of evidence of year-round impacts caused by new development in Wyoming on downstream uses in Nebraska is clear. New projects in Wyoming would have a year-round impact on Nebraska users. Nebraska must be able to present evidence of these impacts when and where they occur. It is not reasonable to place artificial constraints on the consideration of such impacts,

---

[21] In an equitable apportionment action, *i.e.*, an action to divide the waters of an interstate stream, the Court seeks to effectuate an equitable division of the benefits of the use of a finite and usually insufficient supply of water. In modern-day equitable apportionment actions, all types and classes of use are weighed in the balance, including irrigation, municipal, industrial, hydropower, recreation, and fish and wildlife uses. *See, e.g., Arizona v. California*, 373 U.S. 546 (1963).

e.g., irrigation season versus the nonirrigation season or above Tri-State versus below Tri-State. Rather, the nature of the proposed projects dictates the nature of the evidence. New developments and contemporaneous uses in Wyoming can not be considered without also considering all contemporaneous impacts and uses in Nebraska.

While the Court's resolution of the matter in 1993 is clear, Wyoming has maintained that it is difficult "to reconcile [this reasoning] in the Court's 1993 opinion with the fact that the Court has twice denied Nebraska leave to bring claims for a new or expanded apportionment." Wyoming's Brief In Support of Exceptions at 14. According to Wyoming:

> The only interpretation that gives effect to both the April 20, 1993 opinion and the Court's order denying Nebraska leave to amend is one that distinguishes between modification of the Decree and modification of the underlying equitable apportionment. While the Court has indicated a willingness to consider the need for modification of the Decree to give effect to the original apportionment, it has not opened the case to an unlimited reconsideration of the apportionment or to a complete reweighing of the equities on which the apportionment was based.

Wyoming's Brief in Support of Amended Counterclaims and Cross-Claims at 4.

Neither the Court's denial of Nebraska's 1988 motion to amend petition nor its denial of Count I of Nebraska's 1993 motion to amend petition is inconsistent with the Court's explanation of the scope of the case in 1993. The first motion is irrelevant.[22] The second sought an apportionment

---

[22] On January 11, 1988, Nebraska filed a motion which sought to have the Court construe the existing Decree as apportioning the waters of the North Platte for the maintenance of instream *(cont'd)*

of the previously unapportioned, nonirrigation season flows of the North Platte because those flows are relied upon by equitable interests in Nebraska, including irrigation, hydropower, municipalities, recreation, and fish and wildlife. Based on Master Olpin's recommendation, the Court denied the motion without prejudice for lack of ripeness. *Nebraska v. Wyoming*, 113 S. Ct. 1941 (1993).

Count IV of Nebraska's Amended Petition seeks an equitable apportionment of flows during the nonirrigation season, *i.e.*, protection of nonirrigation season flows from further depletion by Wyoming.[23] Special Master Olpin has twice recommended against such an apportionment on the ground that the matter was not ripe. *See generally* letter from Special Master Olpin to Justice Byron R. White dated April 9, 1992 (Docket No. 464); Third Interim Report at 47-55.

In acting on the earlier motions, Master Olpin determined that the resolution of issues already in the case will "inform" a nonirrigation season apportionment. In recommending against Nebraska's first request for an apportionment of nonirrigation season flows, Master Olpin stated:

> The time will likely come when a year around apportionment will be needed, but for now I recommend going forward with the discrete claims that are already before the Court, some of which do involve nonirrigation season natural flows. The resolution of those discrete claims will inform any subsequent proceeding dealing more comprehen-

---

flows. The motion was limited to irrigation season flows and was summarily denied. *Nebraska v. Wyoming*, 485 U.S. 931 (1988) (Docket No. 59).

[23] In the pending motion for leave to amend its pleadings, Nebraska renewed its motion to apportion the nonirrigation season flows based on the over-appropriated condition of the North Platte during the nonirrigation season. Master Olpin again recommended denial of Nebraska's motion in this regard for lack of ripeness. *See* Third Interim Report at 47-55. Nebraska has not taken exception to Master Olpin's recommendation.

> sively with the apportionment of nonirrigation season natural flows.

Letter from Special Master Olpin to Justice Byron R. White dated April 9, 1992 at 6 (Docket No. 464). Similarly, in his Third Interim Report, Master Olpin stated: "Moreover, the examination during trial of concrete nonirrigation season injury claims asserted by Nebraska with respect to both the Laramie River, Deer Creek, and other issues in the case will inform any subsequent case there may be on the nonirrigation season." Third Interim Report at 49.[24]

With respect to the Laramie River, Deer Creek, and other issues already in the case, evidence will be introduced at trial regarding the impacts during the nonirrigation season and below Tri-State Dam. The only way that these issues can "inform" a nonirrigation season apportionment, however, is if the evidence comes in. Through its exception, Wyoming seeks to preclude the very evidence that the Master relied on in recommending against a nonirrigation season apportionment. Were it not for the introduction of evidence of nonirrigation season impacts relating to issues already in the case, such as Deer Creek and the Laramie River, Special Master Olpin may well have recommended a nonirrigation season apportionment.[25]

---

[24] Special Master Olpin also stated:

> My recommendation to deny [Count IV] is grounded in several considerations concerning the development of the case. I believe that the trial on issues already in the case, such as Wyoming's proposed developments on the Laramie River and Deer Creek, will inform any later case that the Court may find justiciable concerning nonirrigation season flows . . ..

Id. at 35-36.

[25] If the Court were to exclude evidence of impacts of new developments during the nonirrigation season and below Tri-State, it would have to reconsider Count IV because the basis of Master Olpin's recommendation, *i.e.*, lack of ripeness, would be gone.

In sum, in ostensibly seeking to limit the case to the presentation of evidence to "more clearly define the existing apportionment," Wyoming is asking the Court to ignore its 1993 decision. Wyoming is also asking the Court to address the Laramie River and Deer Creek issues in the context of 1945 conditions without any evidence of changed conditions pursuant to ¶ XIII(c) and (f) of the Decree. In other words, Wyoming would like to foist its proposed development on Nebraska in the context of its modern-day equity, but limit Nebraska to an evaluation of Wyoming's proposed development in the context of irrigation season equities in 1945. The 'clear definition' that Wyoming seeks of the 1945 apportionment is nothing more than a lopsided playing field.

B. In the Original Litigation, the Court did not Limit the Scope of Evidence to Needs and Impacts above Tri-State Dam.

Aside from a modern-day balancing of equities required to modify the Decree, Wyoming argues that if the Court allows Nebraska to introduce evidence of the impacts of upstream development on water users below Tri-State Dam, it will somehow "enlarge the geographic limit of the apportionment." Wyoming's Brief in Support of Exceptions at 13. Wyoming attempts to restrict the scope of the evidence by asking the Court to define the existing apportionment as embracing only irrigation interests served by canals diverting between Whalen and Tri-State Dam, as opposed to interests below TriState. The Court has twice addressed this issue and neither time did it agree with Wyoming. Principles of *res judicata* and the law of the case apply equally in this respect.

In the original litigation, the Court heard evidence of water needs some 300 miles below Tri-State Dam. *See supra* p. 1-4 (Statement of the Case). It was only after a consideration of all of the evidence, including a determination that local supplies were sufficient to satisfy needs below Tri-State without participating in the direct apportionment of natural

flows above Tri-State, that Master Doherty was able to limit the proportionate allocation in Nebraska to Tri-State Dam. Wyoming has not disputed that evidence was introduced in the original litigation well below Tri-State Dam. All Master Olpin has recommended is that the scope of the evidence remain broad enough for him to make an informed recommendation to the Court on the merits.

Additionally, Master Olpin and the Court addressed this issue on the cross-motions for summary judgment. Wyoming argued then, as now, that Nebraska's apportionment was limited by the Decree to uses supplied by diversions at and above Tri-State Dam. Wyoming's Second Motion for Summary Judgment and Brief in Support at 57-85 (Feb. 22, 1991) (Docket No. 294). After recognizing that the return flows below Tri-State were a predicate to the Decree, Master Olpin recommended that the Court deny Wyoming's motion on all below Tri-State issues on the ground that they were "too theoretical and not sufficiently anchored to concrete pleadings or an adequately developed factual Record . . .." Owen Olpin, Special Master, Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 92 (Apr. 9, 1992) (Docket No. 463). The Court adopted the Master's recommendations with respect to Tri-State. 113 S. Ct. 1700-01. Accordingly, the Court has already denied Wyoming's attempt to preclude evidence of uses and impacts below Tri-State.

POINT III

THE CONTRIBUTIONS OF HORSE CREEK TO THE NEEDS OF NEBRASKA USERS BELOW TRI-STATE ARE AN INTRINSIC PART OF THE APPORTIONMENT OF NATURAL FLOWS FOR DIRECT DIVERSIONS ABOVE TRI-STATE

In Count I of its Amended Petition, Nebraska alleges that Wyoming is presently violating and threatening to violate Nebraska's apportionment by "[r]educing the flow of

tributaries entering the North Platte River below Alcova by means of . . . the depletion of return flows, and the construction of reservoirs." Nebraska's Amended Petition at 4 (¶ 11.b.). Specific examples of activities in Wyoming which support Nebraska's allegation include "reregulating reservoirs and canal linings in the Goshen Irrigation District and the Horse Creek Conservancy District . . .."[26] *Id.* at 5 (¶ 12). Wyoming objected to Count I as it related to Horse Creek on the ground that Horse Creek flows were not included in the 1945 apportionment because it joins the North Platte below Tri-State Dam. Wyoming's Response to Nebraska's Amended Petition at 24-28.[27] Wyoming also contended that Nebraska was required to show injury as a threshold requirement and that Nebraska had not done so. *Id.* at 25.

In recommending that Nebraska's Count I be granted, Special Master Olpin rejected Wyoming's argument that return flows below Tri-State Dam, including inflows from Horse Creek, were outside the scope of this proceeding:

> Because return flows from streams such as Horse Creek furnished the predicate for limiting Nebraska's apportionment to the canals diverting at and above Tri-State-Dam, Nebraska should have the opportunity to present evidence of significant depletions of those return flows. Stated another way, if Wyoming were allowed with impunity to deplete flows that were a predicate for the geographic limits of Nebraska's apportionment, Nebraska could argue persuasively that the geographic limits of her apportionment should be extended to the river sections downstream of Tri-State Dam.

---

[26] Reregulating reservoirs are designed to capture return flows for further use and depletion.

[27] Wyoming Response to Nebraska's Motion for Leave to File Amended Petition (May 2, 1994) (Docket No. 651) ("Wyoming's Response to Nebraska's Amended Petition").

Third Interim Report at 43. The Master also concluded that Wyoming's argument that Nebraska had to show injury with respect to its Horse Creek claims was wrong as a matter of law. *Id.* at 42. The Master further stated that Wyoming's contention was answered "by the showing that Nebraska has made concerning Horse Creek's contribution to the natural flows in the pivotal reach." *Id.* Master Olpin relied on evidence from the original proceedings showing Horse Creek's substantial inflow to the North Platte River of 21,900 acre feet annually during the irrigation season and 13,900 acre feet annually during the nonirrigation season. *Id.* Nebraska also had alleged actions by Wyoming that threatened the contributions. *Id.*

Wyoming's argument regarding the geographical scope of the apportionment fails to account for Special Master Doherty's use of return flows, including those of Horse Creek, to supply Nebraska uses below Tri-State Dam. *See also supra* p. 1-4 (Statement of the Case). The availability of return flows in certain reaches of the river, at certain times of the year, and in certain quantities was a factual predicate of the equitable apportionment.[28]

In the original litigation, Nebraska showed that an annual average of 311,000 acre feet of return flows were available

---

[28] Return flows from diversions under appropriative rights which have returned to the stream are subject to appropriation. *See* 2 W. A. Hutchins, Water Rights Laws In The Nineteen Western States 579-91 (1974). Hutchins observed that "[t]he downstream flow of many Western streams has been augmented by seepage from irrigation of upstream lands. This is a common phenomenon in irrigated valleys, and much development has been predicated wholly or partly upon the existence of return flow." *Id.* at 580.

In the 1945 decision in *Nebraska v. Wyoming*, the Court spoke of equitable apportionment as a "flexible doctrine" calling for "the exercise of an informed judgment on a consideration of many factors" including "the character and rate of return flows . . .." 325 U.S. at 618; *see also Colorado v. New Mexico*, 459 U.S. 176, 183 (1982).

for diversion below Tri-State Dam during the irrigation season for the 1931-1936 period of record. *See* Nebraska Exhibit No. 413. Wyoming contended that an annual average of 361,900 acre feet of return flows were available during that same period of time. *See* Wyoming Exhibit No. 98.

At the insistence of Wyoming, the flows of Horse Creek were considered as part of that source of supply for Nebraska uses below Tri-State Dam. According to Wyoming Exhibit No. 178, over the 1931-1940 drought period, Horse Creek contributed 38,500 acre feet to the North Platte River annually.[29] The Horse Creek contributions to the North Platte River are largely return flows.

When Special Master Doherty compared the available supply below Tri-State Dam with the requirements of the canals between Tri-State and Bridgeport, he concluded that local supplies, primarily return flows, were adequate to meet the irrigation needs of canals diverting below that point.[30] Doherty Report at 95-96. *See also* Wyoming Exhibit Nos. 164, 177, 178. Master Doherty relied upon Horse

---

[29] The contribution of Horse Creek to the North Platte appears in Wyoming Exhibit Nos. W-177, W-178, and W-179, Nebraska Exhibit Nos. N-78, N-84, N-431, and N-363 through 639, and Colorado Exhibit No. C-79. Nebraska calculated Horse Creek's contribution to the North Platte to be 25,000 acre feet at one time and 7,200 acre feet at another. Colorado testified that 55,000 acre feet would be available.

[30] Special Master Doherty specifically relied on Wyoming Exhibit Nos. W-177 and W-178 to insure that the Nebraska lands below Tri-State would continue receiving sufficient North Platte waters:

> Wyoming's Exhibit 177 shows in detail the location of all channel and tributary accretions to the river in the [Tri-State Dam to Kingsley Reservoir] section, and Wyoming's Exhibit 178 sets up the accretions for the 1931-1940 period against the diversion requirements of the canals in the section. Together these exhibits furnish

(cont'd)

Creek as constituting 13.6% of the total tributary accretions between the state line and Bridgeport during the irrigation season. Wyoming's premise in the original litigation was that the Nebraska canals diverting downstream of Tri-State Dam could rely on Horse Creek as their principal source of supply. Special Master Doherty and the Court accepted Wyoming's premise. Doherty Report at 95-96; 325 U.S. at 596, 607, 655.

If Master Doherty had not considered evidence that was necessary to establish that the lands below Tri-State Dam would be satisfied by return flows and local supplies, Nebraska lands between Tri-State and Bridgeport would have been included in the allocation of direct natural flow from Wyoming. Horse Creek was determined by Master Doherty to be one of the principal sources of supply for uses in Nebraska below Tri-State Dam. Thus, Wyoming's present argument that a consideration of Horse Creek would require a new apportionment is inapposite. The argument that it is also outside the scope of this proceeding is contrary to Wyoming's position in the original litigation, as well as the determination made by Master Doherty and adopted by the Court.

Wyoming also contends in its third exception that Nebraska has not alleged sufficient injury regarding its Horse Creek claims. As Special Master Olpin correctly found, however, "Nebraska is not required to show injury to get into court . . . ." Third Interim Report at 42; *see also id.* at 33-34. A party is not required to show injury as a requisite to the adoption of a pleading. Moreover, as set forth above,

---

> an apparent demonstration that the local supplies, even during the drouth period, were adequate to [supply] the needs of the canals without calling upon up-river water. Neither the supply data nor the mathematics of these exhibits is questioned by Nebraska.

Doherty Report at 94-95 (footnote omitted). The ultimate conclusion was that even in times of drought, Horse Creek would annually contribute 21,900 acre feet during the irrigation season and 13,900 acre feet during the nonirrigation season.

Horse Creek's contributions and Nebraska's allegation that Wyoming is depleting tributary inflow by reregulating reservoirs and canal linings below Alcova are sufficient to establish a cognizable claim. *See also id.* at 42.

In sum, Wyoming has not provided persuasive reasoning to change Master Olpin's recommendation that "Nebraska should have the opportunity to show that she will suffer substantial injury from Wyoming's proposed Horse Creek developments or . . . from Wyoming actions threatening depletions of significant sources of supply flowing out of Wyoming and entering the North Platte below Tri-State Dam." *Id.* at 43.

POINT IV

WYOMING CANNOT DEPLETE SURFACE WATERS APPORTIONED TO NEBRASKA BY PUMPING THE WATER OUT OF THE GROUND

Count I of Nebraska's Amended Petition alleges in part that Wyoming is taking Nebraska's share of apportioned water by depleting the tributary flows of the North Platte River below Alcova by groundwater pumping. Nebraska's Amended Petition at 4 (¶ 11.b.). Count I also alleges that groundwater depletions in Wyoming are reducing the flow of the mainstem and tributaries throughout the North Platte River Basin, as well as the flow in canals carrying Nebraska's share of apportioned natural flow and storage water, in violation of Nebraska's apportionment. *Id.* at 4-5 (¶ 11.c.).[31]

---

[31] In Count III, Nebraska alleges that present and existing groundwater development, among other things, in the Laramie River basin in Wyoming is causing injury to Nebraska's beneficial use of and equitable reliance on the inflows of the Laramie to the North Platte River. Nebraska's Amended Petition at 9 (¶ 6.d.). With respect to Count III, Wyoming's groundwater use constitutes one of Wyoming's present uses — one of Wyoming's equities — as the Court determines how to protect Nebraska's

(cont'd)

Wyoming objected to Nebraska's groundwater claims in Count I, arguing that the effect of groundwater depletions should not be included in these proceedings because "[t]he existing Decree does not limit the use of groundwater in any of the three states; it apportions only the surface flows of the North Platte." Wyoming's Response to Nebraska's Amended Petition at 29; *see also id.* at 29-31. Additionally, Wyoming argued that "unless and until Nebraska treats hydraulically connected groundwater as part of the surface flow through intrastate administration in Nebraska, it cannot expect the Court to impose such a standard [on Wyoming] as a matter of interstate apportionment." *Id.* at 31.

In his Third Interim Report, Special Master Olpin recommended that the Court grant Nebraska's motion for leave to file Count I in its entirety. Third Interim Report at 36-43. The United States agreed. The basis for the Special Master's decision allowing groundwater claims was twofold. *Id.* at 38-41. First, Wyoming has acknowledged the physical connection between ground and surface water and the potential depletive effect of groundwater pumping on surface flows. *Id.* at 38. The Master noted that "Nebraska and the United States have presented affidavits of experts showing that groundwater pumping in Wyoming sections of the North Platte Basin, both present and threatened, has the potential to deplete significantly the surface flows that are subject to the decree's seventy-five percent, twenty-five percent split." *Id.* at 39. Accordingly, the Master concluded that Wyoming could be taking Nebraska's apportioned water through groundwater pumping.

Second, rejecting Wyoming's "equitable argument" that the claims should not be allowed because Nebraska does not have conjunctive use laws, Master Olpin found that "it is the upstream state which is subject to decreed restrictions designed to protect the natural flows of the North Platte River

---

equitable interest in Laramie River waters. *See generally supra* p. 21-28 (Point II).

in the reach above the state line." *Id.* at 40. In other words, groundwater pumping in Nebraska is not depleting surface flows owed to Wyoming. *Id.* The Special Master found no legal or equitable basis to exclude evidence respecting injury to Nebraska caused by Wyoming's present and threatened groundwater pumping. *Id.* at 40-41.

In its fourth exception to the Special Master's Third Interim Report, Wyoming persists in complaining of the "recommendation to entertain Nebraska's claims to impose interstate ground water regulation in Wyoming under standards that Nebraska refuses to apply intrastate to its own ground water use." Wyoming's Exceptions at 2 (¶ 4); *see also* Wyoming's Brief in Support of Exceptions at 37-41.

A. The Impacts of Wyoming's Groundwater Pumping on Nebraska's Apportioned Surface Flows are Significant.

Wyoming concedes that groundwater and surface waters are interrelated in the North Platte River Basin in Wyoming.[32] Third Interim Report at 38. Wyoming also ac-

---

[32] There is no dispute that the relationship between ground and surface water is an issue that is cognizable in the Court's original jurisdiction. In *Arizona v. California*, the Court fashioned a decree apportioning the waters of the Colorado River which recognized the interrelationship of surface and groundwater and defined consumptive use within a state to include "all consumptive uses of water of the mainstream, including water drawn from the mainstream by underground pumping . . .." *Arizona v. California*, 376 U.S. 340 (1964).

In *Texas v. New Mexico*, 446 U.S. 540 (1980), and *Texas v. New Mexico*, 462 U.S. 554, 557 (1983), the Court directly considered the impact of ground water pumping in New Mexico on Texas' apportionment of surface flows under the Pecos River Compact, 63 Stat. 159 (1949). The Court observed that its exercise of jurisdiction in *Texas v. New Mexico* was based in part on the fact that "New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme flood conditions . . .." 462 U.S. at 568-69. It should also be noted that

(cont'd)

knowledges that groundwater pumping in Wyoming can and does in fact deplete surface flows. *Id.* Accordingly, Wyoming does not dispute that groundwater pumping in Wyoming is taking Nebraska's apportioned flows.

The impact of post-Decree well development in Wyoming on Nebraska's equitable apportionment is significant. *Id.* at 39. Based on Nebraska's preliminary estimates of well development in Wyoming, there are approximately 300 irrigation wells with adjudicated water rights providing irrigation water to 40,000 acres of land near the mainstem of the North Platte River from Alcova to the Nebraska-Wyoming state line.[33] Withdrawals from these wells are estimated to be 77,000 acre feet annually, with an annual net depletive effect of 38,500 acre feet. Most of these wells are located below Whalen Dam in the reach of the North Platte River that was divided 75%/25% between Nebraska and Wyoming. For the entire North Platte River Basin from Alcova to the Nebraska-Wyoming state line, including the Laramie River and Horse Creek Basins, groundwater with-

---

Texas has no laws facilitating the conjunctive management of surface water and groundwater.

In *Kansas v. Colorado*, 475 U.S. 1079 (1986), the Court extended its original jurisdiction to an enforcement action over obligations on the Arkansas River Compact, 63 Stat. 145 (1949), predicated almost entirely on the impact of upstream pumping on apportioned surface flows. In its First Amended Complaint, Kansas alleged:

> In spite of its duties and obligations under the Compact, since 1949 the State of Colorado has allowed and permitted substantial increases in the diversion and use in Colorado of the surface and hydrologically related ground water of the Arkansas River . . . .

First Amended Complaint at ¶ 8, *Kansas v. Colorado*, No. 105, Original.

[33] *See generally* Nebraska's Reply to Wyoming's, Colorado's, and the United States' Responses to Nebraska's Motion for Leave to File an Amended Petition at 11-13 (May 16, 1994) (Docket No. 659).

drawals in Wyoming are approximately 182,000 acre feet annually, with approximately half of that quantity constituting the annual net depletion.

B. Groundwater Pumping That Takes Nebraska's Apportioned Water Presents a Legal As Opposed to an Equitable Issue.

Having admitted that Wyoming's groundwater pumping takes Nebraska's apportioned water, Wyoming's sole contention on exceptions is that "a simple principle of equity will control the issue" of whether the Court should hear Nebraska's claim that groundwater pumping in Wyoming is taking Nebraska's apportioned surface flows. Wyoming's Brief in Support of Exceptions at 38. Wyoming argues that the issue "turns on the basic equitable principle that Wyoming should not be subject to interstate restrictions that Nebraska will not impose as a matter of intrastate law." *Id.* at 40.

Wyoming misstates the issue. As Master Olpin correctly recognized, the issue is legal in nature, *i.e.*, whether Wyoming is violating the Decree by taking Nebraska's apportioned flows through groundwater pumping. Nebraska's allegation relates to the enforcement of the Decree. Wyoming cannot be allowed to continue to deplete — in increasing quantities — Nebraska's 75% share of natural flow through its groundwater pumping on the theory that such a practice is sanctioned because Nebraska does not have conjunctive use laws in place. Moveover, Wyoming is the upstream state. Pursuant to the Decree, Wyoming owes apportioned surface flows to Nebraska. Nebraska does not owe Wyoming or any other downstream state apportioned flows under the North Platte Decree. How Nebraska allocates its water internally is irrelevant to whether Wyoming is taking Nebraska's apportioned water before the water ever gets to Nebraska.

Finally, Wyoming argues that *Missouri v. Illinois*, 200 U.S. 496 (1906), and *Kansas v. Colorado*, 206 U.S. 46, 104-05 (1907), provide support for its position that Nebraska's

groundwater allegations should not be allowed as a matter of equity because Nebraska does not presently regulate for conjunctive use. Wyoming's Brief in Support of Exceptions at 38-39. As Wyoming nearly concedes, however, its reliance on *Missouri v. Illinois* is misplaced. *Id.* at 39. That case, as well as *Kansas v. Colorado*, stand for the proposition that relief on the merits may turn on equitable principles. While those cases may provide Wyoming with the basis for asserting factual defenses at trial, they have no relevance in testing the sufficiency of Nebraska's allegations.

As the Court observed earlier in this case, in an enforcement action "the only question is whether the [alleged] conduct violates a right established by the decree." 113 S. Ct. at 1695. Nebraska's groundwater pleading amendments properly allege violations of the Decree within the purview of that holding.

CONCLUSION

The Court's opinion in 1993 set the foundation for trial in the manner proposed by the Special Master in his Third Interim Report. The Special Master aptly recommended that the First Counterclaim and First Cross-Claim are barred by *res judicata* because they seek to resurrect the mass allocation rejected in 1945. Nebraska's claims for injunctive relief on the Deer Creek and Laramie tributaries, along with the evidence requisite to an evenhanded evaluation, on the other hand, lie within the relief contemplated by ¶ XIII and the Court's 1993 opinion.

The Court should therefore adopt the Special Master's recommendations with one exception. The Court should reject his recommendation that jurisdiction should be exercised over Wyoming's Fourth Cross-Claim against the United States.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN
Simms & Stein, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

MOTION FILED
DEC 30 1994

No. 108, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE THIRD INTERIM REPORT
OF THE SPECIAL MASTER

MOTION OF AMICUS CURIAE PLATTE RIVER TRUST FOR LEAVE TO FILE A RESPONSE TO WYOMING'S SECOND EXCEPTION TO THE SPECIAL MASTER'S THIRD INTERIM REPORT AND PROPOSED RESPONSE

*Abbe David Lowell
Sue Ellen Russell
Nanette L. Davis
* Counsel of Record

Brand & Lowell, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

December 30 1994

20 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF NEBRASKA,
Plaintiff,
v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

MOTION OF AMICUS CURIAE PLATTE RIVER TRUST FOR LEAVE TO FILE REPLY BRIEF TO EXCEPTIONS FILED AS TO THE SPECIAL MASTER'S THIRD INTERIM REPORT

The Platte River Whooping Crane Critical Habitat Maintenance Trust ("the Trust") submits this motion for leave to file a response to exceptions filed by the parties to the Special Master's Third Interim Report, accepted for filing by this Court on October 11, 1994. In support of its motion, the Trust states as follows:

1. The Trust is a non-profit organization whose mission is to protect and enhance the critical habitat for whooping crane and the habitat for other migratory and resident bird habitat regions of the Platte and North Platte Rivers. Since its organization in 1980, the Trust and its staff of scientists have been engaged in studying and reclaiming Platte River habitat.

2. A three-person Board of Trustees governs the Trust. The State of Nebraska, the Missouri Basin Power Project, and the National Wildlife Federation each appoint one trustee. The Trust has become an excellent source of objective scientific information based on its long-term direct studies and staff expertise.

3. On April 1, 1988, Special Master Owen Olpin granted the Trust *amicus curiae* status in this case, which concerns the apportionment of flows of the North Platte River among the States of Nebraska, Wyoming, Colorado, and the United States. On February 18, 1994, Nebraska and Wyoming filed respective motions to amend the pleadings. Following full briefing by the parties and *amici*, the Special Master issued his Third Interim Report, recommending various dispositions on the motions to amend.

4. In late November of 1994, Nebraska, Wyoming, and the United States filed exceptions to the Third Interim Report. (Colorado filed no exceptions.) Nebraska and the United States excepted to the Special Master's recommendation that Wyoming be granted leave to file her Fourth Cross-Claim against the United States, which alleges that it has failed to operate federal reservoirs in accordance with federal and state laws, and extant water service contracts.

5. Wyoming excepted to the following recommendations of the Special Master: (1) to deny Wyoming's First Counterclaim and First Cross-Claim with prejudice; (2) "to entertain Nebraska's claims of injury to non-irrigation season uses and uses downstream of the apportioned reach of the North Platte River, including endangered species and wildlife habitat uses;[;]" (3) "to entertain Nebraska's Horse Creek claim . . .;" and (4) "to entertain Nebraska's claims to impose interstate ground water regulation in Wyoming under standards that Nebraska refuses to apply intrastate to its own ground water use." Wyoming's Exceptions at 1-2.

6. Pursuant to Supreme Court Rule 37, the Trust seeks permission from this Court to file a response to the exceptions,

as it and other *amici* have done in the past in this case. Nebraska, the United States, and Colorado consent to the filing of a response by the Trust. *See* Letters attached as Exhibits 1, 2, and 3, respectively. Wyoming will not consent to the Trust's request for permission, thereby prompting this motion. *See* December 5, 1994 Letter of Dennis Cook, attached as Exhibit 4. Wyoming, however, does not oppose this motion. *See* December 6, 1994 Letter of Dennis Cook, attached as Exhibit 5.[1]

7. The granting of this motion would permit the Trust to be heard on the issues raised in the exceptions in a manner consistent with the role that it has played in this case heretofore as an *amicus*.

Respectfully submitted,

*ABBE DAVID LOWELL

Abbe David Lowell (SEF)

SUE ELLEN RUSSELL
NANETTE L. DAVIS
* *Counsel of Record*

Brand & Lowell, P.C.
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

Of Counsel:
EUGENE GRESSMAN
Chapel Hill, North Carolina

---

[1] This material has been lodged with the Clerk of the Court.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 2

ARGUMENT

I. CONSIDERATION OF WILDLIFE EQUITIES IN THIS PROCEEDINGS IS ALTOGETHER APPROPRIATE 3

II. THAT WILDLIFE CONCERNS EXIST IN OTHER CASES DOES NOT NEGATE THE NEED TO CONSIDER THEM IN THIS PROCEEDING 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California,
103 S. Ct. 1382 (1983) 13

Nebraska v. Wyoming,
113 S. Ct. 1689 (1993). 5,6,7

Nebraska v. Wyoming,
113 S. Ct. 1941 (1993). 13

Nebraska v. Wyoming,
325 U.S. 589 (1945) 6,7,8,9

Nebraska v. Wyoming,
345 U.S. 981 (1953) 8

Nebraska v. Wyoming,
485 U.S. 931 (1998) 3,12

Platte River Whooping Crane Critical Habitat
Maintenance Trust v. FERC,
876 F.2d (D.C. Cir. 1989) 3,4,10

Platte River Whooping Crane Critical Habitat
Maintenance Trust v. FERC,
962 F.2d (D.C. Cir. 1992) 11

STATUTES AND REGULATIONS

Endangered Species Act,

16 U.S.C. § 1532(6) (1989). 3

16 U.S.C. § 1532(5)(A)(i) 4

REGULATIONS: (cont.) **Page**

43 Fed. Reg. 20,938-42 (1978) 4

MISCELLANEOUS:

The Platte River Ecology Study, Spec. Rept.
Northern Prairie Wildlife Research Center (1981) . . . 5

No. 108, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE THIRD INTERIM REPORT
OF THE SPECIAL MASTER

RESPONSE OF THE PLATTE RIVER TRUST TO THE EXCEPTION FILED BY WYOMING TO THE SPECIAL MASTER'S THIRD INTERIM REPORT AS TO THE PROPER ROLE OF WILDLIFE ISSUES IN THIS PROCEEDING

INTEREST OF *AMICUS CURIAE* PLATTE RIVER TRUST

The Platte River Whooping Crane Critical Habitat Maintenance Trust ("the Trust") is a non-profit organization whose mission is to protect and enhance the Platte River critical habitat for whooping cranes and the habitat for other migratory birds on the Platte and North Platte Rivers. Decisions in other tribunals and studies by the Trust and others establish that the Platte River habitat is in immediate peril. Any further upstream depletions will necessarily decrease available water supplies in Nebraska and expose that habitat to

greater damage. Because of the import to the habitat carried by any decision in this original jurisdiction water apportionment case, and the Trust's role as habitat protectorate, the Trust has been granted status as an *amicus curiae*.

SUMMARY OF ARGUMENT

Wyoming incorrectly argues that wildlife issues are not an equity that can be considered in this proceeding. In support of her statements, Wyoming both misstates the recommendations of the Special Master and ignores the law of the case. Contrary to Wyoming's assertions, the Special Master has not determined that a water requirement for endangered species is necessary. Rather, he has stated simply that wildlife is an equity that cannot continue to be ignored in the claims presented in this case. Moreover, this Court has not in its previous opinions made any statement that can be construed as a limitation on the introduction of the evidence of injury to Nebraska's wildlife in the context of the Deer Creek and Laramie River claims. Finally, there is no adequate alternative forum to address the wildlife equities extant in this case. Therefore, Wyoming's second exception to the Special Master's Third Interim Report should be overruled.

ARGUMENT

The Trust hereby submits its response to the exceptions filed to the Third Interim Report of the Special Master on the Motions to Amend the Pleadings ("Third Interim Report"). The Trust concurs with the exceptions taken by the United States and the State of Nebraska to the recommendation of the Special Master to grant the inclusion of the State of Wyoming's Fourth Cross-Claim for the reasons offered in the briefs of the United States and Nebraska. However, the Trust believes that the Special Master properly recommended that wildlife issues be accounted for as an equity in the trial on Counts I and III, and therefore disagrees with the exceptions taken by Wyoming as to those Counts. The Trust respectfully offers the following extended remarks as to the latter.

I. CONSIDERATION OF WILDLIFE EQUITIES IN THIS PROCEEDING IS ALTOGETHER APPROPRIATE.

Wyoming's argument on her second exception in essence is that, because this Court has denied Nebraska leave to amend the complaint to include a specific apportionment for wildlife,[1] *all* consideration of wildlife issues are barred from this proceeding. *See* Wyoming's Exceptions at 28-34. In doing so, Wyoming suggests that allegations of injury to wildlife and wildlife habitat "are based on mere speculation." *Id.* at 32. To the contrary, the wildlife equities, which include the critical and essential habitat of numerous endangered species,[2] are in dire and worsening shape by virtue of upstream development on the Platte River. Moreover, the approach proposed by the Special Master on the Deer Creek and Laramie issues simply permits evidence of injury to wildlife and their habitats from development upstream in Wyoming to be considered along with the evidence of injuries to other equities, such as agriculture and municipal needs. It is not, contrary to the assertions of Wyoming, "a claim for an apportionment for such wildlife uses." Wyoming's Exceptions at 31.

As Wyoming well knows, "[t]he banks of the Platte River . . . are home to a number of endangered species of wildlife, including the whooping crane." *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109, 110 (D.C. Cir. 1989) ("Platte I"). Accordingly, the Department of the Interior has designated the 53-mile-long Big Bend reach of the Platte River (from Lexington to Denman in central Nebraska) a "critical habitat" for the

---

[1] *Nebraska v. Wyoming*, 485 U.S. 931 (1998).

[2] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range." *Endangered Species Act*, 16 U.S.C. § 1532(6) (1989). Listed species on the Platte include the whooping crane, bald eagle, least tern, peregrine falcon, eskimo curlew, piping plover, western prairie fringed orchid, American burying beetle, and pallid sturgeon.

whooping crane.[3] 43 Fed. Reg. 20,938-42 (1978). The Department has also designated two areas of the Platte River as "Resource Category 1" habitat for Sandhill Cranes and Greater White-fronted Geese, acknowledging that habitat to be "unique and irreplaceable." The Platte I court also noted, "'[Federal Energy Regulatory Commission s]taff concluded that the existing licensed projects in combination with other water projects along the Platte River have contributed to the cumulative flow depletion accruing within the river system.'" 876 F.2d at 116 (quoting 39 F.E.R.C. at 63,016-17).

The Trust has detailed the nature of wildlife conditions on the Platte River in numerous submissions to this Court and the Special Master. *See, e.g.*, May 2, 1994 Brief of Amicus Curiae Platte River Trust in Support of Nebraska's Motion for Leave to File Amended Petition. There, the Trust proffered to the Court:

> Only a few reaches of the Platte River retain [its original] habitat characteristics. Upstream consumptive use of the natural flow of the North Platte system -- in both the irrigation and non-irrigation season -- has significantly altered the character of the Platte River and the habitat it can offer wildlife. The Platte River channel has lost many of its natural contours as inflows have decreased and the natural (seasonal) variance in flow levels has been disrupted. In some reaches, the Platte River channel has become narrow and deep with large trees growing on former sandbars and along its banks. Cranes and other species have abandoned entire portions of the river because 100 percent of the roosting habitat has been lost in those reaches. The Platte River Trust estimates that at least 80 percent of the historic roosting habitat in central Nebraska has been lost. In the "best" reaches less than 50 percent remains.

---

[3] A "critical habitat" is "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

> In 1981, the U.S. Fish and Wildlife Service observed that: "[w]ith approximately 70 percent of the Platte's annual flows diverted for various consumptive uses upstream in Colorado, Wyoming, and western Nebraska, channel width in many areas has been reduced to 10-20 percent of former size. Habitat conditions within the existing channel have also changed as a result of reduced scouring of sandbars and shifting of alluvial sediments. A broad band of mature deciduous woodland now occupies tens of thousands of acres that formerly were part of the river and numerous islands overgrown with woody vegetation exist within the channel." The Platte River Ecology Study, Spec. Rept. Northern Prairie Wildlife Research Center at i (1981). (Footnote omitted).

Id. at 6-7 & n.6. Any further depletions of water from the Platte River cannot be tolerated because the wildlife uses, including the needs of the habitat of numerous endangered species, are not met under the current regime. Thus, Wyoming's statement that Nebraska's allegations of injury to wildlife are "speculative" is contrary to the facts.[4]

Wyoming's position that this Court must exclude all evidence of wildlife equities from this case has no legal basis. For example, in 1993, this Court, in rejecting Wyoming's motion for summary judgment on the Deer Creek injury issue, did so based in part upon the April, 1991 affidavit of H. Lee Becker, a former state hydrologist for the Nebraska Department of Water Resources. Nebraska v. Wyoming, 113 S. Ct. 1689, 1700 (1993) ("[W]e think the Wilde and Becker affidavits raise a genuine issue of material fact sufficient to defeat Wyoming's summary judgment motion.") Although the Court's opinion rests primarily on Wyoming's manner of potential administration, the Court did not disavow the affidavit's discussion

---

[4] This is not to say that the parties, including Wyoming, should not have the opportunity to argue about the weight to be accorded to any evidence on the extent of Nebraska's injuries.

of the risk of the Deer Creek development to the habitat of endangered and threatened species in Nebraska. *Id.*

The Special's Master Second Interim Report reviewed the affidavit in more detail. Second Interim Report at 75-77. The Becker affidavit stated in part, "[w]ith greater impacts on flows below the Tri-State Dam there would be a greater likelihood that the Deer Creek project would jeopardize the habitat of the endangered and threatened species in Nebraska." April, 1991 Becker Affidavit at ¶ 3 (*cited in* Second Interim Report at 75-76). The Special Master concluded,

> I therefore recommend that the Court deny Wyoming's motion. '[T]he facts specifically averred by [Nebraska] contradict facts specifically averred by [Wyoming].' . . . We shall therefore proceed to trial on the Deer Creek Project's effects on 'the delicate balance of the river,' 325 U.S. at 625, *unless* Wyoming can establish that the Deer Creek Project fits within the Decree's paragraph X municipal exemption.

Second Interim Report at 77 (citation omitted). Thus, this Court has already implicitly accepted that wildlife equities will be considered in the context of the Deer Creek issues.

Further, as to the Laramie issue, the Court rejected motions for summary judgment from both Nebraska and Wyoming. 113 S. Ct. at 1697-99. The Court cautioned that Nebraska must "come[] forward with evidence sufficient to establish that Corn Creek (or some other project on the Laramie) poses a threat of injury serious enough to warrant modification of the decree . . . ." *Id.* at 1698-99. The Court did not then proceed to exclude wildlife equities from the injuries allowed to be considered.

Rather, in reference to injuries sufficient to warrant such modification, and in discussing the applicable legal standard, the Court stated,

> As we have said, the Court in those sections [of the original decree] retained jurisdiction to modify the decree to answer

> unresolved questions and to accommodate "change[s] in conditions" -- a phrase sufficiently broad to encompass not only changes in water supply, see, *e.g., Nebraska v. Wyoming*, 325 U.S., at 620, 65 S.Ct., at 1351, but also new development that threatens a party's interests. . . . At least where the case concerns the impact of new development, the inquiry may well entail the same sort of balancing of equities that occurs in an initial proceeding to establish an equitable apportionment. See *Nebraska v. Wyoming*, 325 U.S., at 618, 65 S.Ct., at 1350 (listing equitable considerations).

113 S. Ct. at 1695. The Court expounded on that list of equitable considerations in 1945:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of apportionment is the guiding principle. But the physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas of a limitation is imposed on the former -- these are all relevant factors. *They are merely an illustrative not an exhaustive catalogue.* They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

325 U.S. at 618 (emphasis added). In short, this Court has not imposed any parameters on proof of injury to Nebraska's wildlife equities on the Deer Creek and Laramie issues. The Special Master's recommendation to hear evidence on wildlife equities is a reflection of the need to balance *all* the relevant interests.

Wyoming, however, suggests that "[t]here cannot be a *limited* inquiry into the endangered species and wildlife habitat issues that would apply only to requests for new injunctions against Wyoming." Wyoming's Exceptions at 30. While the Trust believes that a limited inquiry would be less useful than an examination that considers a

global year-round apportionment, *see* discussion of Count IV in Third Interim Report at 30 and 47-55,[5] Wyoming cites no legal authority for her bizarre position that "a trial would be required to determine initially whether and if so, what amount of, flows are essential to the conservation and recovery of the endangered species and their critical habitat." Wyoming's Exceptions at 30. As the Trust has already shown, a limitation on the proof of injuries to wildlife in the context of the Laramie and Deer Creek counts would be inconsistent with the law of this case.[6] That Nebraska will have to produce sufficient

---

[5] Although no party took exception to the Special Master's recommendation to deny inclusion of Count IV, requesting a global non-irrigation season apportionment, the Trust continues to believe that the time is indeed ripe to address the issue of a comprehensive, *year-round* equitable apportionment of the North Platte River. First and foremost, the wildlife equities, including the critical habitat of numerous endangered species, are in dire and worsening shape by virtue of actions on the Platte River that have already occurred in both the irrigation and non-irrigation seasons. Second, the approach proposed by the Special Master avoids an accounting of the cumulative impacts on wildlife from development upstream in Wyoming. Indeed, the Special Master conceded that Nebraska has alleged both over-appropriation and substantial injury of the Platte River in the non-irrigation season, Third Interim Report at 52-53, and that "[t]he 1945 opinion[, Nebraska v. Wyoming, 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953),] certainly affords a ready rationale for the Court to grant Count IV and afford Nebraska the opportunity to present her evidence on whether the North Platte is overappropriated during the non-irrigation season." *Id.* at 53.

[6] Likewise, although the Special Master has recommended that Wyoming's First Counterclaim and First Cross-Claim be denied, "the denial of the First Counterclaim would not necessarily bar Wyoming from introducing evidence of waste in all circumstances of the case." Third Interim Report at 64 n.158.

evidence regarding her affected interests to justify her requested relief is not a novelty, but rather standard practice in any trial.[7]

"The Court [has] expressly retained jurisdiction at the foot of the decree in order to respond to changed circumstances." Special Master's Third Interim Report at 2 & n.3 (citing Paragraph XIII of the 1945 decree). Wyoming lost the battle to exclude any reopener clause from the 1945 decree, *see* 325 U.S. at 655, and should not be heard to prevent Nebraska from presenting evidence of changed circumstances as to the appropriate balance of equities for claims already accepted for filing by this Court. Here, a "new" interest has emerged since 1945, i.e., environmental impacts from upstream development.[8] If Nebraska is foreclosed from raising an important changed circumstance in the context of a petition to modify the decree, then Paragraph XIII would be rendered a nullity, contrary to the explicit intent of this Court.

---

[7] Wyoming in fact has proffered a similar response as to her proposed First Counterclaim and First Cross-Claim, where she seeks a mass allocation to replace the existing proportionate allocation of irrigation flows:

> When asked at oral argument whether Wyoming seeks freedom to use everything except that which might be defined as the Nebraska apportionment and then subtracted from the total flows, counsel for Wyoming responded, "That's the very heart of it. It may not be a specific amount that applies year to year. It may depend on meteorological conditions, snow packs. *But that goes to our proof and our evidence.*"

Third Interim Report at 56 n.141 (quoting July 27, 1994 hearing transcript at 258-59) (emphasis added).

[8] The Special Master recognized that, "since none of the now highly relevant federal environmental laws were in effect at that time [in 1945], the important wildlife resources in the Big Bend reach in central Nebraska were entirely unaccounted-for." Third Interim Report at 9.

Perhaps most telling is that Wyoming characterizes the recommendation of the Special Master to hear at trial the environmental impacts of Wyoming's development as a "presum[ption of] a water requirement for endangered species." Wyoming's Exceptions at 33 n.16 (citing Third Interim Report at 20). Contrary to Wyoming's intimations, the Special Master has *not* yet heard the evidence and decided the appropriate balance of equities. His plain words were, "I do not doubt that wildlife issues must be considered in, and evidence of the needs of these uses admitted into, this case in the context of the controversies of the Laramie River and Deer Creek." Third Interim Report at 19-20. Wyoming's statements may be more a Freudian grant of her fear of what the proof will show if permitted than they are an accurate recital of the Special Master's recommendation.

II. THAT WILDLIFE CONCERNS EXIST IN OTHER CASES DOES NOT NEGATE THE NEED TO CONSIDER THEM IN THIS PROCEEDING.

Wyoming also takes exception to the Special Master's rejection of the argument that other proceedings will adequately address the wildlife interests extant in this case. *See* Wyoming's Exceptions at 32-34 & n.16 (citing Third Interim Report at 26-28 n.72.) The Trust agrees with the Special Master. First, the adequacy of the cited alternative fora remains dubious. The FERC relicensing proceeding for Kingsley Dam and related facilities is a ten-year-old proceeding on licenses that expired in 1987 that has not resulted in any protection for wildlife and whose end is nowhere in sight.

Indeed, the Trust has twice been forced to initiate litigation against FERC to have wildlife issues considered in the relicensing proceeding. In *Platte I*, 876 F.2d at 116, the D.C. Circuit ordered FERC to determine whether the interim operations of the Kingsley Dam projects without protective conditions (a) threaten the continued existence of any endangered or threatened wildlife species such as the whooping crane, least tern, or piping plover, or (b) were likely to

adversely modify the whooping crane critical habitat.[9] FERC subsequently determined that "absent interim measures, project operations will continue to adversely affect Platte River habitat, impeding the recovery of endangered or threatened bird species populations, . . . and thereby may affect the continued existence of these species and result in irreversible environmental damage." Interim License Conditions Order, 50 F.E.R.C. ¶ 61,180, 61,531-32 (1990). However, in *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Commission*, 962 F.2d 27, 32 (D.C. Cir. 1992) ("Platte II"), the D.C. Circuit refused to impose those interim protective conditions because of the absence of a reopener clause in one of the project's licenses.

While FERC finally has begun to consider the environmental impacts of the Kingsley Dam projects, that process is revealing as well. The first draft environmental impact statement ("EIS") was roundly criticized by many of the interested parties and resulted in the publication of a revised draft EIS. Further criticism resulted in a supplement to the revised draft EIS, which was released this December. The Trust's scientific analysis shows that the staff alternative for operations proposed to be adopted by FERC does not meet the requirements of the Endangered Species Act (particularly in light of new recommendations issued by the U.S. Fish and Wildlife Service, which establish the long-term need for even higher flows than had originally been recommended). Not only does it appear that the FERC relicensing will not provide adequate protection to the habitat, but the process is far from over, with the formal consultation on endangered and threatened species impact just beginning. In short, the Trust has ten years of experience to be highly skeptical that the relicensing proceeding is an adequate alternative forum, as Wyoming suggests.

---

[9] Not surprisingly, Wyoming submitted comments to FERC that stated, "Wyoming does not believe the evidence before the Commission supports the need for interim conditions." December 6, 1989 Comments of the State of Wyoming on Requests for Interim Terms and Conditions on Annual Licenses at 9-10.

Second, as the Special Master observed, the so-called "Recovery Plan" appears threatened from the start. *See* Third Interim Report at 27 n.72. Nebraska, Wyoming, Colorado and the United States propose to institute a basin-wide plan for the recovery of endangered species of the Platte River and their habitat. The parties have thus far not been eager to pony up their respective allocations of water. *See, e.g., id.* (citing June 10, 1994 Letter from Governor Romer of Colorado to the Honorable Bruce Babbitt, Secretary of the Interior, "declaring that Colorado was not obliged by the Memorandum of Agreement 'to deliver any more water at the Colorado-Nebraska State line than is provided by interstate compact.'"). If the Recovery Plan indeed will address the basin-wide use of water by Nebraska, Wyoming, Colorado, and the United States, then the Plan counsels as much for delay of this *entire* proceeding than for the exclusion of only wildlife interests from the balance of equities.[10] The states' participation in the Recovery Plan could perhaps result in a concrete agreement over water allocations for wildlife. Given the speculative nature of that result, though, it would be better to allow any possible Recovery Plan initiative to inform these proceedings, and not to act as a mechanism to silence the voice of wildlife interests.[11]

Wyoming invites this Court to read much into its previous summary denials of Nebraska's motion to provide for a wildlife apportionment, *Nebraska v. Wyoming*, 485 U.S. 931 (1988), and of amendments that would allow a year-round global apportionment, not

---

[10] Although the parties in this proceeding are the same as in the Recovery Plan initiative, the only aspect of this proceeding that parties have argued ought to be obviated is consideration of wildlife equities. Neither Wyoming nor Nebraska has argued that resolution of her claims should be delayed pending the outcome of the Recovery Plan initiative.

[11] Wyoming "believes that this Court should encourage [the Recovery Plan] effort to resolve the endangered species concerns within the existing apportionment." Wyoming's Exceptions at 33 n.16. In doing so, however, Wyoming entirely pretermits the issue of how the fair conduct of this proceeding, with wildlife issues, would constitute a discouragement of the Recovery Plan process.

just for wildlife but for the totality of relevant interests, *Nebraska v. Wyoming*, 113 S. Ct. 1941 (1993). Wyoming states, "The Court's denial of Nebraska's previous amendments evidenced not only a reluctance to expand this case into one for a new apportionment but also a recognition that endangered species issues must be addressed in the first instance under the statutes enacted by Congress for that purpose." Wyoming's Exceptions at 32. This Court's decisions on those motions were without opinion. While they might evince this Court's reluctance to expand the apportionment proceeding, the summary decisions cannot appropriately be read as support for Wyoming's argument that wildlife issues have *no* place at trial.

Moreover, the longevity of any resulting apportionment counsels for inclusion of wildlife equities. The history of equitable apportionment cases shows that, once any apportionment is set on account of various projects like Deer Creek, revisiting that apportionment may be well nigh impossible, even if later reflection demonstrates that a particular Wyoming use received more than its fair share of attention. Cf. Arizona v. California, 103 S. Ct. 1382 (1983) (rejecting Indian tribes' request for recalculation of irrigable acreage on grounds that previous amount was in error because of need for finality). Finally, because this case is the only proceeding that answers the question of "how much" (water over the state line), then no other proceeding will suffice as an alternative forum for the

consideration of wildlife equities.

CONCLUSION

In short, the time is ripe in this proceeding to count wildlife as an equity in the balance. Therefore, and for the foregoing reasons, this Court should overrule Wyoming's second exception to the Special Master's recommendations.

Respectfully submitted,

*Abbe David Lowell

Abbe David Lowell

Sue Ellen Russell
Nanette L. Davis
* Counsel of Record

Brand & Lowell
(A Professional Corporation)
923 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 662-9700

December 30, 1994

MOTION FILED
DEC 30 1994

(58)

No. 108, Original

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF NEBRASKA, Plaintiff,
v.
STATE OF WYOMING, *et al.*, Defendants.

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO FILE AND MEMORANDUM IN RESPONSE TO CERTAIN EXCEPTIONS TO THIRD INTERIM REPORT OF THE SPECIAL MASTER

Edward Weinberg
Counsel of Record
Richmond F. [illegible]lan
DUNCAN, WEINBERG, MILLER
& PEMBROKE, P.C.
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

Michael J. Hinman
General Counsel
Claire Olson
Assistant General Counsel
Basin Electric Power
Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

December 30, 1994

No. 108, Original

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, *et al.*,

Defendants.

MOTION OF BASIN ELECTRIC POWER COOPERATIVE FOR LEAVE TO FILE MEMORANDUM IN RESPONSE TO CERTAIN EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

Basin Electric Power Cooperative (Basin) moves for leave to file the accompanying memorandum in response to certain exceptions to the Third Interim Report of the Special Master. In support of its motion Basin states:

1. Basin is the operator and, with five other consumer owned electric utilities, the owner of the Missouri Basin Power Project, the facilities of which include the

Grayrocks Dam and Reservoir and the 1500 megawatt Laramie River Power Station (Grayrocks) located on the Laramie River in Wyoming about ten miles above its confluence with the North Platte River. The owners of the project and their member distribution systems provide electric energy to about 1.2 million people in eight states.

2. Basin is an *amicus curiae* in the proceedings before the Special Master and twice before has been granted leave by the Court to file memoranda. 485 U.S. 931, (1988), Spec. Mast. Doc. No. 59; 117 L.Ed. 2d 102 (1992), Spec. Mast. Doc. No. 423. All *amici*, including Basin, were granted leave by the Court to file exceptions and replies in relation to the First and Second Interim Reports of the Special Master. 118 L.Ed 2d 538 (1992), Spec. Mast. Doc. No. 477.

3. Grayrocks controls the Laramie below the Wheatland Project and is operated in accordance with a Settlement Agreement and an exemption from the Endangered Species Act that limit Basin's diversions and require it to release certain minimum flows year round, during both the irrigation and non-irrigation seasons, for the benefit of the North Platte. *See* 113 S.Ct. at 1697.

4. The Special Master's Third Interim Report recommends that Nebraska be permitted to file her proposed Count III, which seeks to secure the inflows to Grayrocks essential to its operation in accordance with the Settlement Agreement and the Endangered Species Act exemption and to enjoin Wyoming from impounding or interfering with the passage to the North Platte of the water Basin is required to release . Third Int. Rpt. 44. Wyoming's Second Exception opposes the Special Master's recommendation to the extent

that, as Wyoming conceives, it contemplates consideration of injury to non-irrigation season uses and uses downstream of Tri-State Dam, including protection of endangered species and wildlife habitat. Nebraska's proposed Count III and Wyoming's opposition involve Basin's ability to operate Grayrocks in accordance with the Settlement Agreement and the order of the Endangered Species Act Committee.

5. The United States and Nebraska except to the Special Master's recommendation that Wyoming be permitted to file her Fourth Cross-Claim against the United States, which alleges that the United States is operating the federal reservoirs on the North Platte in violation of the governing laws and contracts. If the allegations of this claim are proved and the United States is required to operate the reservoirs in accordance with law, the pressure on Wyoming to increase diversions from the Laramie will be substantially reduced and Basin's ability to operate Grayrocks in accordance with the Settlement Agreement and the Endangered Species Act exemption will be bolstered.

Basin respectfully requests that its motion for leave to file the accompanying memorandum be granted and that the recommendations of the Special Master relating to Nebraska's Count III and Wyoming's Fourth Cross-Claim be accepted.

Respectfully submitted,

Edward Weinberg
Counsel of Record
Richmond F. Allan
DUNCAN, WEINBERG,
MILLER & PEMBROKE, PC
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

Michael J. Hinman
General Counsel
Claire Olson
Assistant General Counsel
Basin Electric Power
Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

December 30, 1994

No. 108, Original

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING,

Defendant.

MEMORANDUM OF BASIN ELECTRIC POWER COOPERATIVE IN RESPONSE TO CERTAIN EXCEPTIONS TO THIRD INTERIM REPORT OF THE SPECIAL MASTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT 1

ARGUMENT

I. Allowing Nebraska To Pursue Her Claim III Is Entirely Consistent with the Existing Apportionment 4

II. This Case Is Uniquely Appropriate for Determining Wyoming's Fourth Cross-Claim that the United States Is Disturbing the Apportionment by Violating the Laws and Contracts that Govern the Operation of the North Platte Reservoirs 7

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Nebraska v. REA, 12 Env. Rep. Cases (BNA) 1156 (D. Neb. 1978), *judg. vacated and app. dsm'd*, 594 F.2d 870 (8th Cir. 1979) 5

Nebraska v. Wyoming, 113 S. Ct. 1689 (1993) 3, 4

395 U.S. 40 (1935) 12

STATUTES

Endangered Species Act, 16 U.S.C. § 1536(e)-(p) 5

Warren Act, 43 U.S.C. § 523 10

No. 108, Original

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF NEBRASKA,

Plaintiff,

v.

STATE OF WYOMING, *et al.*,

Defendants.

MEMORANDUM OF BASIN ELECTRIC POWER COOPERATIVE IN RESPONSE TO CERTAIN EXCEPTIONS TO THIRD INTERIM REPORT OF THE SPECIAL MASTER

STATEMENT

In his Third Interim Report, the Special Master recommends that Nebraska be allowed to amend her complaint to include her proposed Count III and that Wyoming be allowed to amend her pleadings to assert her proposed Fourth Cross-Claim.

By her proposed Count III, Nebraska seeks to secure the inflows necessary to enable Grayrocks to be operated in accordance with the Settlement Agreement and the Endangered Species Act exemption and to enjoin Wyoming from impeding or interfering with the releases Basin is required to make from Grayrocks for the benefit of the North Platte. By her proposed Fourth Cross-Claim Wyoming seeks to require the United States to operate the North Platte reservoirs in accordance with the laws and contracts applying thereto.

Basin supports both of these recommendations. The recommendation that Nebraska be allowed to pursue her proposed Count III is supported also by the United States and the Audubon Society. It is opposed in part by Wyoming. The recommendation that Wyoming be allowed to pursue her Fourth Cross-Claim is opposed by the United States and Nebraska.

Basin is vitally interested in protecting its ability to operate Grayrocks in accordance with the Settlement Agreement and the Endangered Species Act exemption, in assuring that flows of the Laramie above Grayrocks are not depleted to the extent that Basin's ability to operate the project and make the required releases is impaired, and in assuring that the releases reach the North Platte. Basin is also vitally interested in preventing the Bureau of Reclamation from improperly operating the North Platte reservoirs in ways that diminish the natural flow, disturb the apportionment prescribed by the decree, and increase demands on the Laramie.

In 1993, addressing exceptions to the First and Second Interim Reports of the Special Master, the Court

observed that "it is undisputed that Wyoming is not currently interfering with those flows [that Basin is required to maintain under the Settlement Agreement]" and that, "Other than Corn Creek, Nebraska points to no proposed development that might deplete releases from Grayrocks." 113 S. Ct. at 1698.

This is no longer the case. Shortly after the Court's 1993 opinion came down, it was discovered that Wyoming has supplied funds to the Goshen Irrigation District, which has an old water right on the Laramie supplemental to its rights on the North Platte, to install new pumps that will enable Goshen to divert a much larger quantity of water than it was ever formerly able to do and to interfere substantially with the passage downstream of the releases Basin is required to make from Grayrocks. Additionally, it appears that groundwater pumping in Wyoming is depleting surface flows in the Laramie between the foot of the Wheatland Project and Grayrocks.

Substantial evidence has also come to light indicating that the Bureau of Reclamation, among other improprieties in the operation of the North Platte reservoirs, routinely impounds water that constitutes natural flow to which, as such, holders of water rights on the river are entitled and of which they are deprived by the Bureau's malfeasance. To the extent that the government shorts Goshen of water to which it is entitled under its natural flow rights on the North Platte, Goshen looks to the Laramie and claims to be entitled to tap the flows Basin is obligated to maintain to the North Platte under the Settlement Agreement and the exemption granted by the Endangered Species Act Committee.

ARGUMENT

I.

Allowing Nebraska To Pursue Her Count III Is Entirely Consistent with the Existing Apportionment

In its 1993 opinion, the Court held that the Laramie below Wheatland had not been apportioned to Wyoming and that the 1945 decree assumed that the Laramie would contribute to the natural flow in the Whelan to Tri-State section of the North Platte apportioned between Wyoming and Nebraska. The Court indicated that Nebraska would be entitled to relief if, in the future, Wyoming threatened to interfere with the releases called for by the Settlement Agreement. The Court declined to adopt the Special Master's recommendation that Paragraph XIII of the decree be amended to provide specifically for such relief "Because we do not believe such an amendment would add to our authority under subparagraph (f)." 113 S. Ct. at 1698.

Nebraska has now made a persuasive showing that, by activities both above and below Grayrocks, Wyoming is threatening to interfere substantially with the ability of Basin to operate the project as required by the Settlement Agreement and the Endangered Species Act exemption, to make the releases called for, and to secure the passage of the water to the North Platte. Subject to proving the threat, Nebraska is entitled to have her rights to the releases and to inflows from the Laramie protected by modification of the decree. To allow Nebraska to pursue her proposed Count III to secure her rights in the Laramie and the releases Basin is required to make engenders no modification of the existing apportionment (as distinguished from modification of the

existing decree to secure the apportionment) and is by no stretch tantamount to allowing Nebraska through the back door to press claims to obtain water for wildlife and non-irrigation season purposes, like those she has twice previously been denied the right to file. Wyo. Except's & Br. 28-31. Here, again, by her proposed Count IV, Nebraska sought leave to amend her complaint to press a claim for a general non-irrigation season apportionment. The Special Master recommended against allowing her to do so, Third Int. Rpt. 35-36, 47, and Nebraska has not excepted to this recommendation.

While Grayrocks was under construction, Nebraska and several environmental organizations brought suit in the federal district court in Nebraska challenging the issuance by the Corps of Engineers of the 404 permit for the project and the undertaking of the REA to assist in its financing as in violation of federal environmental laws. *Nebraska v. REA*, 12 Env. Rep. Cases (BNA) 1156 (D. Neb. 1978), *judgment vacated and appeal dismissed*, 594 F.2d 870 (8th Cir. 1979). After protracted negotiations, Nebraska, Basin, and the other parties to the litigation, including the Department of Justice, the Corps of Engineers, and the Rural Electrification Administration, entered into the Settlement Agreement. Among other things, the Settlement Agreement prescribes conditions for the use, storage, and release of water by Grayrocks.

The obligations the Settlement Agreement imposes on Grayrocks were incorporated as conditions of the exemption for the project granted by the Endangered Species Act Committee. *See* 16 U.S.C. § 1536(e)-(p). The releases Basin is required to make from Grayrocks for the benefit of

the North Platte were found by the Secretary of the Interior to be necessary to meet the requirements of the Endangered Species Act and, independently of the Settlement Agreement, are mandated by the order of the Endangered Species Act Committee granting the exemption for Grayrocks.

The only issue respecting Grayrocks to be determined pursuant to Nebraska's Count III is whether, as a matter of fact, Wyoming's actions on the Laramie pose a substantial threat of interfering with the ability of Basin to operate the project as required by the Settlement Agreement and the Endangered Species Act exemption and with the passage to the North Platte of the releases Basin is required to make from Grayrocks.

Although Wyoming is not formally a party to the Settlement Agreement, she actively participated in its negotiation and sought and applauded its achievement. In equity she cannot be heard to say that she is not bound by it and may, with impunity, frustrate or impair its execution.

When Nebraska and Basin reached an impasse in their efforts to reach a settlement, the Governor of Wyoming joined the Governor of Nebraska in convening the round of negotiations which finally succeeded in producing the Settlement Agreement. The final negotiating session at which the terms of the agreement were settled upon, subject to approval by the principals of the parties, was conducted under the auspices of the Governor of Wyoming in his office in Cheyenne in early November 1978. The Governors of Wyoming and Nebraska jointly announced on November 3, 1978 that the settlement had been reached and the Governor of Wyoming stated that it secured the interests of both Wyoming and Nebraska.

After the agreement had been cleared by all the signatory parties and on the eve of its being submitted to the Eighth Circuit, the Attorney General of Wyoming, in a letter of December 28, 1978, to Basin's counsel, questioned Basin's authority under Wyoming law to make the releases contemplated by the Settlement Agreement. Significantly, the Attorney General's letter noted that he had delayed raising the point "until all federal actions re approval were cleared." The letter is reproduced in the Appendix to Basin's motion for leave to intervene filed herein on April 13, 1987. Spec. Mast. Doc. No. 14.

Grayrocks' exemption from the Endangered Species Act was granted by unanimous vote of the Endangered Species Act Committee, of which, by his request to the President to be appointed, the Governor of Wyoming was a member.

II.

This Case Is Uniquely Appropriate for Determining Wyoming's Fourth Cross-Claim that the United States Is Disturbing the Apportionment by Violating the Laws and Contracts that Govern the Operation of the North Platte Reservoirs

By her proposed Fourth Cross-Claim, Wyoming charges that the United States, through the Bureau of Reclamation, is violating the laws and contracts that govern the operation of the North Platte reservoirs by, among other things, capturing and using natural flow in derogation of the apportionment made by the decree. She asks simply that the government be required to comply with the applicable laws and contracts.

During the course of these proceedings substantial evidence has come to light indicating that the Bureau of Reclamation routinely impounds water in its North Platte reservoirs that constitutes natural flow to which, as such, holders of water rights on the river are entitled and of which they are being systematically and wrongfully deprived. The Bureau treats this improperly impounded natural flow as storage water for which, upon subsequent distribution, it charges both project entrymen, who were entitled to the water without charge as natural flow, and others, such as Warren Act contractors, who were not so entitled.

The Goshen Irrigation District has natural flow rights on the North Platte and claims to have supplemental natural flow rights on the Laramie. To the extent that the government shorts Goshen of water to which it is entitled under its rights on the North Platte, Goshen looks to the Laramie, where it claims the right to tap the flows that Basin is obligated to maintain under the Settlement Agreement and the order of the Endangered Species Act Committee.

The United States and Nebraska except to the recommendation of the Special Master that Wyoming be permitted to pursue her Fourth Cross-Claim on the same grounds they laid before the Special Master and he found unpersuasive, namely: that the claim seeks an apportionment of storage water and would interfere with the Bureau of Reclamation's administration of the reservoirs; that Wyoming is not a proper party to seek enforcement of the contract rights of entrymen on the North Platte Project; and that the Bureau's violations of the laws and contracts governing the capture and use of water by the project reservoirs should be challenged in other fora.

All of these objections to the allowance of Wyoming's Fourth Cross-Claim misrepresent the claim and the effects of granting the relief Wyoming seeks.

1. Wyoming does not seek an apportionment of storage water nor to interfere in any way with the proper and lawful operation of the North Platte reservoirs but only to compel the government, to the extent it is shown to be doing otherwise, to operate the reservoirs and to release and distribute water from them in conformity with the applicable laws and contracts. Requiring the Bureau of Reclamation to obey the laws and contracts governing its administration of the North Platte Project would hardly constitute "interfere[nce] with the operation of federal water storage facilities" or an "apportionment" of storage water. Govt. Except's & Br. 17-18 (Nov. 1994); Neb. Except's & Br. 9-15 (Nov. 22, 1994).

2. While it is true that an ingredient of Wyoming's Fourth Cross-Claim is that, in contravention of the controlling laws and contracts, the Bureau is distributing storage water to Warren Act contractors on an equal basis with North Platte Project entrymen, a more fundamental ingredient of the claim is that the Bureau is capturing water in the reservoirs that is properly natural flow and treating it as storage water, in violation of the rights of all who have entitlements to the natural flow, the subject of the apportionment.

Focusing exclusively on the former ingredient of the claim and wholly ignoring the latter, the Government suggests that the claim ought not be allowed because "Wyoming is not the appropriate party to challenge the federal government's allocation of storage water." Govt.

Except's & Br. 24. Averring that Wyoming has no direct interest in storage water apart from the interests of her citizens who have rights thereto, the Government suggests that Wyoming's claim is "concerned solely with the Bureau of Reclamation's method of 'allocat[ing] storage water' among Nebraska and Wyoming water users." *Id.* at 24-25.

But Wyoming's claim is not concerned "solely" or, indeed, at all, with the Bureau's method of allocating storage water "among Nebraska and Wyoming water users." It is concerned primarily with the Bureau's capturing and treating as storage water natural flow that ought to be passed through the federal reservoirs, to the injury of all who have rights in such flow, the substance of the apportionment. Secondarily, the claim is concerned with the Bureau's distributing storage water to Warren Act contractors on an equal basis with North Platte Project entrymen, when the law is clear that only storage excess to the requirements of the latter can be made available to the former. 43 U.S.C. § 523; *see* Third Int. Rpt. 67-70.

The decree was formulated on the assumption that the government would operate the North Platte Project and store and deliver water in accordance with the laws and contracts applicable thereto. *See* Third Int. Rpt. 70. To the extent that the project is not operated in accordance with this assumption, the apportionment provided for by the decree is disturbed.

The Government's suggestions that allowing Wyoming to prosecute its Fourth Cross-Claim will complicate the proceedings and may necessitate allowance of interventions by parties to the "water contracts at issue," Govt. Except's & Br. 25-26, are gossamer. Assuming, as

Basin does, that the Government will be truthful and forthcoming about the Bureau's administration of the North Platte reservoirs, the issue of whether the Bureau is operating them in accordance with law will be one of law -- and not a particularly complex one at that. And, where the conduct of the government is challenged as in violation of law, the notion that third parties who are incidental beneficiaries of the government's malfeasance need be let in as parties before the government's wrongdoing can be remedied, has the virtue of novelty, but none other.

3. The gravamen of Wyoming's Fourth Cross-Claim is that the Bureau of Reclamation's operation of the North Platte reservoirs in contravention of the law of the river is disturbing the apportionment, not, as Nebraska and the Government mischaracterize it, that the Bureau's misconduct is violating particular water users' rights. Govt. Except's & Br. 28; Neb. Except's & Br. 19.

It is apparent from the Goshen Irrigation District's complaint in the federal district court, Govt. Except's & Br. Appendix, that the claim Goshen is prosecuting against the Bureau of Reclamation there does not touch or concern the apportionment here in any way. Goshen's claim is simply that the Bureau is not providing it with the quantity of water to which it is entitled under its contract. It is just not true that the claims Goshen is pursuing in the district court "are essentially identical to those Wyoming presses here." Govt. Except's & Br. 28. Wyoming's claims are fundamentally different and much broader. Wyoming seeks to require the Bureau to abide by the laws and contracts governing the administration of the North Platte reservoirs because the

assumption that it would do so is built into the North Platte decree and the apportionment is skewed if it does not.

After this case was commenced by Nebraska in 1934, the Court held that the Secretary of the Interior was not a necessary party because, as an appropriator of water under the reclamation laws, he is no different from any other appropriator under state law. 395 U.S. 40 (1935). In 1938, the United States sought and was granted leave to intervene. In its motion, the government contended that, for the protection of its interests in the irrigation works it had constructed at great cost in the North Platte basin, it should not be required to rely on any state, even if, legally, its position is no different from that of a private appropriator.

While asserting here that the proper forum for challenging the propriety of the Bureau's administration of the North Platte reservoirs is the district court -- where, it asserts, the Goshen Irrigation District is currently so doing -- the Government there is seeking to dismiss Goshen's suit on the ground of sovereign immunity. Third Int. Rpt. 71, n.173; Govt. Except's & Br. 29, n.16. And, while the Government all but concedes here that its challenge to the jurisdiction of the district court is not well founded, it does not indicate that it intends to withdraw its motion to dismiss. *Id.* On the contrary, it ventures that "a meritorious sovereign immunity defense would bar suit in this Court as well as in the district court." *Id.*

This, of course, is not true. Having voluntarily come into this case, after the Court had determined it was not a necessary party, for the express purpose of litigating its rights in relation to its irrigation works on the North Platte, the government waived any immunity it may otherwise have

had from examination in this case of the propriety of its administration of those works.

This case is preeminently the proper and appropriate forum in which to hear and determine Wyoming's claims that the government is interfering with the apportionment by operating the North Platte reservoirs in violation of the laws and contracts governing their use.

CONCLUSION

For the foregoing reasons, the Court should adopt the Special Master's recommendations that Nebraska be allowed to amend her complaint to pursue her proposed Count III and that Wyoming be allowed to amend her pleadings to pursue her proposed Fourth Cross-Claim.

Respectfully submitted,

Edward Weinberg
Counsel of Record
Richmond F. Allan
DUNCAN, WEINBERG,
MILLER & PEMBROKE, PC
1615 M Street, N.W.
Suite 800
Washington, DC 20036
(202) 467-6370

Michael J. Hinman
General Counsel
Claire Olson
Assistant General Counsel
Basin Electric Power
Cooperative
1717 E. Interstate Ave.
Bismarck, ND 58501
(701) 223-0441

December 30, 1994

Supreme Court, U.S.
FILED
DEC 30 1994
OFFICE OF THE CLERK

No. 108, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

BRIEF OF THE STATE OF WYOMING IN RESPONSE TO EXCEPTIONS OF THE STATE OF NEBRASKA AND THE UNITED STATES TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

JOSEPH B. MEYER
Attorney General of Wyoming

LARRY DONOVAN
Senior Assistant
Attorney General
Counsel of Record

DONALD M. GERSTEIN
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

DENNIS C. COOK
Special Assistant
Attorney General
COOK & HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant
Attorneys General
MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

December 30, 1994

No. 108, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

BRIEF OF THE STATE OF WYOMING IN RESPONSE TO EXCEPTIONS OF THE STATE OF NEBRASKA AND THE UNITED STATES TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

I. JURISDICTION 1

II. INTRODUCTION 1

III. STATEMENT OF THE CASE 2

A. *COURSE OF PROCEEDINGS* 2

B. *STATEMENT OF FACTS* 5

IV. SUMMARY OF THE ARGUMENT 9

V. ARGUMENT 12

A. *WYOMING'S FOURTH CROSS-CLAIM IS JUSTICIABLE IN THIS CASE BECAUSE IT SEEKS TO REDRESS UNLAWFUL AND WASTEFUL BUREAU OPERATIONS THAT DIRECTLY AFFECT THE EQUITABLE APPORTIONMENT* 12

1. *The Distribution of Storage Water in Accordance with Federal Reclamation Law and Existing Contracts was an Essential Predicate of the 1945 Equitable Apportionment* 13

2. *The United States and Nebraska have Introduced the Operation of the Federal Storage Projects as a Central Issue in the Case* 15

3. *Wyoming's Fourth Cross-Claim is not Precluded by Either the 1945 Opinion or the 1993 Opinion* 17

B. *IN ITS FOURTH CROSS-CLAIM, WYOMING IS ASSERTING ITS OWN SOVEREIGN INTEREST AS A STATE AND REPRESENTING ITS COLLECTIVE WATER USERS AS* PARENS PATRIAE . . . 22

C. *THIS IS THE ONLY FORUM IN WHICH TO LITIGATE ISSUES CONCERNING THE EQUITABLE APPORTIONMENT OF THE NORTH PLATTE, INCLUDING RELATED QUESTIONS ABOUT THE BUREAU OF RECLAMATION'S COMPLIANCE WITH FEDERAL LAW* 25

VI. CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Arizona v. California,
373 U.S. 546 (1963),
decree entered 326 U.S. 340 (1964) 30

California v. Nevada,
447 U.S. 125 (1980) 29

Christopulos v. United States,
No. C86-0370B (D. Wyo., *complaint dismissed without prejudice* August 31, 1990) . . 27

Goshen Irrigation District v. United States,
No. C89-0161J (D. Wyo., *complaint filed* June 23, 1989) 25, 27, 28, 29

Kansas v. Colorado,
185 U.S. 125 (1902) 23

Kansas v. Colorado,
206 U.S. 46 (1907) 23

Nebraska v. Wyoming,
295 U.S. 40 (1935). 1, 24

Nebraska v. Wyoming,
304 U.S. 545 (1938) 1

Nebraska v. Wyoming,
325 U.S. 589 (1945) . . . . . *passim*

Nebraska v. Wyoming,
113 S.Ct. 1689 (1993) 3, 4, 14, 16, 20

New Jersey v. New York,
345 U.S. 369 (1953) 23, 24

State of Wyoming and Goshen Irrigation District v. United States, No. C89-0286J
(D. Wyo., *complaint filed* October 6, 1989) 27

United States v. Nevada,
411 U.S. 534 (1973) 23, 29

Wyoming v. Colorado,
286 U.S. 494 (1932) 23

Wyoming v. Oklahoma,
112 S.Ct. 789 (1992) 24

CONSTITUTIONS AND STATUTES

U.S. Const. Art. III, § 2, cl. 2 1

Judiciary Act, 28 U.S.C. § 1251(a) (1988) 1, 30

Judiciary Act, 28 U.S.C. § 1251(b)(2) (1988) 30

Reclamation Act of 1902,
43 U.S.C. § 372 (1988) 6, 8, 21

Reclamation Reform Act of 1982,
43 U.S.C. § 390jj (1988) 6, 8

Warren Act, 43 U.S.C. § 523 (1988) 4, 6, 22, 25

I. JURISDICTION

The United States and the States of Wyoming, Colorado and Nebraska are before the Court in its original and exclusive jurisdiction over controversies between states. U.S. Const. Art. III, § 2, cl. 2; 28 U.S.C. § 1251(a) (1988). The Court's jurisdiction over the United States was established when the United States intervened in the case.[1] *Nebraska v. Wyoming*, 304 U.S. 545 (1938). Since the United States intervened, it has participated fully to assert its interest and to protect its reservoirs and irrigation systems in both *Nebraska v. Wyoming I*[2] and in the current proceedings. Thus, the Court has already exercised jurisdiction over the United States and over issues concerning the operation of the federal reservoirs and irrigation systems in this controversy between Nebraska and Wyoming.

II. INTRODUCTION

The Court, through a series of decisions since 1986, has agreed to hear Nebraska's and Wyoming's claims to enforce the existing equitable apportionment of the

1. Wyoming initially moved to dismiss Nebraska's complaint on the ground that the United States was an indispensable party which was immune from joinder in the suit. The Court found that the United States was not a necessary party but was a Wyoming appropriator adequately represented by Wyoming. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). However, the United States subsequently subjected itself to the Court's jurisdiction when it intervened to claim ownership of all unappropriated water and to protect its water rights for the North Platte and Kendrick Reclamation Projects.

2. The litigation that resulted in the opinion and decree in *Nebraska v. Wyoming*, 325 U.S. 589, 665 (1945) will be referred to as *Nebraska v. Wyoming I*.

North Platte River and, if necessary, to modify the North Platte Decree to give effect to that apportionment. Wyoming's Fourth Cross-Claim alleges that the United States Bureau of Reclamation (the "Bureau") has frustrated the Court's equitable apportionment of the North Platte River by the manner in which it has operated various federal storage projects and administered natural flow and storage water deliveries under those projects. Wyoming asks for injunctive relief to make the United States accountable for its actions that alter the equitable apportionment. The Special Master, recognizing the importance of the federal storage water to the North Platte River apportionment, recommends that the Court accept Wyoming's Fourth Cross-Claim. In this brief Wyoming responds to the exceptions of both Nebraska and the United States to the recommendation that the Fourth Cross-Claim be accepted.

III. STATEMENT OF THE CASE

A. *COURSE OF PROCEEDINGS*

Relevant portions of the proceedings leading to the motions for leave to amend pleadings now before the Court are summarized in earlier briefs. Wyoming Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 1-2 (Docket No. 624); Wyoming Brief in Support of Exceptions to the Third Interim Report of the Special Master at 2-6 (November 25, 1994); Nebraska's Brief in Support of Exceptions to the Third Interim Report of the Special Master at 2-7 (November 22, 1994); Brief for the United

States in Support of Exception (November, 1994) at 1-2.[3] Wyoming does not recount all of the relevant proceedings here but supplements those previous statements to explain how operation of the federal reclamation projects and allegations of injury to those projects have already become major issues in this case.

One of the issues addressed in the Court's 1993 opinion was whether Nebraska and the United States had come forward with sufficient facts to avoid summary judgment on the claims involving Wyoming's proposed Deer Creek Reservoir. *Nebraska v. Wyoming,* 113 S.Ct. 1689, 1699-1700 (1993). The United States argued that affidavits presented by the United States and by Nebraska had shown that Wyoming's proposed Deer Creek Reservoir would deplete the "water supply of the federal reservoirs and the Inland Lakes" and that such "evidence, standing alone, [was] sufficient to support the Special Master's denial of summary judgment." Brief for the United States Opposing Exceptions at 32-33 (August, 1992) (Docket No. 503); *see also* Nebraska's Response to Wyoming's, Colorado's, and Basin Electric's Exceptions to the Special Master's First and Second Interim Reports at 83-86 (Docket No. 501). The Special Master's recommendation to deny Wyoming's motions for summary judgment was based on his conclusion that Nebraska's Affidavit of H. Lee Becker had raised a genuine issue of material fact as to whether Wyoming's proposed Deer Creek Reservoir would injure the federal storage projects. First Interim Report at 30-31 (Docket No. 140); Second Interim Report at 75-77 (Docket No.

3. Nebraska's Brief in Support of Exceptions to the Third Interim Report of the Special Master will be cited herein as "Nebraska Brief." The Brief for the United States in Support of Exception will be cited as "U.S. Brief."

463). In adopting the Special Master's recommendation to deny summary judgment, the Court relied on the Becker Affidavit and on the United States' Affidavit of David G. Wilde. The Court specifically noted that the Becker Affidavit had concluded "that the [proposed Deer Creek] [P]roject would cause reductions in the average year-end carryover storage of federal reservoirs on the North Platte and that '[s]uch reductions . . . could limit diversions in the [pivotal] reach in a series of dry years'." *Nebraska v. Wyoming*, 113 S.Ct. at 1699. The Court also noted that the Wilde Affidavit had concluded that "Deer Creek [Reservoir] would 'substantially impact federal projects during an extended dry period,'. . ." *Id.* at 1700. The Court's 1993 opinion thus identified potential injury to the federal projects as a key element of Nebraska's claims of injury to its equitable apportionment.

Wyoming's First and Fourth Cross-Claims are the direct result of the Court's recognition that the operation of the United States' storage facilities and delivery systems are a central focus of Nebraska's and the United States' claims against Wyoming. Wyoming's First Cross-Claim asks the Court to make the United States accountable for delivery of water in excess of beneficial use requirements. Wyoming's Fourth Cross-Claim asks that the federal storage projects be required to comply with the beneficial use standard that is part of federal law and part of contracts for the delivery of storage water written under federal law. The Fourth Cross-Claim additionally asserts that the United States has violated the Warren Act, 43 U.S.C. § 523 (1988) and thereby changed the established storage allocation system on which the equitable apportionment was based. Because the Special Master recommends that the Court deny Wyoming's First Cross-Claim and accept Wyoming's Fourth Cross-Claim, the two cross-claims have

been addressed separately in the parties' exceptions. Nebraska's exception notes an apparent inconsistency in the Special Master's treatment of those two cross-claims. However, if there is an inconsistency it results from the Special Master's failure to appreciate that the cogent reasons that support his recommendation to accept the Fourth Cross-Claim apply with equal force to the First Cross-Claim.

B. *STATEMENT OF FACTS*

The Special Master, citing Special Master Doherty's report, based his recommendation to accept Wyoming's Fourth Cross-Claim in part on the fact "that the availability of storage water from federal reservoirs was part of the calculus for the final equitable apportionment of natural flow under the decree." Third Interim Report at 69; *see also* Doherty Report at 156; *Nebraska v. Wyoming*, 325 U.S. at 645. In *Nebraska v. Wyoming I*, the Court found that storage water provided more than one-half the supply available to the canals in the pivotal Guernsey Dam to Tri-State Dam reach of the North Platte River. Doherty Report at 71, Table IV; *Nebraska v. Wyoming*, 325 U.S. at 605; Third Interim Report at 62. In 1945, 90% of the lands in Nebraska and Wyoming receiving water from the pivotal reach had contracts for storage water to supplement their rights to natural flow. *Nebraska v. Wyoming*, 325 U.S. at 605. With the completion of Glendo Reservoir in the late 1950's, approximately 97% of the lands served from the pivotal reach now have permanent storage water contracts. Because storage water is a crucial element of the water supply in the pivotal reach, Wyoming's Fourth Cross-Claim specifically questions whether the federal storage contracts

are administered and enforced according to Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 372 (1988), the Reclamation Reform Act of 1982, 43 U.S.C. § 390jj (1988) and the Warren Act, 43 U.S.C. § 523 (1988).[4] Because of the direct relationship between the administration of federal storage contracts and the apportionment of natural flow, the injunctive relief sought in Wyoming's Fourth Cross-Claim is a matter of equitable apportionment and not a matter of enforcing private contracts.

Almost all of the natural flow and storage water in the pivotal reach must first pass through Glendo and Guernsey Reservoirs which lie at the upstream end of the pivotal reach. That fact has been recognized throughout these proceedings and in the Decree. Decree, Paragraph IV. The fact that the United States physically controls flows into the pivotal reach, as well as the fact that the United States and Nebraska have focused attention on the federal storage system in their claims of injury against Wyoming, prompted Wyoming to conduct discovery concerning the storage allocation and delivery system. Through discovery it appears that the United States participates in, and in fact is responsible for waste and over-diversion for Nebraska lands that are the subjects of Wyoming's First Counterclaim and First Cross-Claim. Wyoming is particularly concerned about the Bureau's practice of bypassing natural flow and releasing storage water *on demand* to the canals in the pivotal reach without regard to how the water is used. United States Response to Wyoming's Sixth Set of Interrogatories at 22-24, Nos. 30(c) through 30(f)

4. Wyoming's Brief in Support of its Motion for Leave to File Amended Pleadings (Docket No. 624) describes the relationship of storage water to the equitable apportionment of natural flow in the 1945 Decree. *See also*, Third Interim Report at 69-70.

(Docket No. 613) (hereinafter cited as "Sixth Interrogatories at ___, No. ___"). However, beyond those issues, Wyoming has confirmed through discovery that since *Nebraska v. Wyoming I* the United States has periodically implemented its own mass allocation of the storage water and natural flow that is inconsistent with the decreed apportionment.

Since 1954, in years when the Bureau predicts that the supply of storage water may be insufficient to meet the full "requirements", it declares an "allocation year" and allots each district a fraction of the total supply proportionate to that district's average use over previous years.[5] Sixth Interrogatories at 24-27, Nos. 30(h) and

5. When asked how the Bureau determines the need for allocation, the Bureau responded that an allocation year is declared when "the Bureau determines the supply is not sufficient to meet the requirements of North Platte Project water users." Sixth Interrogatories at 22, No. 30(a). The United States does not explain how it determines what the requirements consist of, but it does acknowledge that requirements must first be determined in order to predict a shortage. The United States has disclaimed any responsibility for assuring that water released or bypassed from the federal reservoirs is beneficially used but has asserted its reliance on the states "to insure that the water delivered from the federal reservoirs on the North Platte for use on lands having contracts for such water *is beneficially used*." [emphasis added]. Sixth Interrogatories at 37, No. 43. Despite the Bureau's professed reliance on state administration and state law to determine requirements and beneficial use, in the administration of the dry year allocation plan the Bureau neither consults with nor involves state water officials. Sixth Interrogatories at 22, No. 30(b). Nor does the Bureau consider the limits of Paragraph IV of the Decree, the acreage actually being irrigated by any canal or the waste or return flow occurring from the canal. Sixth Interrogatories at 23-27, Nos. 30(d), 30(e), 30(i), and 30(p). Thus while a determination of requirements appears to be essential to identifying a shortage requiring allocation, the Bureau's method for determining the requirements is a mystery.

30(o). That allotment is a total quantity of water, expressed in acre-feet, allotted to individual canals. The allotment for each canal is reduced by the total of all deliveries to that canal, both natural flow and storage. Although in response to Wyoming's interrogatories the Bureau denies that it allocates natural flow, a review of the actual allocation plan obtained from the Bureau shows that by reducing the allocation on a one-for-one basis by the amount of natural flow diversions, natural flow becomes just as much a part of the allocation as storage water. *See* Sixth Interroga-tories at 28, No. 30(s). Therefore, the allocation procedure employed by the Bureau in dry years is purely a mass allocation that sets a cap on the total diversion of each individual canal. That mass allocation is based on neither beneficial use nor any percentage apportionment between the two states. Sixth Interrogatories at 25-27, Nos. 30(i), 30(j) and 30(p). Rather, it is simply based on the amount of water a district has previously diverted.[6] *Id.*; Sixth

6. Obviously, such an allocation system encourages individual canals to divert as much water as possible during "non-allocation" years in order to maximize their average diversions which will be the measure of their entitlement in a subsequent dry year allocation. That system of administration, when combined with the refusal by Nebraska and the United States to acknowledge or enforce any limit on the individual diversions of the canals, results in the waste of enormous amounts of water that could be conserved in the storage reservoirs to alleviate or avoid the shortage in allocation years. Diversions by the Nebraska canals in the pivotal reach have steadily increased and greatly exceed the requirements as determined by the Court in 1945. Affidavit of Bern S. Hinckley at 7; Wyoming Brief in Support of Second Motion for Summary Judgment (Docket No. 294). Those facts support Wyoming's allegation that the present system of administration is resulting in excessive diversions without regard to actual use or need. The system of delivery of storage water in the pivotal reach is the antithesis of the basic conservation underpinning of the Reclamation Act and directly contravenes the conservation requirements directed in the Reclamation Reform Act of 1982, 43 U.S.C. § 390jj (1988).

Interrogatories at 24, No. 30(h). The allocation plans have changed from year-to-year since the first allocation in 1954. However, in 1989, for example, the Bureau's allocation plan included natural flow, without regard for the carefully crafted 75%/25% apportionment in the North Platte Decree. As a result, in a dry year like 1989 the Bureau's allocation effectively replaces the Court decreed 75/25 apportionment. The Bureau's allocation also includes storage, without regard for the provisions of the contracts which the Court in 1945 explicitly expected to govern the disposition of storage water.

Wyoming's Fourth Cross-Claim questions whether the Bureau's post-decree changes in the way storage water is delivered in the pivotal reach complies with federal law and whether such changes impact the natural flow apportionment. These issues directly affect two classes of water users whom Wyoming represents in this case. The first is the class of users who have contracted for supply from the federal reservoirs, whose storage supply is wasted and whose share of the Wyoming natural flow apportionment is impacted by the Bureau's operations. The second is the class of Wyoming junior appropriators who are subject to the call of the senior rights of the Bureau to refill the federal storage reservoirs in priority.

IV. SUMMARY OF THE ARGUMENT

Wyoming's cross-claims against the United States would hold the United States accountable for its actions that affect the equitable apportionment of the North Platte River. The Court has granted the United States and Nebraska the right to a trial to determine whether

the Decree should be modified to include additional injunctions against Wyoming to protect federal storage projects. Wyoming's cross-claims against the United States simply ask the Court to recognize that there are two sides to the issue of potential injury to the federal storage projects. It is beyond dispute that Wyoming may defend against claims of injury to the federal projects with evidence that unlawful and wasteful operation of those projects is the cause of the injury alleged. Granting leave to file Wyoming's Fourth Cross-Claim, like its First Counterclaim and First Cross-Claim, would allow Wyoming to demonstrate the need for affirmative relief and would provide a jurisdictional basis for such affirmative injunctive relief. If the Court is going to consider modification of the Decree to include new injunctions against Wyoming, the Court should also consider modifications of the Decree to include injunctions against the United States to protect Wyoming's uses of the North Platte.

Nebraska and the United States argue that the issues raised by Wyoming's First and Fourth Cross-Claims were decided in *Nebraska v. Wyoming I* and therefore cannot be reconsidered now for purposes of modifying the Decree. However, whether the Court will consider changed conditions for purposes of modifying the Decree is no longer at issue following the Court's 1993 opinion. Nor is there any question now that operation of the federal storage reservoirs or the use of federal storage water are appropriate subjects for litigation in this Court and in this case. The United States and Nebraska have taken the position that federal reservoirs and the delivery of federal storage water are elements of Nebraska's equitable apportionment that may be injured by proposed new uses of water in Wyoming.

Therefore, they cannot be heard to argue that the Court should refuse to allow Wyoming to show how operation of the federal storage projects injures Wyoming's apportionment.

A predicate of the apportionment of natural flow and the decision not to apportion storage water expressly in the Decree was the assumption that the United States would deliver storage water under existing storage water contracts in accordance with the Reclamation Act and the Warren Act. The Court did not include provisions apportioning storage water in the 1945 Decree because it concluded that storage water in effect was already apportioned in the outstanding contracts between the Bureau and the water users. The United States has not administered storage water according to those laws and contracts and has thereby frustrated the equitable apportionment of natural flow and the overall apportionment of water to lands served by diversions in the pivotal reach. Wyoming's Fourth Cross-Claim would redress the resulting injury to its apportionment.

The Fourth Cross-Claim should be accepted for filing because the Supreme Court is the only court that can resolve the dispute among Wyoming, Nebraska and the United States over the effect of federal storage operations on the equitable apportionment. Wyoming must be able to represent all of its water users as *parens patriae* in this forum. The fact that there is a pending district court action which involves related but more limited private contract issues is no bar to this Court's consideration of the equitable apportionment issues in Wyoming's Fourth Cross-Claim. This Court has original and exclusive jurisdiction over the cross-claims because they implicate the interstate equitable apportionment.

V. ARGUMENT

A. *WYOMING'S FOURTH CROSS-CLAIM IS JUSTICIABLE IN THIS CASE BECAUSE IT SEEKS TO REDRESS UNLAWFUL AND WASTEFUL BUREAU OPERATIONS THAT DIRECTLY AFFECT THE EQUITABLE APPORTIONMENT*

Wyoming's Fourth Cross-Claim alleges, *inter alia*, that the Bureau's operation of the federal projects "(a) upsets the equitable balance on which the apportionment of natural flow was based, (b) results in the allocation of natural flow contrary to the provisions of the Decree and contrary to the equitable apportionment, [and] (c) promotes inefficiency and waste of water contrary to federal and state law . . . ." The critical undisputed fact, which both Nebraska and the United States overlook is that all upstream water entering the pivotal reach from the mainstem of the North Platte River is controlled by the Bureau's operation of Guernsey Dam.

In 1945 the Court acknowledged the tremendous impact on the water resources of the basin that resulted from the North Platte Project. *Nebraska v. Wyoming*, 325 U.S. at 591-99. The federal reclamation projects were at the heart of the controversy that led to the 1945 apportionment. *Id.* Throughout the course of this case, the United States has been more than a disinterested bystander. It intervened in the case for the purpose of protecting its interest in the federal projects and has actively participated in every aspect of the current proceedings as well as *Nebraska v. Wyoming I*. The various claims Wyoming asserts against the United States, including the Fourth Cross-Claim, must be heard if

there is to be a complete adjudication of the equitable apportionment issues that the Court has already accepted.

1. *The Distribution of Storage Water in Accordance with Federal Reclamation Law and Existing Contracts was an Essential Predicate of the 1945 Equitable Apportionment.*

The United States tries to downplay the importance of storage water in the fashioning of the equitable apportionment by the Court in 1945. U.S. Brief at 20-22. However, on the average, only about one-half of the water available to meet the requirements of the canals diverting in the pivotal reach of the North Platte River is supplied by natural flow; the other half is storage water. Third Interim Report at 62; *Nebraska v. Wyoming*, 325 U.S. at 605. While the Court did not apportion storage water as it did natural flow, it assumed that the Bureau would operate the federal projects in accordance with the applicable law and existing contracts. In effect, the Court concluded that storage water had already been apportioned in the storage water delivery contracts between the Bureau and individual districts. That assumption, dealing with half of the total supply available to meet the requirements for which the Court was apportioning the river, was the linchpin that allowed the Court to determine that the limited percentage apportionment of natural flow only in the Guernsey to Tri-State section would be equitable.[7]

---

7. The proper administration of storage contracts under federal law is as much a predicate of the apportionment as was the historical operation of the Inland Lakes. In earlier proceedings, the United States argued that the "Inland Lakes winter diversions are a cor-

See Third Interim Report at 69-70; *Nebraska v. Wyoming*, 325 U.S. at 645. In *Nebraska v. Wyoming I*, Special Master Doherty recommended that "[t]he obligation and necessity of performance of these contracts [for storage water] must be recognized by the decree." Doherty Report at 69. *See also Id.* at 157, 160.[8]

The United States either does not understand the nature of Wyoming's Fourth Cross-Claim or simply mischaracterizes that cross-claim in an effort to convince the Court to decline to hear it. At times the United States argues that Wyoming is merely seeking to enforce private contract rights; at other times it argues that Wyoming is "invok[ing] the Decree to challenge how the Bureau administers storage water." U.S. Brief at 24-26, 19. Neither characterization is correct.

Wyoming's Fourth Cross-Claim asserts that the Bureau's system-wide operation of the federal projects, which includes the administration of all the storage water contracts as a group, violates various aspects of state and federal law and effectively reapportions nat-

---

nerstone of the Court's 1945 scheme. . . ." Response of United States to Wyoming's Motion for Summary Judgment at 47-49 (Docket No. 83). The Court concluded that storage in the Inland Lakes with a 1904 priority was a "necessary predicate" of the equitable apportionment. *Nebraska v. Wyoming*, 113 S.Ct. at 1697.

8. The Court accepted the definition of storage water proposed by the United States (one that admittedly strayed from the usual definition of storage water), "so as to make the operation of the decree more certain and *to adjust it to the storage water contracts which are outstanding*." *Nebraska v. Wyoming*, 325 U.S. at 631 (emphasis added). If the Decree was adjusted to the storage contracts, then operations which ignore or violate the storage contracts or release water without regard to need, throw the Decree out of adjustment. That effect on the Decree is the subject of Wyoming's Fourth Cross-Claim.

ural flow supplies available in the pivotal reach and depletes supplies in Wyoming upstream of the federal reservoirs. Wyoming's Fourth Cross-Claim would address the effect of that operation of the federal projects on the equitable apportionment. It is the effect on the equitable apportionment that makes the issue justiciable in the exclusive original jurisdiction of the Supreme Court.

The United States admits that "[t]he North Platte Decree was carefully crafted to preserve the established system for allocation of storage water . . . ." U.S. Brief at 19. Wyoming agrees that the established system of storage allocation was a predicate of the apportionment. The Fourth Cross-Claim asserts that the Bureau has changed that established predicate of the apportionment and, in effect, changed the apportionment to the injury of Wyoming water users. The United States apparently believes that it is free to change the established system of storage water allocation in any way it sees fit and that the affected states should have no recourse before the Supreme Court to question the change or to address the effect of such change on the apportionment.

2. *The United States and Nebraska have Introduced the Operation of the Federal Storage Projects as a Central Issue in the Case.*

The filing of Wyoming's Fourth Cross-Claim became necessary as a direct result of allegations made by Nebraska as the plaintiff and the United States as an intervenor. Nebraska's original petition alleged injury to its equitable apportionment. Nebraska's Petition for an Order Enforcing Decree and for Injunctive Relief at 2,

¶ 3 (Docket No. 1). When Wyoming sought summary judgment on the ground that Nebraska had failed to come forward with facts showing injury to the users of natural flow in the apportioned reach, both Nebraska and the United States responded with affidavits intended to show that proposed new development in Wyoming threatened the supply available to the federal reservoirs. Brief for the United States Opposing Exceptions [to the First and Second Interim Report of the Special Master] at 32-33 (August, 1992) (Docket No. 503); Nebraska's Response to Wyoming's, Colorado's, and Basin Electric's Exceptions to the Special Master's First and Second Interim Reports at 85-86 (August 17, 1992) (Docket No. 501). The Court adopted the Special Master's recommendation to deny summary judgment, finding that Nebraska and the United States had raised a genuine issue of material fact as to whether Wyoming's actions would deplete the supply of carryover storage in the federal reservoirs. *Nebraska v. Wyoming*, 113 S.Ct. at 1699-1700. Thus, the focus of Nebraska's and the United States' injury claims was turned to the federal projects and away from natural flow diversions in the pivotal reach.

Nebraska and the United States chastise Wyoming for seeking an apportionment of storage water when in their view the Court has once refused to apportion storage water. Yet they both assert injury to the storage projects as a critical element of their claims of injury to the existing apportionment. Their claims of injury to the storage projects are wholly inconsistent with their argument that storage water was not part of the overall apportionment scheme developed by the Court in 1945.

Since injury to the federal storage projects is an issue in this case, fundamental fairness requires that

Wyoming have an opportunity to show how the Bureau's operation of its reservoirs causes or contributes to the injury alleged. Wyoming's use of such proof in that defensive posture does not appear to be disputed. The filing of Wyoming's First and Fourth Cross-Claims would allow Wyoming to demonstrate the need for affirmative relief to control unlawful and wasteful operation of the federal projects and it would provide a basis for the Court to fashion such relief in the form of new injunctions.[9]

3. *Wyoming's Fourth Cross-Claim is not Precluded by Either the 1945 Opinion or the 1993 Opinion.*

Wyoming does not seek a new equitable apportionment of the North Platte by its Fourth Cross-Claim or by any of its other proposed counterclaims and cross-claims. Wyoming's proposed pleading amendments including its Fourth Cross-Claim, would seek modification of the Decree to define and give effect to the apportionment of waters of the North Platte to Nebraska lands served from diversions in the pivotal reach.

---

9. The issue is similar to that raised by the Special Master's recommendation to deny Wyoming's First Counterclaim and First Cross-Claim. Wyoming has taken exception to the Special Master's recommendation that the Court foreclose any Wyoming claim for affirmative relief against Nebraska's unlawful and wasteful use of natural flow while considering proof of wasteful use of natural flow only in the context of Wyoming's defense against Nebraska's claims for new restrictions on Wyoming. Wyoming urges the Court not to prematurely circumscribe the scope of relief that it will consider. *See* Wyoming Brief in Support of Exceptions to the Third Interim Report of the Special Master at 27.

Wyoming's Fourth Cross-Claim does not seek to change the recognized geographic limits of the existing apportionment. *See* Third Interim Report at 43. Instead, Wyoming alleges that by changing the established system of storage allocation and by violating its contracts and federal law, the Bureau has upset the Court's equitable apportionment of the North Platte.[10] Wyoming seeks modification of the Decree to add injunctions requiring compliance by the United States and its officers with applicable law and contracts so that the apportionment will continue to be equitable and to be administered as the Court intended.

Nebraska and the United States argue that, because the Court declined to restrict the Bureau's operation of the federal reservoirs in the 1945 Decree, the Court is now powerless to consider any relief that would involve restrictions on the Bureau's operations. That argument fails for four reasons.

First, the assumption that the Court refused to control Bureau operation of the reservoirs is wrong. Through injunctions directed to Wyoming, Paragraph IV

10. The Special Master noted that Wyoming's Fourth Cross-Claim bears similarity to Nebraska's Horse Creek claim because both allege an interference with an essential predicate of the apportionment. While the theories on which the two claims are based are similar, the claims are distinguished by the relief they seek. Because there is no apportionment below Tri-State Dam, Nebraska's Horse Creek claim seeks to expand the geographic scope of the apportionment below Tri-State Dam. Such a claim for a new and expanded apportionment Wyoming believes is beyond the scope of this case as defined by the Court's various orders and the 1993 opinion. *See* Exceptions of the State of Wyoming to the Third Interim Report of the Special Master (November 25, 1994).

of the Decree limits the Bureau, as a Wyoming appropriator, in the amount and timing of storing water in the federal reservoirs. Paragraph XVII of the Decree also expressly limits the use of water released from Glendo Reservoir and Paragraph III expressly defines the relative priorities for filling of the federal reservoirs. In fact, Nebraska and Wyoming each have uncontested, pending amended pleadings that would question the Bureau's Glendo contracts under Paragraph XVII. *See* Count II of Nebraska's Motion for Leave to File Amended Petition, ¶ 8 at 7-8 (Injunctive relief is necessary to enforce the Decree and to restrain further violations by the United States) (Docket No. 623). *See also* Wyoming's Amended Counterclaims and Cross-Claims, ¶ 15 at 6-7 (Docket No. 624).

Second, the Court's concern in 1945 was to avoid interfering with the Bureau's performance of the outstanding storage contracts under federal law. No one asserted, as Wyoming does now, a need for the Court affirmatively to require the Bureau's compliance with federal law; such compliance was assumed. Thus, the issue that Wyoming's Fourth Cross-Claim would bring was not before the Court in 1945. In *Nebraska v. Wyoming I* the Court proceeded as if storage water was already apportioned by the existing federal storage water delivery contracts. The Court did not apportion storage water, but on the other hand, by providing for the modification of the Decree, the Court did not preclude a formal apportionment of storage water if dictated by changed conditions. Decree Para. XIII; *Nebraska v. Wyoming*, 325 U.S. at 639; *Cf. Nebraska v. Wyoming*, 325 U.S. at 632-633 (The Court recognized that modification of the Decree would be necessary if a different operation of the federal storage reservoirs was subse-

quently allowed by changes to existing contracts and by changes in the existing law.).[11]

Third, the Court specifically provided in Paragraph XIII(f) of the Decree for consideration of relief at the foot of the Decree upon changed conditions. Wyoming has now alleged changed conditions which include a substantial change in the Bureau's operation of the federal projects that directly affects the apportionment. Surely the Court can consider Wyoming's Cross-Claims for injunctive relief made necessary by changed conditions just as it has agreed to consider Nebraska's claims for new restrictions on Wyoming's use of the Laramie River or the tributaries between Pathfinder and Guernsey. For example, the Court has ruled that its refusal in 1945 to restrict Wyoming's use of the Laramie River does not preclude consideration of Nebraska's claims for modification of the Decree now to impose restrictions on use of the Laramie. *Nebraska v. Wyoming*, 113 S.Ct. at 1698; *see also* Decree Para. XII(d). Nor should the fact that the Court declined to apportion storage water expressly in the 1945 Decree stand as a bar to Wyoming's Fourth Cross-Claim.

Finally, both Nebraska and the United States mischaracterize the Court's 1993 opinion by suggesting that the Court ruled that beneficial use could not be a limit on use of water apportioned by the Decree. Nebraska Brief at 16-18; U.S. Brief at 9. The Court's 1993 opinion

---

11. Moreover, the Court went further and expressly noted that it was not deciding the question of whether "the presence of the storage water contracts would preclude an apportionment of storage water." *Nebraska v. Wyoming*, 325 U.S. at 639. The Court merely held that "the equities of the case support the failure to include storage water in the apportionment." *Id.*

held that the present Decree did not impose absolute ceilings on the diversions of the canals in the pivotal reach; it did not preclude consideration of modifying the Decree if Wyoming's proof were to show a need for such additional limitations to protect and to carry out the apportionment. *See* Wyoming Brief in Support of Exceptions to the Special Master's Third Interim Report at 22-26.[12] To completely ignore beneficial use standards as urged by Nebraska and the United States, the Court would have to conclude that the 1945 Decree and the 1993 opinion intentionally abrogated not only the laws of all three states, which make beneficial use the measure and limit of a water right, but also Section 8 of the Federal Reclamation Act, 43 U.S.C. § 372 (1988), which fixes beneficial use as an overriding limit on rights to water under the federal projects. In other words, while a major thrust of Nebraska's and the United States' arguments against Wyoming's Fourth Cross-Claim is that Bureau operations are a matter of federal law outside the reach of the Court in this case, they also argue that the Court implicitly overruled the beneficial use provisions of federal law. Surely the Court would not have adopted such a radical departure from established law without expressly acknowledging its decision to do so.

---

12. Nebraska suggests that the Special Master's recommendation to accept Wyoming's Fourth Cross-Claim is inconsistent with his recommendation to deny Wyoming's First Counterclaim and First Cross-Claim. Wyoming has acknowledged that its Fourth Cross-Claim is an extension of the claims of waste and inefficiency contained in its First Counterclaim and First Cross-Claim. If the Court accepts the filing of Wyoming's First Counterclaim and First Cross-Claim as requested in Wyoming's exceptions, Nebraska's objection of inconsistency would be answered and the Court would not have prematurely circumscribed the scope of relief that it might consider upon full development of the facts.

B. *IN ITS FOURTH CROSS-CLAIM, WYOMING IS ASSERTING ITS OWN SOVEREIGN INTEREST AS A STATE AND REPRESENTING ITS COLLECTIVE WATER USERS AS* PARENS PATRIAE.

The United States' argument that Wyoming is not the real party in interest in its Fourth Cross-Claim fails for several reasons. U.S. Brief at 24-26. First, the United States' argument misconstrues the nature of Wyoming's claim. As pointed out above, Wyoming does not seek to enforce individual rights under the storage contracts. Wyoming's Fourth Cross-Claim recognizes that there are two classes of storage contracts; those supplying water to irrigation districts that were formed as part of the North Platte Project (the "project districts")[13] and those disposing of "surplus" water under the Warren Act, 43 U.S.C. § 523 (1988). Wyoming asserts *inter alia* that the Bureau has violated the Warren Act by failing to subordinate Warren Act contracts to the project district contracts as a group. Wyoming also asserts that the Bureau wastes storage water through its operations. Wyoming's Fourth Cross-Claim would address the effect of these actions on the equitable apportionment.

The United States' argument also ignores a substantial body of law recognizing the role of a state in original actions involving the apportionment of interstate streams. It has been well settled since the turn of the century that individual rights to a supply of water from an interstate stream collectively may be represented by

13. The North Platte Project Districts are: Goshen Irrigation District in Wyoming and Pathfinder, Gering-Fort Laramie and Northport Irrigation Districts in Nebraska.

the state as *parens patriae*. *Kansas v. Colorado*, 185 U.S. 125, 142-43 (1902) and 206 U.S. 46, 99-100 (1907); *Wyoming v. Colorado*, 286 U.S. 494, 508 (1932); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945); *New Jersey v. New York*, 345 U.S. 369, 372-74 (1953); *United States v. Nevada*, 411 U.S. 534, 539 (1973).

The United States suggests that Wyoming's "sovereign interest, however, is minimal insofar as Wyoming has no direct interest in the storage water apart from the interest of a particular class of Wyoming water users who have water contracts." U.S. Brief at 24. The assumption that Wyoming is looking out only for a limited class of water users is wrong. In fact, Wyoming represents all of its users who depend on the interstate equitable apportionment of the North Platte River and seeks to redress the effect on that apportionment of the Bureau's administration of the federal projects. Moreover, the United States' argument that a state cannot appear in this Court to represent the interests of individual water users would apply equally to users of natural flow and would fly directly in the face of the *parens patriae* cases cited above.

The United States also argues that, unless the Court denies Wyoming leave to file its Fourth Cross-Claim, Wyoming's standing to bring the claim will "likely become a matter of litigation" later in this case. United States Brief at 25. However, the standing issue is now before the Court, having been raised at this stage by the United States. The Court necessarily will resolve the issue in deciding whether to accept Wyoming's filing. That decision will be "subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Wyoming v.*

Oklahoma, 112 S.Ct. 789, 796 (1992). There is no reason now to fear that there would be a need to relitigate the standing issue later in this case.[14]

Finally, the United States argues that the Court should not accept Wyoming's Fourth Cross-Claim because the individual irrigation districts with storage contracts might move to intervene in this case. Enforcement of the water storage contracts is not the central issue in Wyoming's Fourth Cross-Claim. At best the contract interpretation issues are ancillary to the equitable apportionment issue. Moreover, there is ample precedent in this case and in the *parens patriae* cases cited above to support the conclusion that individual water users would be adequately represented by the respective states. *See Nebraska v. Wyoming*, 295 U.S. at 43 (the Bureau as well as any Wyoming irrigation district or private appropriator will be bound by an adjudication of Wyoming's rights); *See also New Jersey v. New York*, 345 U.S. 369 (1953) (denying the City of Philadelphia leave to intervene in a suit involving apportionment of the Delaware River on the ground that the State of Pennsylvania adequately represented the City as *parens patriae*).

In summary, Wyoming is entitled to seek protection of its equitable apportionment from interference by the

14. The United States' position on Wyoming's standing is particularly curious in light of the position the United States took with respect to the federal district court suit involving the Inland Lakes that was pending at the time Nebraska's petition was filed in this case. The United States argued that the federal district court suit could not resolve issues related to the equitable apportionment because Nebraska was not a party. *See* Response of United States to Wyoming's Motion for Summary Judgment at 48-49 (Docket No. 83); First Interim Report of the Special Master at 19-20.

unlawful and wasteful operation and administration of the federal water storage projects. In pursuit of that relief Wyoming can represent its water users as *parens patriae* even with respect to ancillary contract interpretation issues that may arise.

C. *THIS IS THE ONLY FORUM IN WHICH TO LITIGATE ISSUES CONCERNING THE EQUITABLE APPORTIONMENT OF THE NORTH PLATTE, INCLUDING RELATED QUESTIONS ABOUT THE BUREAU OF RECLAMATION'S COMPLIANCE WITH FEDERAL LAW.*

The United States argues that the issues in Wyoming's Fourth Cross-Claim are raised in a pending suit between the North Platte Project districts and the Bureau of Reclamation. *Goshen Irrigation District v. United States*, No. C89-0161J (D. Wyo., *complaint filed* June 23, 1989). Goshen Irrigation District is one of four irrigation districts formed under the Reclamation Act as part of the North Platte Project. That suit involves a private dispute over the manner in which the Bureau administered Goshen Irrigation District's storage water contracts in 1989 *vis-a-vis* the Bureau's contracts with nine other irrigation districts in Wyoming and Nebraska under the Warren Act, 43 U.S.C. § 523 (1988). The Warren Act provides for the sale of surplus storage water from federal reclamation projects to non-project districts. Goshen Irrigation District claims that in 1989 the Bureau did not differentiate between it, as a North Platte Project contractor, and Warren Act contractors to supply only surplus water to the latter.

The Goshen Irrigation District suit involves questions raised by one North Platte Project irrigation district over the 1989 version of the Bureau's allocation plans. If anything that suit was the portent of a bigger problem that prompted Wyoming to consider more carefully the Bureau's operation of its storage water delivery contracts. A review of the facts of that case has convinced Wyoming that the Bureau is guilty of wide scale violations of law and the contracts that underlie the equitable apportionment. Although prompted by Goshen Irrigation District's suit, Wyoming's claims go far beyond the claims of one irrigation district over one year's activities by the Bureau. Wyoming's Fourth Cross-Claim extends over the Bureau's systematic disregard of the law, of the terms of its storage water delivery contracts and of this Court's trust that those laws and contracts would be followed.

The United States correctly notes that the irrigation districts are before the federal district court to construe their contracts with the United States and that neither Wyoming nor Nebraska have standing to participate as parties in that action. Moreover, despite its attempts to have that case dismissed on the grounds of sovereign immunity,[15] the United States correctly states that

15. *See* Third Interim Report at 71 n.173. The idea that the Bureau's decisions are easily reviewed in federal district court is inaccurate. The time and expense of litigation against the Bureau is already a deterrent that prevents individual irrigation districts from questioning Bureau decisions no matter how arbitrary and capricious they may be. The time and expense of litigation against the Bureau is further increased when the United States files motions to dismiss that it must now admit to this Court are of questionable legal merit. U.S. Brief at 29-30 n.16. The United States has asserted immunity as a matter of course in other federal district

Bureau contracts can be construed in federal district court. If indeed there were no interstate equitable apportionment involved and if the North Platte Project did not occupy a central place in that apportionment both geographically and legally, then the federal district court may provide an adequate alternative forum to resolve the remaining contract enforcement issue. However, as the Special Master correctly points out, the federal district court lacks jurisdiction to resolve a controversy between states and therefore this Court is the

---

court cases involving the operation of federal reclamation projects in the North Platte system. In *State of Wyoming and Goshen Irrigation District v. United States,* No. C89-0286J (D. Wyo., *complaint filed* October 6, 1989), the State and one of the project districts challenged the Bureau's policy concerning borrowing of water between projects. There the United States has pending but not decided a motion to dismiss based on the United States' claims that it is immune from such suits brought by Wyoming. As with *Goshen Irrigation District v. United States,* No. C89-0161J (D. Wyo., *complaint filed* June 23, 1989), the District Court has effectively stayed proceedings and taken no action since February 23, 1993. In the Inland Lakes case, *Christopulos v. United States,* No. C86-0370B (D. Wyo. *complaint dismissed without prejudice* August 31, 1990), before the Special Master assumed jurisdiction over that dispute in this case, the United States had unsuccessfully moved to dismiss on grounds of sovereign immunity. *See* Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion at Appendix A-45 to A-50 (U.S. District Court Order staying proceedings) (Docket No. 23). The United States has also denied the authority of Wyoming state water officials over the United States as a water appropriator under state law. United States Response to Wyoming's Sixth Set of Interrogatories at 45-48, No. 58 (Docket No. 613). While the United States must now acknowledge that other federal courts have rejected its sovereign immunity claims, U.S. Brief at 29-30 n.16, its actions speak louder than words. In effect, the United States does not believe any forum is adequate or necessary to review the Bureau's actions. In this case, the United States would like to enjoy full party status to protect storage use as part of the apportionment while remaining completely unaccountable for its actions that affect the equitable apportionment.

only appropriate forum for the issues raised in Wyoming's Fourth Cross-Claim. Third Interim Report at 70-71. Furthermore, because the Goshen Irrigation District suit does not involve all of the contractors below Guernsey Dam, a decision in that case would be confined to the precise issues raised concerning the operation of Goshen Irrigation District's contract with the Bureau in 1989.

Wyoming did not bring claims against the United States until now because, until the Court's 1993 decision on motions for summary judgment, the United States had not identified the specific federal interests at stake in these proceedings.[16] However, by focusing their claims of injury on potential injury to the federal projects, the United States and Nebraska have acknowledged that the delivery of federal storage water and the operation of federal projects are part of the equitable apportionment of the North Platte. Wyoming does not disagree with that characterization of the federal projects. Wyoming's First and Fourth Cross-Claims are founded on the premise that the operation of the federal projects can not be viewed in isolation without regard to the equitable apportionment.

In addition, the issues raised by Wyoming's Fourth Cross-Claim are broader than those raised by the parties in *Goshen Irrigation District v. United States.* In *Goshen,* the parties are not interested in the broader

16. In Wyoming's initial Answer and Motion for Leave to File Counterclaims, Wyoming was unaware of any claims of the United States or Colorado, but specifically reserved the "right to assert claims against those parties after their status and position have been disclosed." Wyoming Answer to Petition, Motion for Leave to File Counterclaim and Counterclaim at 8 (Docket No. 5).

implications of the Bureau's operations on the equitable apportionment or on other appropriators in Wyoming; they are only concerned with their own proprietary and contractual interests. Wyoming has pointed out that the Bureau's administration of the storage projects affects both the apportionment of natural flow in the pivotal reach as well as the availability of water for uses upstream of the federal reservoirs. Wyoming must be able to represent all its users of North Platte River water and can do so only in this case. As pointed out above, not even all of the Wyoming storage contractors are participating in the Goshen Irrigation District suit. The fact that Wyoming may share some of the same concerns as the plaintiffs in *Goshen*, does not diminish the need to address the broader apportionment issues in the context of this case where Nebraska, Wyoming and the United States are already before the Court. Judicial economy is served by litigating Wyoming's Fourth Cross-Claim together with Nebraska's and the United States' claims of injury to the federal projects in this forum even if the resolution of those issues may obviate a decision in *Goshen*.[17]

Contrary to the United States' argument, *United States v. Nevada*, 412 U.S. 534 (1973) and *California v. Nevada*, 447 U.S. 125 (1980) do not control the issue now before the Court. Brief of the United States in Support of Exception at 16-17. Those cases involved the question of whether to exercise the Court's original, but not exclusive, jurisdiction over disputes between the United

17. The District Court has taken no substantive action in *Goshen* since the case was submitted for ruling nearly four years ago. The Court has been kept advised of developments in this case and appears to have stayed consideration of the *Goshen* case pending the outcome of proceedings here.

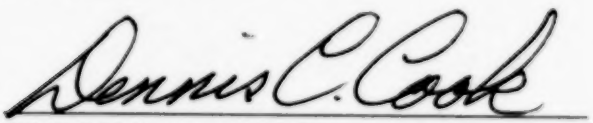
States and a state under 28 U.S.C. § 1251(b)(2) (1988). In each of those cases the Court specifically noted that the issues involving the United States did not also involve any dispute between the states and therefore did not require the exercise of the Court's exclusive original jurisdiction under 28 U.S.C. § 1251(a) (1988). This case is more like *Arizona v. California*, 373 U.S. 546 (1963), *decree entered* 326 U.S. 340 (1964) involving a dispute between states in which the United States intervened and became subject to injunctions in the final decree. Here, the United States is already before the Court, having intervened to litigate issues concerning the operation of its projects. The effect of the Bureau's storage operations on the interstate equitable apportionment is a matter of dispute between the states and lies in the Supreme Court's original jurisdiction under 28 U.S.C. § 1251(a) (1988).

VI. CONCLUSION

For the foregoing reasons the Court should overrule the exceptions of Nebraska and the United States and grant Wyoming leave to file its Fourth Cross-Claim against the United States.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK
Special Assistant Attorney General
Counsel for Wyoming
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

ATTORNEYS FOR THE
STATE OF WYOMING

MOTION FILED
JAN 30 1995

(60)

No. 108, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

WYOMING MOTION FOR LEAVE TO FILE A REPLY BRIEF AND WYOMING REPLY BRIEF IN SUPPORT OF WYOMING'S EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

JOSEPH B. MEYER
Attorney General of Wyoming

LARRY DONOVAN
Senior Assistant
Attorney General
Counsel of Record

DONALD M. GERSTEIN
Assistant Attorney General
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

DENNIS C. COOK
Special Assistant
Attorney General
COOK & HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant
Attorneys General
MOSES, WITTEMYER,
HARRISON AND
WOODRUFF, P.C.
1002 Walnut Street, Suite 300
Boulder, Colorado 80302
(303) 443-8782

January 30, 1995

15 pp

No. 108, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

WYOMING MOTION FOR LEAVE TO FILE A REPLY BRIEF

The State of Wyoming requests leave of the Court to file the accompanying brief replying to the Brief for the United States Opposing Exceptions and to Nebraska's Response to Wyoming's Exceptions to the Special Master's Third Interim Report. The grounds for this motion are:

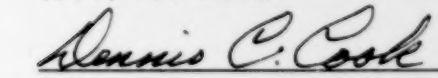
Wyoming's reply brief is tendered for filing within the time limits provided by Sup.Ct.R. 25.3.

Wyoming's reply brief responds to incorrect statements in the United States' and Nebraska's briefs that attempt to distinguish the basis for relief in Wyoming's proposed First Counterclaim and First Cross-Claim from the basis for relief in Nebraska's Counts I and III. In addition, Wyoming's reply brief points out that Nebraska and the United States would have the Court

apply different and inconsistent standards to Nebraska's and Wyoming's amended pleadings. Wyoming respectfully submits that application of these arguments will further demonstrate to the Court why the United States' and Nebraska's arguments provide no basis for overruling Wyoming's exceptions.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK
Counsel for Wyoming
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

ATTORNEYS FOR THE
STATE OF WYOMING

No. 108, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,
v.
STATE OF WYOMING,
Defendant.

UPON EXCEPTIONS TO THE
THIRD INTERIM REPORT
OF THE SPECIAL MASTER

WYOMING REPLY BRIEF IN SUPPORT OF WYOMING'S EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION AND
SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. Wyoming's Claims are not Objectionable for Attempting to Define or Quantify Nebraska's Apportionment When Nebraska's Claims for Additional Injunctions Against Wyoming Also Require Proof of Nebraska's Apportionment in Terms of a Quantity of Water 2

II. The Briefs in Opposition to Wyoming's Exceptions Fail to Acknowledge that the Court has not Expanded this Case to Consider a New or Expanded Equitable Apportionment and that Nebraska has Conceded that its Proposed Claims to Expand this Case are not Ripe 7

CONCLUSION 10

TABLE OF AUTHORITIES

Central Platte Natural Resources District v. Wyoming,
245 Neb. 439, 513 N.W. 2d 847 (1994) 6

Colorado v. New Mexico,
459 U.S. 176 (1982) 6

Nebraska v. Wyoming,
325 U.S. 589 (1945) 6, 9

Nebraska v. Wyoming,
485 U.S. 931 (1988) 7

Nebraska v. Wyoming,
113 S.Ct. 1689 (1993) 2, 3, 7

Nebraska v. Wyoming,
113 S.Ct. 1941 (1993) 7

Wyoming v. Colorado,
259 U.S. 419 (1922) 6

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The purpose of this brief is to correct the suggestion by Nebraska and the United States that the relief sought in Wyoming's First Counterclaim and First and Fourth Cross-Claims is fundamentally different from the relief sought in Nebraska's Counts I and III. Nebraska and the United States object to Wyoming's claims because those claims could result in a quantification of Nebraska's apportionment. However, they ignore the fundamental fact that Nebraska's Counts I and III similarly require that Nebraska quantify its apportionment to show injury from additional Wyoming depletions.

This brief also highlights the inconsistency of the United States and Nebraska arguments that support Decree modifications requested by Nebraska while arguing that the Decree modifications requested by Wyoming are off-limits. That inconsistency is exemplified by the United States' argument that "this Court's 1993 decision does not bar Nebraska seeking relief beyond that provided in the existing apportionment" which is followed immediately by the argument that there is no justification to consider modification of the Decree's percentage-based division of only natural flows in light of changed conditions or experience. Brief For the United States Opposing Exceptions of the State of Wyoming at 10-11. *See also* Nebraska's Response to Wyoming's Exceptions to the Special Master's Third Interim Report at 24-29. In addition to the fact that Nebraska's and the United States' arguments suffer from an unexplained inconsistency, their arguments ignore the Court's previous decisions and their own pleading decisions that shape and define these proceedings.

The questions presented by Wyoming's exceptions, the jurisdictional basis for the relief Wyoming requests and the basic facts supporting Wyoming's exceptions have been stated previously and therefore are not repeated in this brief.

ARGUMENT

I. *Wyoming's Claims are not Objectionable for Attempting to Define or Quantify Nebraska's Apportionment When Nebraska's Claims for Additional Injunctions Against Wyoming Also Require Proof of Nebraska's Apportionment in Terms of a Quantity of Water.*

Throughout this case, Nebraska and the United States have contended that additional depletions in Wyoming on Deer Creek and on the Laramie River, violate Nebraska's apportionment by reducing the amount of natural flow available for apportionment in the pivotal reach and by reducing carryover storage in the federal reservoirs. The Court in 1993 denied Wyoming summary judgment because it found a genuine issue of fact as to whether Wyoming's Deer Creek and Laramie River depletions would so reduce storage in the federal reservoirs and natural flows in the pivotal reach as to injure Nebraska users under the canals in the pivotal reach. *Nebraska v. Wyoming*, 113 S. Ct. 1689, 1699-1700 (1993). Counts I and III of Nebraska's tendered amended petition contain, inter alia, the same allegations of injury from new depletions on Deer Creek and the Laramie. Now, however, in opposition to Wyoming's exceptions, Nebraska and the United States argue that

Nebraska's apportionment cannot be defined or quantified without going beyond the limits of this case. Those arguments ignore the obvious fact that Nebraska's Counts I and III claim that further depletions in Wyoming would deny Nebraska a quantity of water that is part of Nebraska's equitable apportionment.

As the Court recognized in its 1993 decision, for Nebraska to succeed in its claims, Nebraska must demonstrate by clear and convincing evidence that the alleged new depletions cause or will cause serious injury to Nebraska's apportionment. *Nebraska v. Wyoming,* 113 S.Ct. at 1696. In other words, Nebraska must prove the need for protection of a quantity of water to support additional restrictions on Wyoming's use. Any notion that Nebraska need prove only a general reduction in pivotal reach flows in order to have additional injunctions restraining Wyoming's use was soundly rejected by the Court in 1993 when it denied Nebraska's summary judgment motion which claimed that the existing Decree implicitly required the maintenance of the historical contributions of the Laramie River to the North Platte. *Nebraska v. Wyoming,* 113 S.Ct. at 1698.

Neither Nebraska's initial claims nor its proposed Counts I and III claim that Wyoming has ever violated Paragraph V of the Decree by denying Nebraska its apportioned seventy-five percent of the natural flow "in the Guernsey Dam to Tri-State Dam section" during the irrigation season. *See* First Interim Report of the Special Master at 25 (Docket No. 140); *See also* Transcript July 26, 1993 Hearing at 171-173 (Docket No. 688). Instead, Nebraska claims that proposed and present uses of water in Wyoming violate Nebraska's apportionment by depleting the amount of flow into the piv-

otal section to the point that seventy-five percent of the resulting natural flow in the section together with federal storage water is insufficient to meet Nebraska's equitable claims in that section.[1] In other words, Nebraska's claims are predicated on the concept that there is a threshold quantity of storage and natural flow water available in the pivotal reach that defines Nebraska's apportionment.

Wyoming's initial counterclaims and now its proposed First Counterclaim, First Cross-Claim and, to some extent, its Fourth Cross-Claim simply present the other side of Nebraska's claims. Where Nebraska claims that it is not going to get "enough water" as a result of certain Wyoming actions, Wyoming's counterclaim and cross-claims would define how much water is "enough water" for Nebraska. The injunctive relief that Wyoming seeks is to insure that when Nebraska has had "enough water" it will not continue to demand water from Wyoming or from federal reservoirs and waste that water to the detriment of Wyoming uses. Therefore to the extent that Nebraska's claims to a threshold quantity of storage and natural flow water under the apportionment are justiciable in this case, Wyoming's First Counterclaim and First and Fourth Cross-Claims are justiciable as well.

---

1. Natural flow amounts to approximately one-half of the water diverted in the pivotal reach; the remaining water is storage water transferred into the reach from federal reservoirs. *See* Brief of the State of Wyoming in Response to Exceptions of the State of Nebraska and the United States to the Third Interim Report of the Special Master at 5. Also, all of the Nebraska lands served from that reach have federal storage water contracts.

Nebraska and the United States argue that any Wyoming claim that conceivably could lead to a quantification of Nebraska's apportionment is beyond the scope of this case. They argue that because the Court rejected Wyoming's claim for a mass allocation of both natural flow and storage water in the earlier case, any attempt now to quantify or define Nebraska's apportionment must be denied without any consideration of the facts that may support that type of solution to the current competing claims. However, if the Court accepts the argument that any quantification of Nebraska's apportionment is off-limits in this case, then it must reject Nebraska's Counts I and III in their entirety as well as Nebraska's existing Laramie and Deer Creek claims. To avoid the inconsistency inherent in the position taken by Nebraska and the United States the Court should recognize that Wyoming's First Counterclaim and First Cross-Claim, like the Deer Creek and Laramie River Claims in Nebraska's Count I and Count III, fall within the limits of this case as defined in the Court's 1993 opinion.

Although Nebraska suggests that Wyoming has concealed a claim for a mass allocation of water in its First Counterclaim and First Cross-Claim, that is not accurate. Wyoming does not deny that the quantification of Nebraska's apportionment required in the trial of Nebraska's Counts I and III as well as Wyoming's Counterclaims and Cross-Claims might identify the need for a mass allocation. On the other hand, there might be other types of relief that would control Nebraska's waste without necessarily quantifying a numerical limit on Nebraska's apportionment. For example, Wyoming's evidence might identify specific feasible conservation measures that Nebraska or

the United States should be required to adopt in the pivotal reach.[2]

The point that should compel the Court to accept Wyoming's amended counterclaims and cross-claims is that Wyoming's request that the Court more clearly define and quantify Nebraska's apportionment in light of changed conditions is no different than Nebraska and

---

2. There is no merit to Nebraska's argument that accepting claims that involve questions of efficiency or of beneficial use would take the Court into new and unfamiliar territory. *See* Nebraska Response Brief at 16-18. In *Colorado v. New Mexico,* 459 U.S. 176 (1982) the Court recognized that the efficient use of the apportioned water supply is central to the equitable apportionment of an interstate stream:

> Our prior cases clearly establish that equitable apportionment will protect only those rights to water that are "reasonably required and applied." *Wyoming v Colorado,* 259 U.S. 419, 484 (1922) . . . . Thus, wasteful or inefficient uses will not be protected. [citing *Nebraska v. Wyoming,* 325 U.S. at 618] . . . .
>
> We have invoked equitable apportionment not only to require the reasonably efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream.

Id. at 184-85.

Furthermore, the difficulty of Wyoming's task with regard to proving its overdiversion claims is irrelevant when considering whether to accept Wyoming's amended pleadings. Nevertheless, in its effort to paint the determination of beneficial use as overly complicated, Nebraska fails to mention the ease with which the Nebraska Department of Water Resources and the Nebraska Supreme Court determined beneficial use in a case involving Wyoming and water use in the central Platte. *See Central Platte Natural Resources District v. Wyoming,* 245 Neb. 439, 513 N.W. 2d 847 (1994).

the United States asking the Court to reconsider the need for restrictions on tributaries or the need for limits on Wyoming's use of the lower Laramie River. The ultimate scope or form of relief that the Court might adopt on either Nebraska's or Wyoming's claims should not be predetermined at this stage of the proceeding. The fashioning of relief should follow trial. At this stage the Court should determine which claims are within the proper scope of this suit to give effect to the existing apportionment.

II. *The Briefs in Opposition to Wyoming's Exceptions Fail to Acknowledge that the Court has not Expanded this Case to Consider a New or Expanded Equitable Apportionment and that Nebraska has Conceded that its Proposed Claims to Expand this Case are not Ripe.*

Throughout these proceedings, there have been certain decisions by the Court and the parties that have shaped and defined this case. The Court's 1993 decision on cross-motions for summary judgment was such a decision just as the Court's denial of Nebraska's two previous attempts to add downstream uses to this case have also defined this case. *Nebraska v. Wyoming*, 485 U.S. 931 (1988), *Nebraska v. Wyoming*, 113 S.Ct. 1689 (1993), *Nebraska v. Wyoming*, 113 S.Ct. 1941 (1993). Similarly, Nebraska's and Wyoming's pleadings as well as their reactions to the Special Master's recommendations to their respective amended pleadings also define these proceedings. However, in the descriptions of the case and arguments in opposition to Wyoming's exceptions, neither the United States nor Nebraska account for the Court's denial of Nebraska's two previous attempts to

expand the geographic limits of the existing apportionment. Moreover, neither the United States nor Nebraska acknowledge that by declining to take exception to the Special Master's recommendation to deny Nebraska's proposed Count IV for "lack of ripeness", they concede that Count IV is not ripe. Third Interim Report at 47. Nebraska's Count IV represents Nebraska's third attempt to expand the geographic limits of the apportionment.

Wyoming has tried to give effect to the Court's previous denials of Nebraska's attempts to expand the geographic limits of the apportionment. Wyoming Brief in Support of Motion for Leave to File Amended Counterclaims and Cross-Claims at 4 (Docket No. 624); Wyoming Brief in Support of Exceptions to the Third Interim Report of the Special Master at 14-15. In response, Nebraska argues that "[t]he question before the Court which cuts through the discrete issues framed by the proposed pleading amendments is whether evidence of changed conditions over the past fifty years will be relevant in those areas where Wyoming and Nebraska are now seeking to modify the Decree." Nebraska Response at 9. When it comes to its own claims, Nebraska appears to continue to argue that the evidence of "changed conditions" extends to alleged post-decree uses in Nebraska downstream of the apportionment. However, when it comes to Wyoming's claims to modify the Decree within the limits of the existing apportionment, Nebraska and the United States argue that Wyoming's claims seek a new apportionment and are therefore beyond the narrow limits of this case.[3]

3. Nebraska and the United States suggest that Wyoming is inconsistent when it argues that the Court should accept Wyoming's claims for new injunctive relief against Nebraska but reject

Even if Nebraska's and the United States' arguments were not irreconcilable, they must fail because they mischaracterize Wyoming's claim and ignore their own decision to concede their downstream claims. *See* Argument I, *supra*.

In fact, the changed conditions that the Court has agreed to consider are those that can affect the existing apportionment to Nebraska lands served by diversions in the pivotal reach. Any claims to reweigh equities to protect Nebraska's post-Decree developments downstream in the Central Platte would constitute a new apportionment and such claims have been specifically rejected by the Special Master and the Court. Moreover, by declining to take exception to the recommended denial of Nebraska's proposed Count IV, Nebraska and the United States have backed away from directly claiming a new or expanded apportionment that would include downstream uses. Whether downstream issues are ripe is irrelevant now because those issues are no

---

Nebraska's claims that would expand the geographic limits of the apportionment. To the contrary, Wyoming acknowledges the limited scope of this case as defined by the Court's previous orders denying Nebraska leave to amend. Consequently Wyoming has limited the relief sought in its counterclaims to that believed necessary to give effect to the geographically limited apportionment fashioned by the Court in 1945. If the Court were now to change course and to open this case to a complete reweighing of the equities and to consider Nebraska claims for an expanded apportionment, Wyoming certainly would seek further relief. Such further relief could be the release of present restrictions in the Decree by reason of increased supplies since 1945 (*See Nebraska v. Wyoming*, 325 U.S. 589, 620 (1945); Doherty Report at 10-11, 121-122) or changed or new injunctions to account for the effect on upstream areas of the addition of downstream storage such as Lake McConaughy in Nebraska since 1945. (*See* ¶ XIII(b) of Decree.)

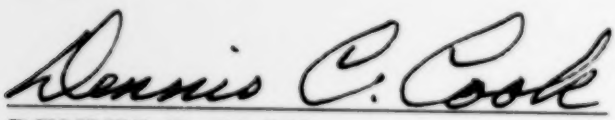
longer present. The Court should not allow Nebraska to claim indirectly through its Counts I and III that same expanded apportionment that was directly requested in Count IV.

CONCLUSION

The Court should sustain Wyoming's exceptions to the Third Interim Report of the Special Master.

Respectfully submitted,

JOSEPH B. MEYER
Attorney General of Wyoming
LARRY M. DONOVAN
Senior Assistant Attorney General
DONALD M. GERSTEIN
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841



DENNIS C. COOK
Counsel for Wyoming
COOK AND HOLTZ, P.C.
2020 Grand Avenue, Suite 220
Laramie, Wyoming 82070
(307) 745-7320

RAPHAEL J. MOSES
JAMES R. MONTGOMERY
Special Assistant Attorneys General
MOSES, WITTEMYER, HARRISON
AND WOODRUFF, P.C.
1002 Walnut, Suite 300
Boulder, Colorado 80302
(303) 443-8782

ATTORNEYS FOR THE
STATE OF WYOMING

(61)

No. 108, Original

Supreme Court, U.S.
FILED
FEB 9 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S RESPONSE TO WYOMING MOTION FOR LEAVE TO FILE A REPLY BRIEF AND WYOMING REPLY BRIEF IN SUPPORT OF WYOMING'S EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN
SIMMS & STEIN, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880

February 9, 1995

Bowne of Phoenix, Inc., Law Printers (602) 223-4455

11 PP

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. NEBRASKA DOES NOT NEED TO QUANTIFY ITS APPORTIONMENT TO SHOW INJURY FROM PROPOSED DEVELOPMENT IN WYOMING	2
II. THE NONIRRIGATION SEASON IMPACTS OF IRRIGATION SEASON PROJECTS IN WYOMING ARE NECESSARILY IN THE CASE	5
CONCLUSION	8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Nebraska v. Wyoming, 325 U.S. 589 (1945), *modified*, 345 U.S. 981 (1953) 3

Nebraska v. Wyoming, 507 U.S.____, 113 S. Ct. 1689 (1993) 5, 6

Nebraska v. Wyoming, 115 S. Ct. 308 (1994) 1

Wyoming v. Colorado, 259 U.S. 419 (1922) 3-4

STATUTES AND COURT RULES

Reclamation Act of 1902, 43 U.S.C. §372 (1988) 4

S. Ct. R. 21.4 2

S. Ct. R. 25.3 2

No. 108, Original

IN THE

Supreme Court of the United States

October Term, 1994

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

NEBRASKA'S RESPONSE TO WYOMING MOTION FOR LEAVE TO FILE A REPLY BRIEF AND WYOMING REPLY BRIEF IN SUPPORT OF WYOMING'S EXCEPTIONS TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

INTRODUCTION

The Court set the briefing schedule on exceptions to the Special Master's Third Interim Report on October 11, 1994, allowing briefs in support of exceptions and responses thereto.[1] *Nebraska v. Wyoming*, 115 S. Ct. 308 (1994). Reply briefs were not contemplated, presumably on the assumption that the issues would be delineated and the arguments aired in two rounds of briefs.

Wyoming's reply brief is not based on any alleged misstatement of fact, abuse of argumentative license, late authorities, newly enacted legislation, or any other inter-

[1] Owen Olpin, Special Master, Third Interim Report on Motions to Amend the Pleadings (Sept. 9, 1994) (Docket No. 699) ("Third Interim Report").

vening matter.[2] Instead, its filing was prompted by alleged "incorrect" arguments in Nebraska's and the United States' response briefs. Accordingly, the purpose of Wyoming's reply brief is simply to supplement its argument on the merits of the exceptions.

In order to assure equality of treatment between Nebraska and Wyoming, Wyoming alone should not be allowed more argument or tactically advantaged argument. Consequently, the Court should deny Wyoming's motion and reject Wyoming's reply brief. In the alternative, if the Court grants Wyoming's motion for leave to file its reply brief, the Court should accept for filing Nebraska's response to Wyoming's motion as well.[3]

ARGUMENT

POINT I

NEBRASKA DOES NOT NEED TO QUANTIFY ITS APPORTIONMENT TO SHOW INJURY FROM PROPOSED DEVELOPMENT IN WYOMING

In its reply brief, Wyoming argues that there is no basis upon which to distinguish between Wyoming's First Counterclaim and First and Fourth Cross-Claims and Nebraska's Counts I and III, urging that both sets of claims seek the same relief and are equally justiciable. Wyoming's rationale purports to be a syllogism: 1) Nebraska must demonstrate by clear and convincing evidence that Wyoming's proposed depletions of North Platte flows would

---

[2] Wyoming Motion for Leave to File a Reply Brief and Wyoming Reply Brief in Support of Wyoming's Exceptions to the Third Interim Report of the Special Master (Jan. 30, 1995) ("Wyoming's Reply Brief").

[3] Wyoming's motion for leave to file its reply brief was tendered pursuant to S. Ct. R. 25.3. Nebraska's response to Wyoming's motion is being submitted pursuant to S. Ct. R. 21.4.

cause serious injury to its apportionment; 2) Nebraska does not claim that the new depletions would deprive it of its apportioned 75% of the natural flows in the pivotal reach, but claims instead that depletions of flows going into the pivotal reach would cause the water supply in the reach to be insufficient to satisfy Nebraska's equitable claims; 3) therefore, "Nebraska's claims are predicated on the concept that there is a threshold quantity of storage and natural flow water available in the pivotal reach that defines Nebraska's apportionment." Wyoming's Reply Brief at 3-4. Wyoming's conclusion, however, does not follow.

The conclusion does not follow for the same reason that the Court held that the case should not be dismissed in 1945. At the conclusion of Nebraska's case and again after all the evidence was in, Colorado moved to dismiss the suit on the ground that the evidence was insufficient to sustain any judgment in favor of or against any party. The basis of the motion was the lack of quantification of the water uses in Nebraska and the related legal assertion that "the case [was] not of such serious magnitude and the damage [was] not so fully and clearly proved as to warrant the intervention of [the] Court . . .." *Nebraska v. Wyoming*, 325 U.S. 589, 608 (1945), *modified*, 345 U.S. 981 (1953); *see also* Brief for the State of Colorado, Impleaded Defendant at 22 (1944) ("Injury does not result from the deprivation of water for irrigation uses unless there is a showing of a need of the water for beneficial consumptive use . . .."). Justice Douglas explained that the Court recognized the elements of the burden of proof, but that "they [did] not stand in the way of an entry of a decree in this case." 325 U.S. at 608. He went on to state that "[t]he evidence supports the finding of the Special Master that the dependable natural flow of the river during the irrigation season [had] long been over-appropriated." *Id.* Agreeing that "[t]he various statistics with which the record abounds [were] inconclusive in showing the existence or extent of actual damage to Nebraska," the Court nonetheless concluded that any "deprivation of water in arid or semi-arid regions cannot help but be injurious." *Id.* at 610. *Cf. Wyo-*

ming v. Colorado, 259 U.S. 419 (1922) (the only showing of injury or threat of injury was the inadequacy of the supply to meet all appropriative rights). In 1945, the Court recognized that any exacerbation of the shortage of supply on an over-appropriated stream would necessarily constitute injury.

In sum, because the river has long been over-appropriated, Nebraska's Counts I and III do not require that Nebraska quantify its apportionment to show injury from proposed new depletions of the North Platte in Wyoming.

The relief requested in Nebraska's Counts I and III is also fundamentally different from the relief requested by Wyoming's First Counterclaim and First and Fourth Cross-Claims because Nebraska does not seek to replace the existing apportionment with a categorically different apportionment. Nebraska seeks to address post-1945 development as contemplated in ¶ XIII of the Decree to protect the status quo. Wyoming wants to relitigate the Court's existing apportionment to change the status quo. Principles of finality and repose, however, militate against considering Wyoming's First Counterclaim and First and Fourth Cross-Claims because the Court rejected a quantification of Nebraska's rights in 1945 and Wyoming's argument then that Nebraska's uses should be governed by the beneficial use provisions in the Reclamation Act of 1902, 43 U.S.C. §372 (1988), the North Platte Project contracts, and the Warren Act contracts. Accordingly, Wyoming is "incorrect" when it argues that its First Counterclaim and First and Fourth Cross-Claims and Nebraska's Counts I and III are equally justiciable.[4]

---

[4] Wyoming also mischaracterizes the Court's 1993 opinion regarding the scope of evidence for Nebraska's success on the merits of Counts I and III. Wyoming states:

> The Court in 1993 denied Wyoming summary judgment because it found a genuine issue of fact as to whether Wyoming's Deer Creek and Laramie River depletions would so
>
> *(cont'd)*

POINT II

THE NONIRRIGATION SEASON IMPACTS OF IRRIGATION SEASON PROJECTS IN WYOMING ARE NECESSARILY IN THE CASE

Wyoming argues that "neither the United States nor Nebraska acknowledge[s] that by declining to take exception to the Special Master's recommendation to deny Nebraska's proposed Count IV for 'lack of ripeness,' they concede that Count IV is not ripe." Wyoming's Reply Brief at 8. Based on this alleged concession, Wyoming concludes that consideration of any evidence of post-Decree equities below Tri-State Dam "would constitute a new apportionment and such claims have been specifically rejected by the Special Master and the Court." *Id.* at 9. Wyoming's argument, however, misstates the status of the matter.

Nebraska's Count IV sought an apportionment of the nonirrigation flows of the North Platte. The Special Master has recommended that the Court decline to hear Count IV at this time, to which neither Nebraska nor the United States has taken exception. *See* Third Interim Report at 19-20, 35-36, 47-55.

---

reduce storage in the federal reservoirs and natural flows in the pivotal reach as to injure Nebraska users under the canals in the pivotal reach.

Wyoming's Reply Brief at 2. Similarly, Wyoming characterized the Court's 1993 decision as requiring Nebraska to prove by clear and convincing evidence that new depletions in Wyoming will cause serious injury "to Nebraska's apportionment." *Id.* at 3. The Court did not limit the scope of injury as Wyoming states. Instead, with respect to Deer Creek, the Court stated the inquiry at trial will be whether the proposed project will "injure Nebraska." *Nebraska v. Wyoming*, 507 U.S. ___; 113 S. Ct. 1689, 1700 (1993). With respect to the Laramie, the Court stated that Nebraska must produce evidence that Laramie depletions pose "a threat of injury serious enough to warrant modification of the decree . . .." *Id.* at 1699. Nowhere did the Court limit the scope of Nebraska's evidence to the pivotal reach as Wyoming suggests.

In declining to recommend that the Court hear Count IV now, the Special Master observed that "[a]part from the Laramie River and Deer Creek projects already in the case, . . . Nebraska makes no allegations that any of the enumerated projects [in Wyoming] will actually be implemented . . .." *Id.* at 49. Accordingly, the Master concluded that "Nebraska has made no meaningful showing of changed circumstances since the Court denied her previous amendment on April 26, 1993." *Id.*

The Master did not, however, preclude the consideration of nonirrigation season impacts in relation to issues already in the case. For example:

> With respect to the Laramie, Nebraska has already identified three issues with the potential for near-term significant impacts on year around flows. First, the Grayrocks Settlement Agreement requires Basin Electric to deliver minimum flows downstream to the North Platte mainstem throughout the year. Wyoming, not a party to the 1978 agreement, does not concede that the settlement constrains her water users. The case on the Laramie would examine whether Wyoming should be enjoined from actions that impede or interfere with Basin Electric's guaranteed deliveries in all twelve months. In addition, the proposed Corn Creek and Goshen Irrigation District projects on the Laramie will be examined for their potential to cause year around injury to Nebraska.

Id. at 50-51 (footnotes omitted).[5]

The Court has held that Nebraska may come "forward with evidence sufficient to establish that Corn Creek (or some other project on the Laramie) poses a threat of injury serious enough to warrant modification of the decree . . .." 113 S. Ct. at 1699. Pursuant to the burden of proof articu-

---

[5]The inflows of the Laramie River during the nonirrigation season constitute the bulk of the nonirrigation season flows.

lated by the Court in 1945 and 1993, Nebraska will have to establish again that the North Platte River has long been over-appropriated. Doing so will necessarily involve an appreciation of all of the demands on the river against which the threat of injury would be posed. With respect to proposed irrigation season projects, the impacts of which would extend to the nonirrigation season, nonirrigation season uses are necessarily in the case. As the Special Master has recognized, Wyoming cannot pursue post-Decree projects which would upset the balance of the river without allowing Nebraska to account for the post-Decree equities that currently rely on the water Wyoming would take. *See* Third Interim Report at 47.

CONCLUSION

Wyoming's reply brief does not reply to Nebraska's and the United States' response briefs, but rather attempts to synthesize and supplement prior argument on the merits of the exceptions. Accordingly, the Court should deny Wyoming's motion for leave to file. Alternatively, if the Court grants Wyoming's motion for leave, the Court should accept Nebraska's response as well. Neither party alone should be given the opportunity to further argue the matter simply because it believes that the opposing party's position is incorrect.

Respectfully submitted,

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

RICHARD A. SIMMS
Counsel of Record
Special Assistant Attorney General

JAMES C. BROCKMANN
JAY F. STEIN
Simms & Stein, P.A.
430 West San Francisco Street
Post Office Box 280
Santa Fe, New Mexico 87504
(505) 983-3880